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Ten Key FCRA Decisions of 2020

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The year 2020 was an unprecedented year, but one thing remained constant: the number of Fair Credit Reporting Act (FCRA) case filings continued to increase dramatically.[1] In addition to new filings, the year saw several key decisions handed down by federal courts, shedding light on diverse issues such as the matching procedures of credit reporting agencies (CRAs), Article III standing, the meaning of "maximum possible accuracy," and preemption of state credit reporting laws. As FCRA cases continue to be filed with increasing frequency, CRAs, employers seeking to screen new hires, and other FCRA-regulated entities should examine these decisions and their consequences carefully. To that end, we've compiled the following list of ten key FCRA decisions of 2020.

Williams v. First Advantage LNS Screening Solutions

In January 2020, the Eleventh Circuit 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 section 1681e(b) of the FCRA.[2] In *Williams*, the plaintiff sued defendant First Advantage for alleged violations of the FCRA in connection with twice attributing the criminal background information of another individual to the plaintiff.

The court recognized that although First Advantage had a policy requiring use of a third identifier before attributing criminal information to a subject with a common name, evidence indicated that this policy was not followed in practice. Based on this evidence, the Eleventh Circuit affirmed the district court's denial of First Advantage's motion for judgment as a matter of law with respect to willfulness under the FCRA.

The court also affirmed the jury's compensatory damages award but found that the $3.3 million punitive damages—at a ratio of 13:1 to the compensatory damages—was unconstitutionally excessive. The court noted that the Supreme Court had previously found that a 4:1 ratio was "close to the line" of unconstitutionality and that an award that exceeded a single-digit ratio was likely a violation of the Due Process Clause. Ruling that a 4:1 ratio was appropriate here based on the state court's assessment of First Advantage's conduct, the court reduced the award to $1 million.

As evidenced by *Williams*, challenges to matching procedures utilized by the background screening industry continue to be an area of focus in FCRA litigation. This decision is also significant regarding the availability (and constitutional limits) of punitive damages.

Ramirez v. TransUnion LLC

In February, the Ninth Circuit issued its decision in a class action case watched closely by consumer reporting agencies.[3] *Ramirez* involved a product offered by TransUnion to identify consumers with names designated by the Department of the Treasury's Office of Assets Control (OFAC) as posing a national security threat. A jury ultimately awarded $8 million in statutory damages and $52 million in punitive damages to the class members, finding that TransUnion failed to comply with certain disclosure requirements under the FCRA. TransUnion appealed on various grounds, including that many of the class members lacked Article III standing.

On appeal, the Ninth Circuit held for the first time that "every member of a class certified under Federal Rule of Civil Procedure 23 must satisfy the basic requirements of Article III standing." However, the court went on to rule that a "material risk of harm" was sufficient to confer standing to each class member. The Ninth Circuit held that "a real risk of harm arose when TransUnion prepared the inaccurate reports and made them readily available to third parties," even though most class members' reports were never actually disclosed to a third party.

The Supreme Court granted certiorari in December 2020, to consider "whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."

Walker v. Fred Meyer, Inc.

In March, the Ninth Circuit issued important guidance for employers obtaining background checks on potential or current employees.[4] The plaintiff in *Walker* claimed that his employer violated the FCRA by not disclosing its background check process in a "clear and conspicuous" disclosure contained "in a document that consists solely of the disclosure." Although the district court held the disclosure form signed by the plaintiff was a standalone document, the Ninth Circuit reversed, finding that certain provisions in the disclosure form referenced other rights under federal and state law and, in so doing, violated the FCRA's requirement that the document consist "solely of the disclosure."

The Ninth Circuit held that in addition to a "plain statement" that a report may be obtained for employment purposes, a standalone disclosure may include a "concise explanation" of that statement. The court cautioned, however, that the explanation must not be so long or confusing that it detracts from the disclosure or in any way makes the disclosure unclear and conspicuous.

Separately, the Ninth Circuit also affirmed that employers, in a pre-adverse action letter sent before taking action against an applicant or employee, are not required to provide employees or applicants with an opportunity to directly discuss a consumer report with the employer. Rather, it is sufficient for the employer to provide notice in a pre-adverse action letter that describes the consumer's ability to dispute the completeness or accuracy of the information with the CRA.

Luna v. Hansen & Adkins Auto Transport, Inc.

In April, shortly after the *Walker* decision, the Ninth Circuit issued another decision interpreting the FCRA's disclosure requirements for employers conducting background checks on potential hires.[5] Whereas *Walker*

looked at the language of the disclosure, *Luna* focused on the format of the disclosure and its accompanying authorization.

The disclosure form in *Luna* was a separate page included within a larger group of application materials. The plaintiff argued that including the disclosure page alongside other materials violated the FCRA's "standalone" requirement. The court rejected this argument, stating that while the disclosure itself cannot contain other unrelated information, "no authority suggests that a disclosure must be distinct in time, as well."

The court in *Luna* also weighed in on the "clear and conspicuous" prong of the FCRA's disclosure requirement—one of the issues left open in *Walker*. The court reiterated that a disclosure must be "readily noticeable" and in a "reasonably understandable form." The court found the employer's disclosure (featuring a bold, all-caps heading and simple explanatory statement) to meet the clear and conspicuous requirement, saying "applicants, such as big-rig truckers, can be expected to notice a standalone document featuring a bolded, underlined, capital-lettered heading."

Finally, the Ninth Circuit also dispensed with the employee's claim that the authorization for an employer to obtain a consumer report on an applicant also needed to be in a clear and conspicuous standalone document. The court found no statutory support for this position.

Davis v. C&D Security Management, Inc. et al.

In July, the Eastern District of Pennsylvania confirmed that a plaintiff lacks Article III standing to state a claim for violation of the FCRA premised solely on a failure to receive a copy of the background report and a summary of rights.[6] In *Davis*, the plaintiff applied for employment as a security guard with C&D Security and was ultimately denied the position twice. She brought suit on behalf of a putative class claiming that C&D Security failed to provide her with notice of the background check, a copy of her report, and a summary of her rights, as required under the FCRA.

Following Third Circuit precedent, the court held that Davis lacked an injury-in-fact since she ultimately became aware of her rights and timely brought suit against the employer. It cited the U.S. Supreme Court's maxim in its landmark *Spokeo* decision that a bare procedural violation, divorced from any concrete harm, cannot satisfy the injury-in-fact requirement of Article III. Further, the court found that because Davis failed to establish her own standing, she could not seek relief on behalf of the putative class.

This decision highlights the critical role of Article III standing in FCRA cases, in both individual and class contexts. Companies defending FCRA class actions should consider standing issues at the forefront of the matter, rather than reserving them for the certification stage.

Moran v. The Screening Pros, LLC, et al.

Also in July, a California district court granted summary judgment in favor of a background screening agency, holding there was no willful or negligent violation of the FCRA despite the agency's incorrect interpretation of the FCRA provision at issue.[7]

Plaintiff Moran filed suit after he was allegedly denied housing based on a screening report issued by The Screening Pros, LLC. The report included misdemeanor charges that had been filed ten years earlier but dismissed after six years, prior to the report. Moran argued that this violated the FCRA's prohibition on reporting nonconviction adverse information older than seven years, pursuant to 15 U.S.C. § 1681c(a)(5). The district court dismissed the claim, holding that because the charges had only been dismissed six years prior, the dismissal fell within the seven-year period prior to issuance of the report. The Ninth Circuit reversed, holding that the seven-year reporting window for a criminal charge begins on the date of entry rather than on the date of disposition.

Despite this reversal, the district court granted summary judgment to The Screening Pros on remand because the violation of § 1681c(a)(5) was neither willful nor negligent. The district court's holding was supported by the fact that this was an issue of first impression in the Ninth Circuit. FTC guidance available at the time the report was issued (but rescinded afterward) indicated that the seven-year reporting period ran from the date of the disposition.

While the decision in *Moran* was certainly favorable to the background screener defendant, courts are not likely to be as lenient moving forward, given that the holding in *Moran* was largely predicated on the fact that the FTC's guidance was rescinded only after the report was issued.

Domante v. Dish Networks, LLC

In September, the Eleventh Circuit weighed in on the meaning of a "legitimate business need," one of the permitted purposes for obtaining a screening report under § 1681b of the FCRA.[8] In *Domante*, the court held that requesting and obtaining a consumer report for verification and eligibility purposes is a legitimate business need under the FCRA.

Plaintiff Domante had previously filed and settled an FCRA suit against Defendant Dish Networks, LLC (Dish), after Domante's personal information was stolen and used to open two accounts with Dish. To implement the terms of that settlement, Dish entered Domante's personal information, including her Social Security number, into an internal system designed to prevent unauthorized accounts from being opened in the future.

When an attempt was made to open a new account using the last four digits of Domante's Social Security number but a different name, Dish submitted the applicant's information to a CRA to verify the applicant's identity. The CRA matched the information with Domante and returned her credit report to Dish, which included Domante's full Social Security number. Dish then blocked the application and requested that the CRA delete the inquiry from Domante's credit record. Domante sued, arguing that Dish did not have a legitimate business need to pull her credit report because Dish knew or should have known that Domante was not the account applicant based on their prior settlement agreement.

The Eleventh Circuit noted that the false applicant provided only the last four digits of Domante's Social Security number. Dish depended on the CRA's credit report to obtain the full Social Security number for cross-checking with its internal records. Using the report for this verification and eligibility purpose was a legitimate business need.

A key takeaway for requesters of consumer credit reports is the importance of developing and maintaining internal verification and eligibility procedures that are consistent with the information contained in the requested report.

Consumer Data Industry Association v. Frey

In October, the district court of Maine held that the federal FCRA preempted burdensome credit reporting restrictions imposed by the Maine Fair Credit Reporting Act.[9] The Maine legislature passed two amendments to the Maine Fair Credit Reporting Act in 2019 prohibiting CRAs from including certain kinds of information in a consumer's credit report. The amendments restricted reporting certain medical debts and debts that were the result of "economic abuse." Both laws required CRAs to engage in extensive investigations of the underlying circumstances, conditions, and status of a consumer's debts to determine whether those debts were reportable. The Consumer Data Industry Association (CDIA) filed suit, seeking declaratory judgment that both laws were preempted by the FCRA.

The court ruled in favor of the CDIA and held that the amendments were preempted by the FCRA. Engaging in a detailed analysis of the language and history of the FCRA's preemption provisions, the court held that the FCRA preempted *any* state regulation of information contained in consumer reports. In doing so, the court rejected the narrower construction advocated by the state of Maine that would limit preemption to the specific types of information already regulated by the FCRA.

The court's analysis in *Frey* will have important ramifications for other states seeking to impose their own restrictions on consumer credit reports and for any other present or future preemption claims against states by CRAs, furnishers and users. The state of Maine has filed an appeal of the district court's decision, which will give the First Circuit an opportunity to rule definitively on this issue.

Settles v. Trans Union, LLC

The year 2020 saw an influx of complaints alleging that the "current pay status" reported by a furnisher is inaccurate when an account that was delinquent when closed is reported with a historical delinquency status. *Settles* was one such case where the theory was soundly rejected.[10]

In *Settles*, the plaintiff was overdue on his account by 120 days when his account was closed. His credit report showed that his account was closed, and the account balance was $0. However, the pay status reflected 120 days past due. The plaintiff brought suit claiming that this was materially misleading because the account could not be past due while also having a $0 balance. The court held that the reporting was not inaccurate or misleading. The court noted that it must look at the accuracy of the report as a whole, taking into account relevant context. It listed several cases holding that reporting historical data is not inaccurate.

This decision and others like it underscore that the inclusion of accurate historical account information on credit reports is allowable and not misleading, even when the current account information is different from the historical information and may even appear contradictory on its face.

Erickson v. First Advantage Background Services Corp.

Addressing a recurring issue bedeviling the background screening industry, the Eleventh Circuit confirmed in December that it is not inaccurate for a CRA to report a criminal or sex-offender record without matching the record to a subject consumer, as long as the CRA notifies the user of the report that the record needs further

investigation before being attributed to the consumer.[11]

Plaintiff Erickson applied to be a Little League coach and was subjected to a background check. Unfortunately, his report identified a sex offender record of his estranged father, with whom he shared his name. In releasing the report, First Advantage explained to Little League that it was a name-only match and that further review was necessary to determine if the record belonged to Erickson. Erickson nevertheless filed suit, arguing that First Advantage violated the FCRA's requirement that a CRA "follow reasonable procedures to assure maximum possible accuracy" of reported information. The district court ruled against him.

On appeal, the Eleventh Circuit weighed in on a debate that has reached several circuit courts: whether the FCRA's "maximum possible accuracy" requirement demands more than technical accuracy. The court held that it does, following a plurality of circuit courts by holding that the FCRA requires reported information to be both factually true and "unlikely to lead to a misunderstanding."

Despite rejecting a lenient test in favor of a more stringent one, the court affirmed that First Advantage's report was neither inaccurate nor objectively misleading because no reasonable user in the shoes of the report's intended user would be misled. The court focused on First Advantage's cautionary disclaimer that further review was required. CRAs seeking compliance tips should note carefully the notifications First Advantage gave to the users of its reports, which the court found to be clear.

Conclusion

FCRA litigation continues to increase. With increased caseloads comes increased precedent, and going forward, we continue to expect to see more and more published FCRA decisions.

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[1] WebRecon LLC, *WebRecon Stats for Oct 2020 & Year-End Projections*, https://webrecon.com/webrecon-stats-for-oct-2020-year-end-projections.

[2] *Williams v. First Advantage LNS Screening Solutions, Inc.*, 947 F.3d 735 (11th Cir. 2020).

[3] *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020).

[4] *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082 (9th Cir. 2020).

[5] *Luna v. Hansen and Adkins Auto Transport, Inc.*, 956 F.3d 1151 (9th Cir. 2020).

[6] *Davis v. C&D Security Management, Inc.*, 2020 U.S. Dist. LEXIS 132291 (E.D. Penn. July 27, 2020).

[7] *Moran v. Screening Pros*, 2020 U.S. Dist. LEXIS 148171 (C.D. Cal. July 30, 2020).

[8] *Domante v. Dish Networks, LLC*, 974 F.3d 1342 (11th Cir. 2020).

[9] *Consumer Data Industry Association v. Frey*, 2020 U.S. Dist. LEXIS 187061 (D. Me. Oct. 8, 2020).

[10] *Settles v. Trans Union, LLC*, 2020 U.S. Dist. LEXIS 220341 (Nov. 24, 2020).

[11] *Erickson v. First Advantage Background Servs. Corp.*, 981 F.3d 1246 (11th Cir. 2020).

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