

# The 7 Most Notable FCRA Cases of 2023 So Far

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The first half of 2023 has produced significant developments for the Fair Credit Reporting Act. Important decisions have come from multiple areas of the field, including the federal courts of appeals and regulatory agencies.

With many decisive cases and issues still pending and awaiting judicial decision, the remainder of 2023 is showing no signs of slowing down.

Here are some of the biggest decisions and developments in FCRA litigation from 2023 so far.

### 1. **Sessa v. Linear Motors LLC**

The issue of whether furnishers or consumer reporting agencies are independently and/or collectively responsible to resolve questions regarding the legal validity of disputed accounts has resulted in a flurry of litigation and regulatory activity. Notably, the Consumer Financial Protection Bureau — the agency responsible for enforcing the FCRA — has taken a particular interest in this issue.

For example, in *Sessa v. Linear Motors LLC*, the plaintiff alleged that the consumer reporting agency failed to accurately report debt obligations relating to her motor vehicle lease.[1]

The U.S. District Court for the Southern District of New York concluded that consumer reporting agencies cannot be held liable when the accuracy at issue requires a legal determination as to the validity of the debt the agency reported.[2]

On appeal, the CFPB and Federal Trade Commission filed a joint amicus brief, arguing that consumer reporting agencies should be held to the same standards as furnishers in that they should not be exempt from following reasonable procedures when dealing with legal inaccuracies.[3]

In July, the U.S. Court of Appeals for the Second Circuit vacated the district court's decision, finding “there is no bright-line rule ... that only purely factual or transcription errors are actionable under the [FCRA].”

The Second Circuit further concluded that the definition of accuracy under Section 1681e(b) requires a focus on objectively and readily verifiable information, which may require consumer reporting agencies to accurately report information derived from the readily verifiable and straightforward application of law to facts.

At least in the Second Circuit, the CFPB's attempt to expand the FCRA's obligations could be seen as successful.

## **2. Belair v. Holiday Inn Club Vacations Inc.**

On April 14, the CFPB filed an amicus brief in *Belair v. Holiday Inn Club Vacations Inc.*<sup>[4]</sup> In *Belair*, the U.S. District Court for the Middle District of Florida granted summary judgment in favor of the furnisher, Holiday Inn.

The basis of the plaintiff's FCRA dispute was whether a debt stemming from a contract dispute was owed to the defendant. The court found that since contract disputes are legal rather than factual, the plaintiff's FCRA dispute was inherently legal and thus not actionable under Section 1681s-2(b).<sup>[5]</sup>

On appeal to the U.S. Court of Appeals for the Eleventh Circuit, the appellant argued the district court erred in its interpretation of the FCRA's inaccuracy requirement.<sup>[6]</sup>

In its amicus brief, the CFPB asked the court to reverse the district court's judgment and clarify that furnishers are required to conduct reasonable investigations of both legal and factual issues involved in consumer disputes.<sup>[7]</sup> The case remains pending.

## **3. Department of Agriculture Rural Development Rural Housing Service v. Kirtz**

The U.S. Supreme Court recently granted the U.S. Department of Agriculture's petition for a writ of certiorari in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, where it will address whether government agencies are immune from suit under the FCRA.<sup>[8]</sup>

The Supreme Court will hopefully settle the current circuit split on whether the FCRA operates as a waiver of sovereign immunity that allows suits against federal government agencies.

Currently, the U.S. Courts of Appeals for the D.C., Third and Seventh circuits have allowed FCRA litigation against the government, but the U.S. Courts of Appeals for the Fourth and Ninth Circuits have taken the opposite position, ruling that sovereign immunity is not waived by the FCRA.

## **4. Frazier v. Dovenmuehle Mortgage Inc.**

A June decision from the U.S. Court of Appeals for the Seventh Circuit illustrates courts' continued reliance on an objective standard to determine whether data is materially misleading and thus actionable under the FCRA.

In *Frazier v. Dovenmuehle Mortgage Inc.*,<sup>[9]</sup> the Seventh Circuit affirmed summary judgment in favor of the defendant furnisher in a suit brought by a consumer under Section 1681s-2(b).

The appellate court rejected the consumer's argument that the information provided by the furnisher on an automated credit dispute verification response to a consumer reporting agency was materially misleading, even though the agency's interpretation of the automated credit dispute verification response caused it to inaccurately report that the consumer was currently delinquent on a settled debt.

The Seventh Circuit held that the completeness or accuracy of an automated credit dispute verification response is determined based on objective review of the information provided by the furnisher to the consumer reporting agency, rather than the agency's subjective interpretation of that data or the consumer report generated by the agency in response to receiving the furnisher's information.

In other words, the furnisher's liability under Section 1681s-2(b) is not affected by the consumer reporting agency's inaccurate interpretation of the furnisher's automated credit dispute verification response.

## **5. Wynn v. United Parcel Service Inc.**

The FCRA's stand-alone disclosure requirements also continue to generate litigation in 2023. In March, the U.S. District Court for the Northern District of California dismissed a proposed class action in *Wynn v. United Parcel Service*.<sup>[10]</sup>

The plaintiff alleged that UPS violated the stand-alone disclosure requirements of Section 1681b(b)(2)(A) after it obtained her consumer report in connection with an employment application.

The plaintiff argued that UPS's disclosure form violated the FCRA because it "misstated the law" relating to whether the FCRA requires employers to obtain authorization before obtaining each consumer report.

The district court noted that the Ninth Circuit has not addressed the issue of whether an employer can procure more than one credit report. Instead, the court relied on Third Circuit case law and an FTC staff opinion letter to inform its holding that Section 1681b(b)(2)(A)(i) allows an employer to "procure several consumer reports based on a one-time, blanket authorization so long as authorization occurred 'any time' before the reports are procured."

Accordingly, the court dismissed the plaintiff's FCRA claims against UPS. The plaintiff appealed to the Ninth Circuit, which remains pending.

## **6. Ingram v. Experian Information Solutions Inc.**

The issue of whether furnishers have an obligation to investigate frivolous disputes remains a hotly contested issue. On March 22, the U.S. Court of Appeals for the Third Circuit heard oral arguments in *Ingram v. Experian Information Solutions Inc.*<sup>[11]</sup>

For context, the plaintiff disputed a debt with Comcast Corp., the original creditor, and argued that he was the victim of identity theft. Comcast requested that the plaintiff submit a so-called fraud packet to initiate the dispute, which the plaintiff failed to produce. Comcast then informed Waypoint Resource Group, the collection agency, that collections could resume until the fraud packet was received.

The U.S. District Court for the Eastern District of Pennsylvania found that plaintiff's dispute may be deemed frivolous because he failed to provide sufficient information for Waypoint to investigate the dispute. Therefore, Waypoint's duty to investigate under the FCRA was never triggered, and Waypoint's motion for summary judgment was granted.<sup>[12]</sup>

On appeal, the Third Circuit may determine whether the FCRA requires furnishers to investigate all indirect disputes, even if they are deemed frivolous or the consumer fails to substantiate his claim of identity theft.

The CFPB and FTC filed a joint amicus brief arguing that a furnisher is required to investigate any dispute forwarded to it by a consumer reporting agency and cannot choose not to simply by claiming a dispute is frivolous.[13] The case remains pending.

## **7. Phoenix Financial Services LLC**

The CFPB recently brought an enforcement action against a furnisher after investigating how consumer disputes were being processed internally.

On June 8, the CFPB issued an order against Phoenix Financial Services LLC in its capacity as both a debt collector and a furnisher of consumer information.[14]

The CFPB alleged that Phoenix violated Sections 1681s-2(a) and (b) by sending collection letters to consumers who had disputed their debts without first conducting a reasonable investigation of the dispute or verifying the debt. Additionally, the CFPB alleged that Phoenix lacked documentation and failed to obtain additional information about the disputed debts during its investigations.

In resolving the enforcement action, the CFPB detailed what it regarded as the insufficiencies of Phoenix's policies and procedures, stating that Phoenix "instructed employees to only perform a circular and cursory review of limited information already in its system to resolve a dispute."

The CFPB alleged that merely matching consumers' personally identifying information against data in a furnisher's system is an insufficient inquiry because it assumes the accuracy of that information.

When discussing Phoenix's failure to conduct reasonable investigations, the CFPB also highlighted its belief that Phoenix "did not have enough employees ... to effectively handle the volume of disputes received."

The consent order resolving the action required that Phoenix pay redress to consumers, as well as a \$1.675 million civil penalty to the CFPB.

## **Conclusion**

2023 is shaping up to be an important year for FCRA litigants and practitioners. Both consumer reporting agencies and furnishers should take note of the CFPBs continued involvement with FCRA issues, especially concerning dispute processing and the distinction between legal and factual inaccuracies.

Agencies are not shying away from enforcement actions, lawsuits and amicus brief filings, and these practices seem to be ramping up under the CFPBs current leadership. As the year progresses, pending court of appeals decisions may result in significant changes for the FCRA landscape.

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- [1] 56 F.4th 264 (2d Cir. 2023).
- [2] No. 22-87 (2d Cir. Mar. 3, 2023).
- [3] *Sessa v. Linear Motors, LLC*, No. 19-CV-9914, WL 6052134 (S.D.N.Y. Dec. 20, 2021).
- [4] *Belair v. Holiday Inn Club Vacations, Inc.*, No. 23-10101, amicus brief filed (11th Cir. Apr. 20, 2023).
- [5] *Belair v. Holiday Inn Club Vacations, Inc.*, No. 6:21-cv-165, 2022 WL 18284974 (M.D. Fla. Dec. 12, 2022).
- [6] Brief for Appellant at 17 — 18, *Belair v. Holiday Inn Club Vacations, Inc.*, No. 23-10101 (11th Cir. Apr. 13, 2023).
- [7] Brief for the CFPB as Amicus Curiae Supporting Appellant at 11, *Belair v. Holiday Inn Club Vacations, Inc.*, No. 23-10101 (11th Cir. Apr. 20, 2023).
- [8] *Dept. of Agric. Rural Dev. v. Kirtz*, No. 22-846, 2023 WL 4065594 (U.S. June 20, 2023).
- [9] 2023 WL 4134907 (N.D. Ill. June 22, 2023).
- [10] *Wynn v. United Parcel Service, Inc.*, No. 21-cv-10029, 2023 WL 2324288 (N.D. Cal. Mar. 1, 2023).
- [11] No. 21-2430 (3d Cir. Mar. 22, 2023).
- [12] *Ingram v. Experian Information Solutions, Inc.*, No. 18-3776, 2021 WL 2681275 (E.D. Pa. June 30, 2021).
- [13] Brief for the CFPB & FTC as Amicus Curiae Supporting Appellant at 14 — 16, *Ingram v. Experian Information Solutions, Inc.*, No. 21-2430 (3d Cir. Sept. 13, 2022).
- [14] *Phoenix Financial Services, LLC*, No. 2023-CFPB-0004 (June 8, 2023).

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