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The California Split: How Two Courts Are Changing FCRA Litigation on the West Coast

SPEAKERS

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In this episode of *FCRA Focus*, host Dave Gettings is joined by Elizabeth Holt Andrews to break down a significant new development in California standing law — a recent split between the Fifth Appellate District's *Limon* decision and the First Appellate District's *Askins* ruling — and what that split means for defendants facing FCRA claims in California state court. Dave and Elizabeth discuss strategic considerations around removal, demurrers, and a critical procedural tool for attacking nationwide class action claims at the pleading stage.

Transcript

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Episode: The California Split: How Two Courts Are Changing FCRA Litigation
Host: Dave Gettings
Guest: Elizabeth Andrews
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Dave Gettings (00:07):
Hey everyone, welcome to another edition of *FCRA Focus*, the podcast that discusses all things credit reporting. Today we're going to focus on an issue in California that has the potential to lead to an increase in FCRA litigation in California state court mainly. We're talking about developments in California standing law and a recent appellate court split. Joining me today is one of our California gurus, Elizabeth Andrews. When I say California guru, I don't mean surfing or wine or growing avocados, unless Elizabeth, you have an expertise in those. I mean California appellate law, and Elizabeth is one of my go-tos for that area. Elizabeth, welcome to the show.

Elizabeth Andrews (00:49):
Good morning from the best coast.

Dave Gettings (00:52):
Do you have any expertise in surfing, wine, or growing avocados?

Elizabeth Andrews (00:55):
I can speak about surfing because I live in Half Moon Bay, which is pretty much the big wave capital of America. If anyone has ever heard of the Mavericks surfing competition, I can watch that from my windows of my house.

Dave Gettings (01:10):
So can you actually surf or can you just speak on surfing from watching it?

Elizabeth Andrews (01:14):
I think you would be taking your life into your hands to surf Mavericks without very substantial surfing expertise. I am more of a baby wave person.

Dave Gettings (01:22):
What's the phrase? It's like, if you can't do, you teach? Is that it?

Elizabeth Andrews (01:25):
I don't know if I could even teach. I certainly enjoy watching it, though, Dave.

Dave Gettings (01:29):
All right, cool. It sounds like you've got a pretty awesome view from your house, so I'm a little bit jealous. [chuckle]

Elizabeth Andrews (01:33):
I'll work on avocados and wine grape growing next, I guess. [chuckle]

Dave Gettings (01:37):
We are going to dive right in. So we're talking about some recent developments in California appellate law and specifically on standing and a split of authority. So can you just give us a little bit of background in terms of how we got here with respect to California appellate procedure so we can just orient the listener to where we are?

Elizabeth Andrews (01:57):
I apologize to our dear listeners for hitting you with appellate procedure right up front. Try to make this as painless as possible. But in order to sort of understand what's happening in California right now, it's important to understand the structure of the California appellate courts. So, Dave, you're out in Virginia. How many appellate courts do you have in Virginia?

Dave Gettings (02:17):
We've got a Court of Appeals and then we've got a Supreme Court.

Elizabeth Andrews (02:21):
Right.

Dave Gettings (02:22):
So at least two.

Elizabeth Andrews (02:23):
And that's true in North Carolina as well, which is where I grew up. There's essentially the intermediate appellate court and then there's the Supreme Court. So that's true in California, too. Historically, there were just two courts in California. If you lost at the trial level and you wanted to take it up, you went to an intermediate appellate court,

and then if you lost there, you tried to go to the Supreme Court. Dave, on another podcast episode another day, I will tell you the story of how the Chief Justice of California killed the United States Senator for California in a duel in San Francisco back in the day.

Dave Gettings (02:59):
Okay, we'll save that for another day.

Elizabeth Andrews (03:01):
Yeah, [chuckle] it's the Wild West out here. One other slightly less violent way in which it is the Wild West is that California grew really, really fast. It went from being this cowboys type place to we are now the fourth largest world economy and we have the largest judicial system in the Western Hemisphere, believe it or not. Certainly larger than any other state, larger than the federal government. I think we're smaller than maybe the country of India or a few places like that. But California is a very, very large place. And one single Court of Appeal just had no hope of keeping up with all of the appeals that were being generated in this enormous state. So what it did was it split itself into six districts back a few generations ago. The six districts are District 1, San Francisco, 2 is LA, 3, Sacramento, 4, San Diego/Riverside, 5 is Fresno, and 6 is San Jose. Because historically, though, it's all one court, any ruling in any of those six districts, regardless of where it is, is binding in every trial court in every county, regardless of where that trial court is located. So if the First Appellate District in San Francisco decides something, that binds all the trial courts all over the state. Doesn't matter where they are or what appellate district they might happen to sit in.

Dave Gettings (04:26):
And so what happens if there's a split?

Elizabeth Andrews (04:28):
So if there's a split between the appellate districts, which does happen, they're not bound to follow each other. There's no, "horizontal stare decisis between the appellate districts." If one Court of Appeal district splits from another, very weirdly, trial courts throughout the state, regardless of geography, they have discretion to choose which side of that split to adopt. Doesn't matter where they sit. You don't have to adopt the view of the appellate court that sits across the street from you.

Dave Gettings (04:59):
Oh, interesting.

Elizabeth Andrews (05:01):
So it's very different from federal court in that way.

Dave Gettings (05:03):
Okay, so appreciate the background. Let's transition a little bit to standing, because that's going to be the subject of the podcast, besides surfing and avocados and duels. We don't need to cover in detail federal law. We've talked in other podcasts about the standing requirement in federal court, specifically the injury-in-fact requirement for Article III standing. And we know a plaintiff has to show that he or she suffered injury-in-fact that is concrete, particularized, and actual or imminent, that the injury was likely caused by the defendant, and that the injury would likely be redressed by judicial relief. We've covered that before. How does standing law under California law

compare?

Elizabeth Andrews (05:43):
Generally speaking, there's a lot of overlap. California, rather than using this rubric of injury-in-fact, which you usually hear under federal law and Article III analyses, standing under California law is governed by what is known as the beneficial interest test, which is essentially the court is going to ask whether the party who's trying to come in and start a case has a special interest over and above the interest of the public at large. In practice, getting to FCRA litigation specifically, that has really overlapped almost completely with federal standing. For purposes of the FCRA under federal law, as I'm sure you've talked about on the podcast before, you can't just show a bare violation of the FCRA as the plaintiff and try to make a case out of that. You have to show that you were actually harmed. So, for example, there's a famous Ninth Circuit case from 2018 called Bassett…

Where somebody tried to sue under a division of the FCRA known as FACTA, which essentially says that you have to truncate credit card numbers on receipts. So somebody got handed a receipt with their own credit card number printed on it, which was insufficiently truncated, allegedly. And that person didn't allege anything else. They didn't say, "And so someone stole my credit card and stole money from me," or, "I had to go and I had to get credit monitoring and pay for it." They just didn't allege any harm at all. And the court, the Ninth Circuit in Bassett, said that is not sufficient to establish Article III standing under the FCRA. Now, California, up until recently, was very aligned with Bassett.

Dave Gettings (07:36):
Yes. For the last, what, three or four years, we keep hearing about Limon, Limon, Limon and California standing law, right?

Elizabeth Andrews (07:41):
Yes, that's right. And under Limon, the Venn diagram between federal Article III standing and California beneficial interest standing for FCRA purposes, that Venn diagram was a circle. You had to have an injury-in-fact under both federal law and California law, regardless of what name you gave the test.

Dave Gettings (08:04):
So Limon recognized that there's different words in the standard between California and federal, but effectively the result was the same. Is that right?

Elizabeth Andrews (08:10):
That's right. That's right. Essentially, if you can't show an injury-in-fact as you would under Article III, you also can't show beneficial interest under California law. That case was decided in 2022. And again, this is all for FCRA purposes. I think getting into the nuances of standing in state and federal court for other purposes is a little beyond our scope here, Dave. But for purposes of the FCRA, Limon aligned California law with federal law and specifically in the Ninth Circuit, that Bassett case.

Dave Gettings (08:41):
Got it. I know we talked a little bit earlier about the different geography. Do you recall where Limon was in terms of the appellate courts in California?

Elizabeth Andrews (08:50):
Yes, Limon was out in the Fifth Appellate District, which is Fresno. It tends to be a more conservative part of California. The Fifth Appellate District is probably the most actually conservative appellate district. And just for the sake of thoroughness, as you've probably discussed before, Limon was not a credit card receipt case, but it involved a, quote, unquote, informational injury, which in that case, allegedly the employer, who was Circle K, Mr. Limon's employer, didn't provide, he claimed, compliant disclosures on some paperwork that they had him sign before they pulled a consumer report on him. But he didn't have any allegation that he was actually injured by that. So Limon said, the case Limon said, no standing, can't get past pleading stage.

Dave Gettings (09:36):
So when Limon came down, were all the trial courts obligated to follow Limon with respect to standing in FCRA cases?

Elizabeth Andrews (09:43):
They were. They were bound statewide by that Fifth Appellate District decision.

Dave Gettings (09:47):
Now comes the big but, right?

Elizabeth Andrews (09:50):
Yes, the big but, as you said, is, as I mentioned at the top of this episode, there is no horizontal stare decisis among these appellate districts. So sooner or later, California being what it is, Limon was bound to get disagreed with. And on June 4, 2024, that happened. Surprise, surprise, it was San Francisco. The First Appellate District parted ways from Limon and said…

Dave Gettings (10:16):
And San Francisco, spoiler, is not as conservative as Fresno. Is that right?

Elizabeth Andrews (10:20):
No, to say the least. Probably the most liberal of the six. That court said, we see Limon, we read Limon, and we think Limon is wrong. And the case is called Askins that came out at the beginning of this month. And essentially, Askins says that the beneficial interest test means to us that as long as a statute carries statutory damages, which the FCRA does, then you can meet the beneficial interest test even without a showing of actual injury. Because in their view, all you have to do to meet beneficial interest is have some kind of interest over and above the interest of the public at large. And they thought that the existence of statutory damages meets that. So parted ways from Limon very clearly. So now here we are in California. If you're in trial court, you now as a defense attorney defending one of these FCRA cases, you need to argue to the trial court that they need to choose Limon, not Askins.

Dave Gettings (11:20):
Before we get there, Elizabeth, is there a higher appellate court that reviews splits among the geographies of the Court of Appeals, or does that not happen?

Elizabeth Andrews (11:33):

It does happen. The California Supreme Court will take up cases where there's a split. And just like the US Supreme Court, they're more likely to grant a petition for review if there is a split in the appellate courts. However, they really are very conservative and like to see splits develop for frequently a very long period of time. There are some issues that I've worked on… I've been litigating in California since 2010… And there was an issue involving negligence of mortgage loan servicers that the California Supreme Court let that split go on for 10 years before they finally granted a petition for review on that subject and resolved the split. So we can't necessarily count on getting relief from this situation quickly. You never know. I'm sure people are going to be trying, and essentially people just bring petitions year after year on these recurring issues until eventually the Supreme Court finally takes it up.

So I would imagine, if I had to look in a crystal ball, Dave, I would think that it's going to be a few years out here. The California Supreme Court's going to want to see, well, what are trial courts doing with this? Which way are they leaning? Do any other California appellate districts want to weigh in and say whether they agree more with Limon or with Askins? I think it's going to unfold for a while.

Dave Gettings (12:51):
All right, that makes sense. So moving to what we were going to talk about next, strategy for defendants. You get sued in California state court, let's say an FCRA case where there is defendants will argue no cognizable injury in fact. So the first thing you're going to argue is Limon is right and Askins is wrong, correct?

Elizabeth Andrews (13:11):
Correct. Although I want to insert one point there, Dave. When you get sued in state court for violating a federal statute, what is usually the first thing you think about doing?

Dave Gettings (13:23):
Well, removing.

Elizabeth Andrews (13:24):
Exactly. Here, that is not always going to be a good move because of that Ninth Circuit Bassett case. As soon as you remove to federal court, the federal court's going to say, "Wait a minute, the plaintiff doesn't have standing to bring this case in federal court." So what we've seen happen in case after case is the plaintiff will move to remand and the federal court will grant that motion because they'll say, "Well, you can't remove this because the plaintiff doesn't have standing in federal court." And then when the federal court remands, the plaintiff gets attorney's fees if that remand motion gets granted. So it's…

Dave Gettings (13:57):
Well, could get attorney's fees, right? Not guaranteed.

Elizabeth Andrews (13:59):
They could. It's not guaranteed. But often we are seeing that happen.

Dave Gettings (14:04):
What I've seen a lot and, for example, New York and New Jersey, and maybe this hasn't developed yet since Askins is so new, but sometimes you'll have plaintiffs' counsel bring cases and specifically disclaim any actual

injury. They will say in the complaint, "I have not suffered any actual injury, just a procedural injury of my rights." Are you seeing that?

Elizabeth Andrews (14:23):
I think we will start to. As you said, Askins is new, but I certainly think that is probably where this is going. And plaintiffs' counsels will then be in a position where, okay, they're going to be able to stay out of federal court with that kind of allegation in there, but they're going to have to argue pretty hard that the trial court should, in its discretion, choose Askins, not Limon.

Dave Gettings (14:43):
Right.

Elizabeth Andrews (14:45):
So they're rolling the dice a little bit when they do that. But so are defendants, because they're going to demur, which is the equivalent of moving to dismiss in California, and you got to argue that Limon is right and Askins is wrong, and your opponent's going to be arguing the opposite. So it's really going to be up to that trial judge how he or she decides to rule on that issue. Then if you're playing the long game, Dave, of course, if you lose and the trial court picks Askins, you can try to create some good law by seeing if you can do a writ petition and take that up to a court of appeal, which you may not be able to do because they don't love granting discretionary writ petitions, but you can try.

Dave Gettings (15:25):
Right. So, Elizabeth, as we sort of wind down, a lot of times in this podcast we talk about class actions and the impact of certain laws on class actions and procedures on class actions. Do you see any unique nuance with the standing law as it impacts potentially nationwide class actions under the FCRA in California?

Elizabeth Andrews (15:45):
Absolutely. We are defending a number of these in our firm right now.

Dave Gettings (15:48):
I like the plug, Elizabeth. Good plug.

Elizabeth Andrews (15:50):
Absolutely. Cross-selling, Dave. [chuckle] If you get hit with a nationwide class action based on the FCRA in California state court, you might or might not be able to win on demur based on this Limon-Askins split. But one thing that you should try to shoe-surface as soon as you possibly can is the putative class members in the other 49 states. Because even if the putative class members in California could be said to have standing under Askins, there's no way that class members in the other 49 states can take advantage of California standing. And the problem is, ordinarily you don't get to raise issues like that until class certification, at which point you may have gone through nationwide discovery. Fortunately, California has a small little procedural escape hatch for this type of situation. It's Rule of Court 3.767(a)(3). Be saying that in your dreams tonight, Dave.

It's a rule that allows you to move to strike aspects of class claims at the pleading stage, well before the class has been certified. So what I have been recommending to clients that they consider doing is you get this nationwide class action and you demur and hope you win on Limon. But if you don't, you bring an alternative motion to strike class claims to the extent that they allege nationwide class membership. So you can try to get those other 49 states out of there at the pleading stage, which I think is critical to get that issue out there as early in the case as possible rather than waiting for class cert when you have to potentially defend against nationwide class discovery on an issue where there is no actual injury.

Dave Gettings (17:33):
Yeah, it'd be a huge win. In fact, I was just looking at a Fourth Circuit decision from two weeks ago, and the Fourth Circuit kind of said the quiet part out loud. It's that class certification becomes an absolute holdup game where it forces defendants to potentially settle.

Elizabeth Andrews (17:46):
Absolutely.

Dave Gettings (17:49):
The earlier you can hopefully get it taken care of, the better. Obviously, that's like the understatement of the podcast.

Elizabeth Andrews (17:53):
Absolutely. Yep. I'm going to say it again: California Rule of Court 3.767(a)(3). That's your go-to for motion to strike class aspects of the class claims at the pleading stage.

Dave Gettings (18:07):
Perfect. All right, Elizabeth, we are winding down on the podcast. I think you have done an excellent job making California standing law interesting, riveting, and exciting. So thank you very much for doing that.

Elizabeth Andrews (18:18):
My pleasure. Thanks for having me, Dave.

Dave Gettings (18:20):
Yeah, of course. Any last parting thoughts before we end it?

Elizabeth Andrews (18:23):
I think I would just say if you ever want to watch some really awesome big wave surfing, Dave, just Google Mavericks, Half Moon Bay, and you'll see some of the biggest waves you've ever seen in your life. People fly in from all over the world to surf here in my little hometown.

Dave Gettings (18:38):
And we may see your house apparently on the drone footage of the waves, right?

Elizabeth Andrews (18:41):
You can look out for me waving, Dave.

Dave Gettings (18:44):

All right, Elizabeth, thank you for joining. Really appreciate it as always. And we'd like to thank everyone for listening to the podcast today. And as always, don't forget to visit our blogs, consumerfinancialserviceslawmonitor.com and troutmanfinancialservices.com, and please subscribe to our podcast at all of your favorite podcasting locations. Thanks for listening.

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