

## THE WASHINGTON REPORT April 2015

### At the Supreme Court

On April 1<sup>st</sup>, Spokeo filed a supplemental brief with the Supreme Court in support of its request that the Court agree to grant certiorari in its Fair Credit Reporting Act case, *Spokeo Inc. v. Robins*. The brief follows the submission of an *amicus* brief on March 13<sup>th</sup> by the Solicitor General and the Consumer Financial Protection Bureau recommending that the Court decline to hear the case. Spokeo, as discussed in last month's edition of The Washington Report, has requested that the Court review an opinion of the 9<sup>th</sup> Circuit which held that a consumer had standing to sue Spokeo for FCRA violations even if the consumer could not demonstrate having been harmed as a result of the alleged violation. A decision by the Court on whether to hear the case could come as early as April 24.

### At the EEOC

On April 21<sup>st</sup>, Freeman, the company that in February won its long running battle with the EEOC over EEOC allegations that the company violated Title VII by engaging in background check practices that had a disparate impact on African-Americans and males, launched something of a counterattack against the Agency, requesting that a federal court award the Freeman nearly \$1.7 million in attorneys' fees and expert witness fees that the company incurred defending itself in the case. Freeman argues that it is entitled to recover the fees because the EEOC continued to pursue the action long after it became clear that the reports submitted by the EEOC's expert witness in support of the agency's disparate impact claim were discredited.

### At the FTC

On April 15, the FTC issued its 2014 Annual Highlights report. Among the highlights cited by the FTC were its actions against Instant Checkmate, Inc. and InfoTrack Information Services, Inc. which, according to the FTC report "settled charges that they violated the Fair Credit Reporting Act by providing reports about consumers to users, such as prospective employers and landlords, without taking reasonable steps to make sure that they were accurate, or without making sure their users had a permissible reason to have them."

On April 13<sup>th</sup>, Maneesha Mithal, Associate Director of the Division of Privacy and Identity Protection in the FTC's Bureau of Consumer Protection, spoke at the National Association of Professional Background Screeners Mid-year conference in Washington DC. Ms. Mithal addressed a number of issues of interest to background screeners, focusing on five tips or takeaways for consumer reporting agencies:

- **Know your customer** and the importance of credentialing prospective customers;
- **Data security**, both with respect to the consumer reporting agencies own practices and the practices of its customers regarding their handling of consumer report information;

- **Disclaimers**, such as statements that an entity is not a consumer reporting agency or a product is not a consumer report or that a product is not to be used for an FCRA permissible purpose such as employment are ineffective if they are inconsistent with the CRAs practices such as in cases brought by the FTC where the companies in question had disclaimers indicating that their reports were not to be used for employment purposes, but marketed them for employment screening.
- **Accuracy**, both in terms of providing multiple entries on a report for the same matter and providing information on multiple individuals with the same name for the customer to sort out which records are applicable were both practices Ms. Mithal warned against.
- **Adequate staffing for consumer inquiries** is another area that Ms. Mithal highlighted, noting that this has long been an area of interest to the FTC, citing the settlement with the three national credit reporting systems in 2000 regarding their responsiveness to consumer calls.

Ms. Mithal observed that the FCRA is not limited by technology, noting that the reporting of social media information for employment purposes is subject to the FCRA and that the FCRA applies to the provision of employment background checks provided through mobile applications as well as more traditional means of conveyance.

More interestingly, Ms. Mithal also indicated that it was the view of the FTC Staff that FCRA Section 603(y), which excludes certain workplace investigations from the definition of consumer report, should be interpreted to apply only to existing employees and not to applicants. The scope of this provision, added to the FCRA as part of the 2003 FCRA amendments after an FTC Informal Staff Opinion Letter that opined that certain reports on the findings of workplace sexual harassment investigations were consumer reports, has resulted in litigation over how broadly it should be interpreted. Employment screeners that produce reports that rely on the 603(y) exception would be wise to continue to monitor developments in this area.

On April 2, the Federal Trade Commission (FTC) issued a new brochure for job applicants and employees and reminded employers of its joint guidance with the EEOC on the conduct of background checks. The two publications are available from the FTC website:

- Background Checks: What Employers Need to Know – as the FTC calls it, this “joint FTC-EEOC publication offers dos and don’ts for businesses when looking into the background of prospective employees or current staff up for promotion, retention, transfer, etc.”; and
- Background Checks: Tips for Job Applicants and Employees – this publication is from the perspective of a job applicant or employee but the FTC has recommended that employers review it as a reminder of the applicant or employee’s point of view.

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