FCRA Climbing the Ladder to Top Consumer Litigation Statute

In many cases moving up to the 'Big League' is considered a positive move when a professional athlete moves up from a lessor level league up to the top level of the sport. In this article moving into the 'Big League' has a total different meaning and is far from being good news. As we have reported over the last several years lawsuits regarding allege violations of Fair Credit Reporting Act (FCRA) have been steadily increasing and the pace has not slowed down this year.

Wesley Bulgarella and Jonathan Hoffmann, Attorneys with Balch & Bingham LLP, wrote in a recent article, '*FCRA Climbing the Ladder to Top Consumer Litigation Statute*,' which shared insights from WebRecon, a leading litigation-monitoring service, about FCRA filings. "According to their report FCRA filings have begun to outnumber Telephone Consumer Protection Act (TCPA) filings across the country in recent months. This development represents a drastic shift in consumer protection litigation, as TCPA filings had consistently outpaced FCRA filings over the previous two years. In each month save one since September 2017, FCRA suits have outnumbered those filed under TCPA. For example, in February 2018, 422 plaintiffs filed suit under the FCRA compared to 296 plaintiffs alleging violations of the TCPA.

FCRA litigation has not simply started to overtake other consumer credit statutes, but it has started to exceed its own track record. The 422 suits filed under the FCRA in February 2018 is a 59.2% increase from the 265 that were filed in February 2017. In the same timeframe, TCPA filings decreased 21.3%. To date, in raw numbers, 2018 FCRA suits have outnumbered TCPA suits 731 to 611. Noteworthy, the report shows a higher percentage (36.3%) of all FCRA suits are filed as class actions, as compared to the TCPA (22.3%) and Fair Debt Collection Practices Act (FDCPA) (23%). Putting aside record breaking class actions like the $60 million verdict against TransUnion, it is not unheard of for individual suits to involve six-figure verdicts. For example, the Ninth Circuit upheld a $430,000 jury verdict in an individual suit just last year.

The report also shows that many consumer plaintiffs are repeat players—about 33% of all plaintiffs alleging FCRA, TCPA, or FDCPA violations in February 2018 had filed at least one similar suit before. Combined, these repeat player plaintiffs had filed about 4,069 lawsuits under the various consumer protection statutes since 2001.

FDCPA suits still outpace all others, and TCPA filings generally remain strong. However, this consistent uptick in FCRA suits makes clear that consumers and the plaintiffs' bar have set their sights on the FCRA for individual and ever increasingly class action suits."

Some recent examples of FCRA cases include:

PETCO Job Applicants Reach $1.2M Background Back Check Class Action

Petco and two job applicants are seeking preliminary approval of a $1.2 million settlement in a lawsuit claiming the company's background check policies are unlawful. The lawsuit was filed in a California state court in May 2016 for claims that the company violated the Fair Credit Reporting Act (FCRA) by not sufficiently notifying job applicants that the company would conduct background checks of applicants. The company allegedly "buries" the background check notification in the fine print of its online application.

Disclosure Form Must "Stand Alone," Recent Case Hold Company Liable for Including Too Much on FCRA Disclosures

In Syed v. M-I, Ltd. Liab. Co., 853 F .3d 492 (9th Cir. 2017), the Ninth Circuit of Appeal held that the inclusion of a liability waiver in the same document at the FCRA disclosure violated the "stand alone" requirement.

Vitas Healthcare Corp. Employees Alleges Form Violates Fair Credit Reporting Act

Vitas Healthcare Corp. job applicant Jazzina Williams alleges she was provided a facially invalid authorization form when she applied for employment. The complaint states authorization and release forms she signed is unlawful because it includes a clause requiring applicants to "release from liability all persons, companies and governmental or other agencies disclosing such information."

FCRA Costs PepsiCo Millions

In one case against PepsiCo subsidiary, Bottling Group LLC, the named plaintiff says the company did not properly notify him that a background check would be conducted after he filled out the job application. He says Pepsi failed to make the mandatory disclosure. The company has agreed to pay $1.2 million to settle that case.

In another case, Frito-Lay, was accused of including "impermissible extraneous information" in its disclosure forms. Frito-Lay argued that the noncompliance was not "willful" and that the electronic forms were legal because the extra information was on a different part of the screen from the actual disclosure. That said, they agreed to pay $2.4 million to resolve the claim and satisfy the class of more than 38,000 applicants.

The above cases represent a small sampling from the headlines about FCRA lawsuit filings

To present some hope for Private Investigators that conduct background checks and their clients they support employers are winning some cases as well:

The Truth Brings Relief Under FCRA

In Ratliff v. A&R Logistics, Inc., the plaintiff claimed A&R denied him a job based on a background check without the appropriate adverse action process. Ratliff alleged that the company failed to properly provide pre- and post-adverse action as set forth under the Fair Credit Reporting Act (FCRA) guidelines. A&R moved to dismiss, arguing that the plaintiff lacked Constitutional standing. The Northern District of Illinois agreed.

9th Circuit Affirms Dismissal of FCRA Putative Class Action for Lack of Standing

The Ninth Circuit has ruled that the plaintiff in *Bassett v. ABM Parking Services, Inc.,* failed to allege a concrete injury-in-fact sufficient for Article III standing in a suit alleging a violation of the Fair Credit Reporting Act (FCRA).

Employers Prevail in FCRA Class Actions

In *Lewis v. Southwest Airlines,* the plaintiff asserted classwide and "willful" violations of the Fair Credit Reporting Act's disclosure requirement and corresponding violations. The court reasoned that the district courts have considered whether extraneous information in an FCRA disclosure constitutes a willful violation, but have provided inconsistent and even conflicting answers.

In *Branch v. GEICO,* GEICO did not defeat a pre-adverse action claim on summary judgement, but did beat the plaintiff's motion to certify a class action. The plaintiff alleged that GEICO took an adverse action when it assigned the plaintiff's background check a preliminary grade of "Fail" – based on GEICO's "Adjudication Process."

And finally, in *Culberson v. Walt Disney,* Culberson involved allegations that a pre-notice "coding" constituted an adverse action and a "willful" violation of the FCRA. The court relied on the opinion in *Lewis v. Southwest,* holding that Disney did not act "objectively unreasonable."

With FCRA lawsuit continuing to rise we once again remind Private Investigators to strongly advise their clients to audit their background screening processes and procedures with a special emphasis on disclosure & authorization forms and notification of applicants when they intent to take adverse action, e.g., not hiring the applicant. Be sure to involve your legal counsel in this process to verify that the client's processes and procedures fully comply with the law.

A disclosure & authorization form must be a stand alone document that excludes any extraneous information. Also make sure the form is not part of the employment application form or anything else and is conspicuously presented.

Also notification when taking adverse action should include the following process:

Before you take an adverse action against an applicant you must send them a pre-adverse action letter telling the person that based on information contained in their background report you may take an adverse action.

You must give the applicant a reasonable amount of time to dispute accuracy or completeness of the information in the report. A reasonable amount of time is not defined in the FCRA, however, the acceptable standard is 5 - 10 business days. Check with your attorney for any state requirements.

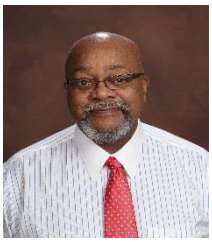
The Adverse Action Notice is the last of the three steps you must take. If, after a reasonable amount of time your candidate has not appealed the Pre-Adverse Action Letter or provided reasonable explanation refuting the report, you must provide written notice, containing the following information:

- Statement that the adverse action is based either in whole or part on information contained in the background report provided by the CRA;
- Notice of applicant's right to dispute the accuracy or completeness of the provided information;
- Name, address, and toll free telephone number of the CRA you used;

- Statement that the CRA supplying the background report had no hand in the decision to take adverse action and cannot give specific reasons for it;
- Notice of applicant's right to another free consumer report. This is provided upon request of the CRA within 60 days.

In conclusion, two key points to keep in mind. First, most of the allege violations that have led to FCRA lawsuits are 'technical' violations that simply do not follow the procedures defined in the law. Accordingly, you and your client should align your processes and procedures so that you are following the FCRA to the letter of the law. Don't take any shortcuts. Second, plaintiff attorneys are increasingly naming the background screening firm that conducted the background check in the lawsuit in addition to the company where the applicant applied. Consequently, it is in your own best interest to make sure that the client is doing it right or you may find yourself in hot water and needing to defend your actions in court. Never was there a time that the ole saying 'an ounce of prevention is worth a pound of cure' hold more truth.

About the Author



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