FCRA Focus — 2024 Credit Reporting Review: Impactful Changes and Future Forecast
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Guests: Tim St. George, Cindy Hanson, Scott Kelly
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Dave Gettings:

Hey, everyone. Welcome to another edition of *FCRA Focus*, the podcast that discusses all things credit reporting. As we start 2025, we are now in Season 4 of the podcast. Meaning, we started the last time Patrick Mahomes was not in the Super Bowl. Today, we're going to take a trip down memory lane by looking back at some of the most impactful regulatory issues and court decisions in credit reporting from 2024, and how those developments may influence credit reporting in 2025.

For this recap, we're first going to focus on background screening and then pivot to credit reporting more generally. Joining me today are three of our resident experts in screening, Cindy Hanson, Scott Kelly, and Tim St. George. They're all *FCRA Focus* alums, so we will do away with the long and verbose introductions. Cindy, Scott, and Tim, happy to have you here. Thanks for joining the show.

Tim St. George:

Thanks for having us, Dave. Appreciate it.

Cindy Hanson:

Great to be here.

Scott Kelly:

Yes. Thanks, Dave.

Dave Gettings:

Happy to have you guys here. Scott, we're going to start with you a little bit and talk about background screening. But Tim and Cindy, you're also experts, so obviously, please feel free to chime in. Scott, even though this is *FCRA Focus*, one of the most impactful issues in screening in 2024, we will say was FCRA adjacent, dealing with the FHA, the Fair Housing Act. Can you touch a little bit on some of the 2024 developments in the FHA and how they may impact the consumer reporting industry?

Scott Kelly:

Certainly. You can start really back in March of 2024 when HUD, the FTC, the DOJ, and the CFPB all came together to issue joint guidance on the interplay between the Fair Housing Act, and tenant background checks, and background screening. In that regulator guidance, which was comprehensive in its coverage across the regulator spectrum here in the United States, they emphasized really that tenant background checks can become, then rise to the level of illegal discrimination, even if there is not a "factual error" or "technical error" in the report.

The regulators viewed that as deriving from, if not error, then sort of the pretextual interpretation of a landlord, or in a lot of times, the regulators viewed the tenant screening company's use of what they considered to be "irrelevant information" to have a potential disparate impact on certain classes of individuals. That guidance really, to a certain extent, came out of nowhere to some individuals. It then sprang activity by the plaintiffs' bar that had predated that, but then came to the foreground in the industry after this regulator guidance.

Tim and Cindy were involved in litigation here and have a good sense of how it developed over time. But one of the major decisions came down in Connecticut Fair Housing Center versus CoreLogic Rental Property Solutions. Courts have grappled with how to interpret this regulator guidance in the interplay with the Fair Housing Act and FCRA. But ultimately, in that case, the court held that there was not a disparate impact on certain minority applicants because it did not, under the statute, under the Fair Housing Act, make housing unavailable. I'll sort of throw it to Cindy and Tim to sort of provide some context there.

Cindy Hanson:

Thanks, Scott. A little bit, and then I'll let Tim jump in. One of the things I think you really see with the regulators or with the plaintiffs' bar trying to impose the Fair Housing Act on top of the Fair Credit Reporting Act is they want to impose some limits on the Fair Credit Reporting Act that don't exist. So, in the Arroyo case, what plaintiffs, and they were well-funded plaintiffs by organizations who are very active in this area, even though the Fair Credit Reporting Act allows for the reporting of all types of criminal records, at least for seven years and allows for the reporting of convictions indefinitely.

What you see the plaintiffs' bar trying to do is say, "Well, under the Fair Housing Act, we now have to look at this through a different lens, through discrimination, and maybe, there should be limits on how far back you can go, or what type of convictions or criminal records can you look at, and how they relate to housing. I really see this as an attempt by plaintiffs and the regulators to put more limits around what is reportable, because the FCRA does allow for a very broad reporting. Tim, if you want to jump in here and add more.

Tim. St. George:

Yes, sure. The other large issue in the Arroyo case was, who caused housing to be unavailable? As Cindy mentioned, there's all sorts of limitations that the regulators and the plaintiffs' bar want to put on the reporting process. Criminal records, of course, are reportable in perpetuity under the federal FCRA, but the plaintiffs' bar took a lot of issue with that, particularly as it might relate to non-felony offenses. But I think the real critical issue in the case, and the

one that was ultimately decisive was, who actually made the housing decision, who made housing unavailable?

The plaintiffs' bar were taking the position very stridently that it was the background screening company because they were essentially the but for, the triggering cause of the denial. And there was a lot of battles waged about what making housing unavailable means and what standard of causation is there under the FHA. I'll note that the Department of Justice, even when the case went up on appeal, filed an amicus brief weighing in on the side of the plaintiffs' bar and saying that this is actually a very low bar for applicability.

Screening companies that may have thought, "Look, we're only involved in causing our report to be generated and not causing any housing decision need to be really mindful about the positions that are being taken by the government and the plaintiffs' bar as to when the screening company can maybe arguably step out of its role under the FCRA and step into a new role under the FHA as actually the cause of the denial of housing. That decision from the Second Circuit still remains outstanding, but there's a lot of lessons learned in terms of the trial court opinion and how the issues were based on appeal in terms of keeping your business safe.

Dave Gettings:

So, do we see this in 2025 as an area where plaintiff's counsel are going to continue to push or was the decision from the district court good enough or we think it's going to be the death knell of that theory?

Scott Kelly:

This is going to keep popping up. It's going to be a continued issue for the plaintiffs' bar to litigate. You can see that in the regulator statements that went counter to the ultimate ruling in the Arroyo case, and you can also see that in the settlement that was agreed to last year in the Lewis case in Massachusetts. It sort of went the other way in terms of being a successful outcome for the plaintiffs' bar and enforcing these types of FHA claims. So, I don't think this is going away. I think there's a lot of movement behind it and there's daylight in between for the plaintiffs' bar and what they see they can put pressure and achieve pretty significant settlements in these cases.

Tim St. George:

And I'll also say that, even, notwithstanding civil litigation, I'm currently handling a number of investigative complaints and demands against consumer reporting agencies that have been filed by local fair housing organizations and investigations that are ongoing. Where, including as well by state attorneys general, where the predominant theory is that, the screening company is the one making housing unavailable. So, this is an extremely active space on the regulatory front as well. I think, even if a lot of people are waiting to see what the Second Circuit does, that's not stopping state and government regulators from moving forward.

Cindy Hanson:

I would echo that point, even with a change in administration, where you feel there will be less federal enforcement on statutes such as housing statutes, we have seen increase activities from state and local government. So, they will definitely pick up the slack here.

Dave Gettings:

So, pivoting from FCRA adjacent to certainly FCRA central. Talk a little bit about the CFPB, Scott, and background screening. As we're recording this today, President Trump relieved Director Chopra of his leadership at the CFPB over the weekend. What did the CFPB do in 2024 looking back that was active in the screening industry and how do we think it might translate to 2025 going into this uncertain change in administration?

Scott Kelly:

Yes. So, in January of 2024, the CFPB issued a number of advisory opinions surrounding background screening and the FCRA. They were very instructive and sort of went above and beyond in terms of the types of requirements, including for reasonable procedures under 1681(e)(b), that far field from where we had seen FCRA litigation in the past.

Dave Gettings:

You say that so civilly, Scott, above and beyond. How do you really feel?

Scott Kelly:

There are strong statements here. I think, again, that was January 2024. We're now in February 2025 with a new administration, and we can discuss that. I think there's going to be a different take on the pronouncements and advisory opinions. But just to talk a little bit about the specifics there, and people can go look at the opinions that came out on January 23rd and January 11th. The January 23rd one really focused on reasonable procedures and talked about certain requirements that CFPB viewed as mandatory to ensure maximum possible accuracy. Like ensuring that there wasn't duplicative entries on consumer reports or credit reports that would give the impression that a single event occurred more than once.

There is also, CFPB said, "Consumer reporting agencies need to ensure that information is updated, that there's affirmative action taken before a consumer report is issued to make sure that there's not a charge that's been expunged, or sealed, or dismissed." There's the sealing aspect of things, the expungement aspect of things that also overlays with state law. I know there's 45 states where there's law allowing for the expungement and sealing of certain convictions. The interplay there is difficult for consumer reporting agencies and others in the industry to comply with given the volume that they have.

There's also disposition information that CFPB focused on. They're requiring sort of above and beyond procedures as I said earlier in terms of what they view as the requirements of consumer reporting agencies and the steps needed to go interpret state law and understand sort of what

the status of a particular conviction, or charge, or arrest, or record. So, we're seeing a lot of movement there and it's shown during the January advisory opinions from the CFPB.

Dave Gettings:

I guess the risk there, Scott is, once the advisory opinions are out, even if you have a change in administration, if the advisory opinions are not withdrawn, you're still going to get the plaintiffs' bar pointing to those advisory opinions as what the industry standard is and what's necessary for reasonable procedures, what counts against companies for willfulness. So, how do you think 2025 is going to progress? Any sense of what we're going to see out of the CFPB? I know I'm asking you to totally guess.

Scott Kelly:

In terms of the CFPB, I think we're going to see a slowdown of enforcement activity and advisory activity on the FCRA. I don't think it's going to be a complete 180 from what it was in 2024, but I think you're going to see a slowdown. I do think that as a result of this sort of enhanced activity of the CFPB in 2024, you're going to see the plaintiffs' bar continue to aggressively litigate these issues, especially the popular issue of, what is a legal interpretation of a particular issue with respect to a consumer report versus a factual interpretation. Legal versus factual issues is an issue that courts have struggled with nationwide, and that interplays with whether CRA is performing reasonably and has reasonable procedures to check those kinds of legal versus factual issues. I think, litigation is going to continue. I think the CFPB will have somewhat put the brakes on in terms of its aggressive enforcement.

Dave Gettings:

Yes, we actually saw that today in one of the cases we're following in the Fifth Circuit, the CFPB filed an emergency notice saying they want to pause the proceeding. So, I'm curious if that's going to be an edict that comes through all CFPB litigation, if there was some interesting nuance of the Fifth Circuit case. But we will see how aggressive the CFPB is in prosecuting things going forward. So, Tim, pivoting from background screening to credit reporting more generally, what did we see from FCRA rulemaking in 2024 with respect to some of the technical credit reporting issues?

Tim St. George:

Sure. The rulemaking has been going on since 2023 when there was a notice to propose rulemaking and it progressed throughout 2024. It was sort of publicly styled as medical debt. But when you actually pierced through the veneer of the press releases, you could see that there was a very significant reworking of the credit reporting space envisioned by the CFPB. In particular, the CFPB wanted to do a couple things. They wanted to expand the definition of what constitutes assembly or evaluation. Those are two of the triggering points for whether something constitutes a consumer report. If you're pumping out consumer reports for profit, then you're going to be a consumer reporting agency.

Even compiling information about consumers into a database could be seen as assembling or evaluating under this new proposed rule, which was announced in December. There's also significant reworking of whether a credit header information is consumer reporting governed. Typically, we've taken the position that that's outside of the FCRA so you can't have accuracy claims about credit header information, but the rule pushes back on that. And we also saw some CFPB amicus activity on that front as well. And then, there's a whole background about data brokers and what is a data broker in an attempt to move data brokers explicitly into the FCRA space. There's all sorts of other technical things about what constitutes written consent for a report and disputes, and there's a lot going on.

Now, it's unclear how much of this will be finalized, if at all, given the change in administration. But again, to Scott's point earlier, a lot of this is not just an attempt to regulate per se, but also to signal to the plaintiffs' bar as a whole broad support for certain positions that might be seen at the vanguard of current FCRA litigation. Is a data broker in or out? Well, the FTC is trying to throw its weight behind the position that they should most certainly be in. That is galvanizing for a lot of plaintiffs attorneys.

What actually shakes out in the regulatory space from a rulemaking perspective? Stay tuned. But what impact this has on the on private litigation, and on state attorneys general, and on state rulemaking, that may be a little bit more direct and more impactful in 2025. Cindy, do you have any thoughts on the rulemaking and where we might be headed?

Cindy Hanson:

I'll pick up on your last point, which I completely agree with in terms of, even though there has been a change in administration, you're going to see these arguments being made by state attorney generals and by private litigants, which struck me most about the proposed rulemaking that the CFPB put out. If you read the 90-some-odd pages, and I think it's longer than that, you see the CFPB actually making arguments the way you would expect a plaintiffs' lawyer to make, citing cases, acknowledging cases that have gone the other way, and then discussing why those cases in the CFPB's opinion are flawed, and how you could meet them in future litigation.

So, it really did provide a roadmap, in my opinion, for arguments that I think we will begin to see in litigation. And while the riskiest proposition in an FCRA case is a class action and to have a successful class action, a plaintiff needs to show willfulness. So, I do think these arguments need some runway. They need to get a couple of courts at the district court level to agree with them. So, they can begin to create some momentum. I do think you will see the plaintiffs' bar begin down this road of trying to reverse some of the case law that is out there, that I think from the defendant's perspective, we have always taken pretty much for granted, because it has been the set law for some time.

Dave Gettings:

Yes, I think the other thing about the CFPB rulemaking is to be aware of unintended consequences and how they may play out. For example, a CRA may become a reseller because the data broker that was not a CRA may ultimately become a CRA based on the CFPB's guidance. Things like dispute processes will need to change, potentially. Aspects like the ability to get data that wasn't a consumer report for things like authentication purposes may

be much more difficult. So, as is everything, the devil's in the details, but I think in 2025, we need to certainly watch out for unintended consequences. Tim, talking a little bit more broadly, what types of other credit reporting developments did we see outside of rulemaking for consumer reporting agencies in 2024? Then, we'll pivot a little bit to furnishers and end users.

Tim St. George:

One thing that I thought was significant, this straddles the gap between consumer reporting agencies, furnishers, et cetera was the Kirtz decision. This was actually a Supreme Court of the United States decision 2024, where the Department of Agriculture was actually reporting on a loan that had been taken out by Mr. Kirtz. There was no actual factual dispute that the information was inaccurate that was being reported about the borrower. It was all about sovereign immunity. The government typically enjoys immunity from suits for money damages, but Congress can waive that immunity and the contention with that, the use of the term "person" in the FCRA, any person can be liable, was brought enough to cover the government because "person" did not contain any limitations or explicit government carve-outs.

Everybody needs to be aware of the fact that when you're dealing with a government, that government could now be a furnisher. Under certain circumstances, that government could be a consumer reporting agency, and of course, the government isn't going to want to assume all of those obligations. So, this may have kind of the unintended negative consequence, Dave, that you mentioned of the government just not making information available in certain circumstances. It's not going to want to assume the liability, it's not going to want to assume the regulatory apparatus, so maybe it just doesn't report the information, and that's really to the to the detriment of everybody.

That ruling was significant. Obviously, it's a Supreme Court ruling in the FCRA space, so it deserves some attention. And anybody that's getting information directly from government should think about how that might affect your operations to the extent that the FCRA was not already being applied to that business arrangement.

A couple other things that I thought were significant over the course of the year. You see this increasing debate over what actual damages and statutory damages are and how they relate to causation. There's this line of authority that's developed, and was reaffirmed by the Eleventh Circuit specifically, that actual damages are not a prerequisite to recovering statutory damages. So, you can see an argument where someone say, applies for credit, and they would have been disqualified due to a bankruptcy. But there was also a collection trade line that was incorrect.

If it was clear that the person wasn't going to get the loan because of the bankruptcy, there would be a very plausible and legitimate tendency to argue that that person has no claim, but there's been this growing, increasing willingness by courts to separate out those concepts. It's not everywhere, there is still pushback, and there still are Article III standing issues. Is someone actually damaged in that position?

But that development has been a little bit disconcerting, including because, I don't think it's really a faithful application of what proximate cause really means. If you suffer any form of damages, you need to show that they were caused by the challenge reporting. And in circumstances like that, I don't think causation exists, but hey, I don't write the laws. I don't

interpret them. I just litigate them. So, I thought that's kind of an interesting development as well in terms of causation and standing. If nothing else, it would allow claims of emotional distress and what I would consider more technical statutory violations to potentially survive summary judgment, and get to a jury on the issue of willfulness.

So, I don't know if Scott or Cindy, if anybody else is seeing developments in the standing or causation space, but I thought that was significant and interesting and we'll see how other circuits interpret those issues going forward in 2025.

Scott Kelly:

Yes, Tim, I have seen those issues percolate in litigation, particularly surrounding FCA identity theft claims, which I think have been a major focus of the plaintiffs' bar nationally. Those result in higher profile cases with potentially higher damages. The ability to connect sort of those ID theft damages to a causation argument has been a major focus of the plaintiffs' bar. So, I would venture to say that 2025, there's going to be increased focus on ID theft, increased focus given what the CFPB has said on reasonable procedures, and increased focus on technical class, like violations from the plaintiffs' bar.

I think they're going to have a geographic focus as well, whether it's a California focus for litigation under the FCRA, or other jurisdictions. But I can see the plaintiffs' bar stepping in as we alluded to earlier, and sort of filling the void of a less prominent regulatory environment and the CFPB's administration change.

Cindy Hanson:

I would note two things on sort of recent litigation. The first is, you can bring an FCRA case in state court, as we all know, and we probably all lived through the experience of removing something, only to have it kicked back down because there was no standing. The function of that has been, state standing law is being developed as a result of FCRA cases now being litigated in the state court. And very interestingly, the law coming out of the State of California has been far more defendant friendly than I think anyone would have expected. I recently saw a case out of Illinois, also on standing, which again, these are being spawned by the consumer protection type statutes like the FCRA that are being brought in state court and then get stuck in state court, because there's probably not standing in an article-free context.

But the state courts, I think, sometimes are following the federal court and they're agreeing there really is no harm here or damage here. So, they're not going to litigate a pure statutory violation. The other thing I think we're going to see, and this relates back a little to regulatory activity. There's recently announced a consent decree with one of the three large credit reporting agencies that goes into quite some detail over the handling of disputes and what CRAs are supposed to do or have procedures when the information coming back from the furnisher is illogical or contradictory. It also has some real specificity around repeat disputes. In litigation, we see cases with repeat disputes, and those are always typically have a higher value if a consumer tries to dispute several times and is not able to have their issue resolved.

I find that consent decree very interesting because I think you will see the plaintiffs' bar begin to argue that, well, now these requirements are in a consent decree, they are becoming industry

standard and so for any CRA out there, no matter what area you're in, background screening, rental screening, credit, banking, it doesn't matter, what is in that consent decree should really be taken seriously.

Dave Gettings:

Yes. Thanks, Cindy. I was going to mention something similar on the CRA conducting an independent dispute. I've seen that coming up more and more in litigation where the CRA relies on the furnisher, and then, the plaintiffs' bar claims that the CRA has an independent duty and cannot just rely on the furnisher. Comes up a lot in ID theft investigations I've seen. As Scott mentioned, those are becoming very, very prevalent and very, very expensive.

I think we've sufficiently covered the landscape in 2024 as much as we can in a 25-minute or so podcast. Really appreciate everyone's time. We'd like to thank everyone for listening to the podcast today. Don't forget to visit our blogs, consumerfinancialserviceslawmonitor.com and troutmanfinancialservices.com. Please subscribe to our podcast at all your favorite podcasting locations. Thanks everyone for listening. Enjoy the beginning of 2025.