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# What We Learned From 2022's Top FCRA Developments

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The Fair Credit Reporting Act saw no shortage of activity in 2022. That activity included judicial decisions, regulatory actions, and federal and state legislation. As we reflect on certain significant developments from the past year, FCRA litigants and practitioners should be prepared for a busy 2023.

**Article III Standing**

In the wake of the U.S. Supreme Court's 2021 FCRA decision *TransUnion LLC v. Ramirez*,[1] the type of harm required to confer Article III standing to sue under the FCRA remained a focus at both the federal and state levels, and FCRA standing decisions will have continuing impact on litigation in 2023.

In May, the U.S. Court of Appeals for the Eighth Circuit found in *Schumacher v. SC Data Center Inc.* that the FCRA does not create a right for a prospective employee to explain negative but undisputed background check information to their prospective employer prior to an adverse action.[2]

The plaintiff was denied employment after a background check revealed her prior conviction, but the employer did not provide a copy of her report until after it rescinded her employment offer.

Although the plaintiff did not dispute the conviction, she filed suit claiming the employer's failure to provide a copy of her report prior to taking adverse action prevented her from explaining the circumstances of that conviction to the employer. The defendant moved to dismiss, challenging the plaintiff's Article III standing to assert an adverse action claim.

The district court held she had standing, but the Eighth Circuit reversed finding that the right protected by the relevant provisions of the FCRA was the right to dispute information in a consumer report prior to an adverse action, not a right to discuss with an employer undisputed negative information.

Because the plaintiff never claimed the information was inaccurate or that she would have disputed the information, the court found she had no standing.

In November, the U.S. Court of Appeals for the Sixth Circuit concluded in *Hammoud v. Equifax Information Services LLC* that a third-party disclosure of allegedly inaccurate information is likely sufficient for Article III standing, unless the inaccuracy is innocuous.[3]

The Sixth Circuit reiterated that a plaintiff has a concrete injury where the consumer reporting agency, or CRA, actually disclosed inaccurate information in a credit report to a third party.

Also in November, the U.S. Court of Appeals for the Ninth Circuit found in *Tailford v. Experian Information Solutions Inc.* that the plaintiffs had standing to assert a claim when they alleged that they were unable to opt out of certain disclosures to other parties without the complete information required under Section 1681g of the FCRA.[4]

Unlike Ramirez, where the plaintiff alleged they received information in the wrong format, the Ninth Circuit found a sufficient concrete injury where the alleged violations of the FCRA prevented plaintiffs from being able to opt out of certain disclosures to third parties.

There was also significant standing activity at the state level. For instance, in late October, the California Fifth District Court of Appeal addressed the intersection of California's standing jurisprudence with an alleged technical violation of the federal FCRA's disclosure and authorization form requirements for employment screening in *Limon v. Circle K Stores Inc.*[5]

The plaintiff alleged that the defendant's standard form by which consent to run a background check was procured violated the FCRA's standalone disclosure requirement because it contained extraneous provisions. The California trial court dismissed the case for failure to meet California's standing requirements.

The California court of appeals affirmed that dismissal, holding that the plaintiff had not suffered a concrete or particularized injury in connection with the alleged form violation.

The plaintiff is currently seeking review of the dismissal by the California Supreme Court. Until such review occurs, or until another California court of appeals disagrees with the decision, this current decision serves as binding precedent for all state trial courts in California.

Given the technical nature of many of the requirements imposed by the FCRA, these decisions defining standing under both federal and state law will provide crucial guidance to the industry, courts and litigants in 2023.

**Credit Reporting and Furnishing**

Furnishers and CRAs also saw substantial litigation activity and regulatory guidance throughout 2022.

The Consumer Financial Protection Bureau and the Federal Trade Commission continued to advocate for expanding furnishers' duties to reasonably investigate consumer disputes.

The CFPB and FTC filed amicus briefs — one in April in the U.S. Court of Appeals for the Eleventh Circuit for the *Milgram v. JPMorgan Chase* case[6] and one in September in the U.S. Court of Appeals for the Third Circuit for

the *Ingram v. Waypoint Resource Group* case[7] — focused on two primary issues: the distinction between legal and factual disputes, and furnishers' investigation of indirect disputes deemed frivolous.

The CFPB continued to publish bulletins focusing on furnishing medical debt information, including a compliance bulletin warning debt collectors that reporting medical debt charges in excess of those permitted under the No Surprises Act[8] could violate the FCRA.

The CFPB also opined that medical debt and collection are not predictive of a consumer's creditworthiness. In response, three nationwide CRAs updated their medical debt reporting practices and, in 2023, will not include any unpaid medical debt less than $500 on consumer credit reports.

The CFPB also issued a circular highlighting inadequate investigatory practices by both CRAs and furnishers. The circular clarified that the FCRA prohibits CRAs and furnishers from requiring a consumer to provide documentation or satisfy demands as a precondition to investigation.

Moreover, the CFPB advised that a CRA must forward all relevant information regarding the dispute to the furnisher. The CFPB issued furnisher-specific guidance that highlighted a furnisher's duty to reasonably investigate direct disputes received from consumers and all indirect disputes received from CRAs.

The CFPB issued an advisory opinion warning CRAs that the failure to detect and remove logical inconsistencies from consumer reports, such as the illogical reporting of a date of first delinquency, violates the FCRA's reasonable procedures requirement. The advisory opinion is consistent with ongoing CFPB efforts to regulate the FCRA outside the formal rulemaking process.

Regulators were also active as amici in FCRA litigation. In April, the CFPB filed an amicus brief in *Milgram v. JPMorgan Chase*[9] in the Eleventh Circuit, arguing that a furnisher is obligated to reasonably investigate disputed information regardless of whether the underlying dispute is factual or legal."

While several courts have distinguished between factual and legal disputes in determining a furnisher's obligation to investigate, the CFPB requested the court reject a formal distinction between factual and legal investigations.

In May, the CFPB and FTC also filed a joint amicus brief in *Sessa v. TransUnion LLC*[10] in the U.S. Court of Appeals for the Second Circuit, arguing that the FCRA does not distinguish between factual and legal inaccuracies and thus, CRAs may be held liable for failing to maintain reasonable procedures to prevent inaccuracies that turn on legal questions regarding an underlying debt or related credit information.

In addition, the CFPB and FTC also filed a joint amicus brief in September in *Ingram v. Waypoint Resource Group*,[11] arguing to the Third Circuit that a furnisher is required to investigate all disputes forwarded by a CRA and cannot avoid that obligation by claiming a dispute is frivolous.

In Ingram, they argued the statutory text is unambiguous and a decision allowing furnishers to decline to investigate any indirect dispute it deems frivolous "would risk opening a loophole in this careful statutory scheme."

Apart from regulatory advocacy, CRAs received some clarity on the Third Circuit's standard for assuring

maximum possible accuracy when the Third Circuit adopted an objective "reasonable reader" standard to evaluate whether information is inaccurate or misleading under Section 1681e(b).[12]

The court analyzed whether certain pay status notations were inaccurate or misleading and rejected the plaintiffs' contention that it is misleading to report a negative "Pay Status" notation of "Account 120 Days Past Due," in conjunction with reporting that the account has been closed, transferred and had a zero balance.

Applying the reasonable reader standard to find the negative pay status notations were not misleading, the court noted "the possibility of further clarity is not an indication of vagueness."

The Third Circuit held that the reasonable reader standard requires reading the report as a whole — not in isolation — to determine if the information is inaccurate or ambiguous.

Under the reasonable reader standard, "if an entry is inaccurate or ambiguous when read both in isolation and in the entirety of the report, that entry is not accurate under § 1681e(b)."

**Other Significant Decisions**

In *Kirtz v. TransUnion LLC*,[13] the Third Circuit widened a circuit split by joining the U.S. Court of Appeals for the D.C. Circuit and U.S. Court of Appeals for the Seventh Circuit in holding that the FCRA operates as a waiver of sovereign immunity that allows suits against federal government agencies. The U.S. Courts of Appeals for the Fourth and the Ninth Circuit have held it does not.

In *Hammoud v. Equifax Information Services LLC*,[14] the Sixth Circuit affirmed in November that a CRA's "reliance on information gathered by outside entities is reasonable" under Section 1681e(b) "so long as the information is not 'obtained from a source that was known to be unreliable' and is not 'inaccurate on its face' or otherwise 'inconsistent with the information the [CRA] already had on file.'"

Finally, starting off 2023, the Second Circuit in *Mader v. Experian Information Solutions Inc.*[15] affirmed summary judgment to the defendant on a Section 1681e(b) claim, holding that the legal inaccuracy alleged by the plaintiff "evade[d] objective verification" and thus was not cognizable as an inaccuracy under the FCRA.

The decision adds to appellate authority holding that inaccuracies hinging on legal disputes are not cognizable under the FCRA.

**Legislative Updates**

At the federal level, several bills were introduced that would affect FCRA-regulated entities. The pending bills would:

Make all servicemembers eligible for free credit monitoring services;[16]

Establish a task force to protect members of the U.S. Armed Forces, veterans and military families from financial fraud;[17]

Permit certain credit repair organizations to dispute credit information directly with a furnisher;[18]

Amend the FCRA to require use of a consumer's current legal name on consumer reports at the consumer's request;[19]

Clarify reporting certain consumer credit information related to lease agreements or certain information reported by utility or telecommunication firms to CRAs;[20] and

Provide a consumer protection framework to support the growth of affordable financing options for postsecondary education and other purposes.[21]

At the state level, numerous states proposed consumer protection legislation. Rhode Island proposed legislation prohibiting a credit bureau from using a consumer's social security number as the sole factor when determining whether a credit report matches the inquiring user's identity. Similarly, California, Vermont and Washington, D.C., introduced and implemented legislation affecting credit reporting standards.

Additionally, in June, the CFPB issued an interpretive rule that state regulators play an important role in the regulation of consumer reporting, with the CFPB further stating its position that state laws that are not "inconsistent" with the FCRA are generally not preempted.

Although the FCRA expressly preempts certain categories of state laws, the interpretive rule clarifies the CFPB's position that state-level laws that are stricter than the FCRA are not preempted unless they conflict with specific provisions of the FCRA.

Accordingly, in the CFPB's view, the FCRA's express preemption provisions should be interpreted to have a narrow and targeted scope. These developments signal a likely increase in state legislation affecting credit reporting in 2023.

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[1] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

[2] *Schumacher v. SC Data Center, Inc.*, 33 F.4th 504 (8th Cir. 2022).

[3] *Hammoud v. Equifax Information Services*, LLC , 52 F.4th 669 (6th Cir. Nov. 4, 2022).

[4] *Tailford v. Experian Information Solutions, Inc.*, 26 F.4th 1092 (9th Cir. 2022).

[5] *Limon v. Circle K Stores Inc.*, 84 Cal. App. 5th 671, 671.

[6] *Milgram v. JPMorgan Chase*, No. 19-60929, amicus brief filed (11th Cir. Apr. 7, 2022).

[7] *Ingram v. Waypoint Resource Group*, No. 21-2430, amicus brief filed (3d Cir. Sept. 13, 2022).

[8] Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

[9] No. 19-60929, amicus brief filed (11th Cir. Apr. 7, 2022).

[10] No. 22-87, amicus brief filed (2d Cir. May 5, 2022).

[11] No. 21-2430, amicus brief filed (3d Cir. Sept. 13, 2022).

[12] *Bibbs v. Trans Union, LLC*, 43 F.4th 331 (3d Cir. Aug. 8, 2022).

[13] 46 F.4th 159 (3d Cir. Aug. 24, 2022).

[14] 52 F.4th 669, 675 (6th Cir. Nov. 4, 2022).

[15] No. 20-3073, 2023 WL 27654 (2d Cir. Jan. 4, 2023).

[16] H.R. 7526.

[17] H.R. 8321.

[18] H.R. 7919.

[19] H.R. 8478.

[20] H.R. 8985.

[21] S. 4551.

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- Consumer Financial Services
- Fair Credit Reporting Act (FCRA)