LITIGATING UNDER THE FAIR CREDIT REPORTING ACT

David Esquivel
Bass Berry & Sims (Nashville, TN)
615.742.6285 | desquivel@bassberry.com

Fair Credit Reporting Act Litigation

David Esquivel
BASS BERRY + SIMS PLC

Fair Credit Reporting Act

- Consumers only
- Privacy
- Accuracy
- Identity theft
- FDCPA, TILA, RESPA

The Players

- Furnishers
- Users
- Consumer Reporting Agencies
- Employers

Furnishers & Users

- Furnishers—anyone supplying consumer information to CRAs
  - Financial institutions
  - Loan servicers
  - Retailers
  - Health care providers
- Users—entities that purchase reports or use information from reports for permissible purpose

Duties – Furnisher

- Accuracy
- Disputes – Direct and Indirect
- Written Procedures

Duties – User

- Permissible purpose
- Adverse action notice

CRA – Definition

- "Any person which…regularly engages…in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties…."

[§ 603(f); 15 U.S.C. §1681a(f)]

Consumer Reports

- Any communication of information by a CRA
  - (1) "bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living;" and
  - (2) used or "expected to be used" to determine consumer's eligibility for
    - Credit or insurance to be used primarily for personal, family, or household purposes;
    - Employment purposes;
    - Any other permissible purpose.

Duties – CRA

- Accuracy
- Privacy
- Disputes

Duties – Employer

- Disclosure
- Written authorization
- Notice before adverse action

Enforcement & Supervision

- Federal Regulators (FTC and CFPB)
- Private Plaintiffs

FTC & CFPB Penalties

- DriveTime Auto Group
  $8M (CFPB - Nov. 2014)
- First Investors
  $2.75M (CFPB - Aug. 2014)
- TeleCheck
  $3.5M (FTC - Jan. 2014)
- Certegy
  $3.5M (FTC - Aug. 2013)
- HireRight
  $2.6M (FTC - Aug. 2012)
- ChoicePoint
  $10M Penalty/$5M Redress (FTC - Jan. 2006)

Private Enforcement

- Statutory damages from $100 to $1,000 per violation
- No cap on class damages
- Punitive damages, attorney's fees

Fair Credit Reporting Act – Current Hot Topics

The past several years have shown a significant increase in private litigation and government enforcement actions under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. This uptick primarily results from the increased attention on consumer financial services following the 2008 financial crisis, including passage of the Dodd-Frank Act and the creation of a new federal agency dedicated to this area – the Consumer Financial Protection Bureau. While the FCRA is multifaceted, and many aspects of the Act are currently the subject of interesting developments, two issues stand out as ones to watch. The first is recent class action litigation involving use of consumer reports in employment applications. The second is a petition for certiorari pending before the United States Supreme Court that could dramatically affect the scope of private litigation, not only under the FCRA, but other federal consumer protection statutes that provide private rights of action.

1. Employment Applications - The "Stand-Alone Disclosure" Requirement

Many employers use consumer reports to make hiring decisions. But an employer may unwittingly violate the FCRA by failing to give an employee or applicant adequate notice of its intention to obtain a consumer report. Employers who utilize online employment applications and accompanying online disclosures may be particularly at risk of running afoul of the FCRA's "stand-alone disclosure" requirement. Combining the statutorily required FCRA disclosure with other notices, releases, or agreements in the same document – whether in print or webpage format – violates the Act and may subject an employer to liability for statutory damages in a class action lawsuit.

The FCRA requires that, before an employer obtains a consumer report from a consumer reporting agency, the employer must have the employee's or applicant's written permission and must make a "clear and conspicuous" disclosure that such a report may be obtained. A disclosure must be provided "in a document that consists solely of the disclosure." 15 U.S.C. § 1681b(b)(2)(A)(i). That is, the disclosure must be a stand-alone document. A notice situated on a page among other notices is insufficient for purposes of the FCRA. This disclosure document may contain an authorization by the employee or applicant for the employer to obtain the report, but no other information, including waivers of liability, at-will employment provisions, or other notices, may be included in the document.

Damages available under the FCRA vary based on the type of violation. The FCRA prohibits both negligent and willful failure to comply with any of the Act's requirements and prescribes different penalties for each. A negligent violation will result in liability for actual damages and reasonable attorneys' fees and costs. A willful violation, however, will result in liability for actual or statutory damages, punitive damages, and attorneys' fees and costs. Statutory damages range from $100 to $1000; under current law, they are available regardless of whether the employee or applicant was actually harmed by the failure to provide a stand-alone disclosure. This is significant because it seems unlikely that an otherwise adequate disclosure would harm an applicant merely by sharing space on a page with other information. A willful violation of the Act occurs when an employer knowingly or recklessly fails to comply with the Act's requirements.

There was a time when lawsuits under the FCRA tended to target consumer reporting agencies rather than employers. In the past two years, however, that trend has begun to change. The plaintiff's bar has taken up these technical violations of the FCRA's stand-alone disclosure requirement with increasing frequency, sometimes filing multiple suits against multiple employers in a single day. No industry seems to be immune as restaurants, retailers, manufacturers, transportation companies, financial institutions, and theater chains have all been forced to defend these types of claims. Settlements ranging from $2.5 million to nearly $6.8 million have been reached in a number of cases. The underlying claims allege violation of the stand-alone disclosure requirement or failure to give adequate notice prior to taking adverse action based (even in part) on information contained in a consumer report. A list of significant recent cases follows.

Settlements

• Reardon v. ClosetMaid Corp., Case No. 2:08-CV-01730, was settled for $600,000 after the federal district court for the Western District of Pennsylvania decided that the defendant had violated the FRCA by including a waiver of liability with its disclosure and authorization form. The defendant agreed to pay $400 to each of the 1,540 class members who received the offending disclosure form, plus attorneys' fees and the costs of administering the settlement.

• Knights v. Publix Super Markets Inc., Case No. 3:14-cv-00720, filed in the federal district court for the Middle District of Tennessee, settled in 2014 for nearly $6.8 million. The defendant was alleged to have included improper release language in its FCRA disclosure form.

• Singleton v. Domino's Pizza, LLC, Case No. 8:11-cv-01823-DKC, was filed in the federal district court for the District of Maryland. The defendant in Singleton was alleged to have included improper release language in its disclosure and authorization form in violation of the Act. The case settled for $2.5 million in 2013.

Pending Cases

• Plasters v. UBS Financial Services Inc., Case No. 2:14-cv-01659, was filed in the federal district court for the

District of New Jersey alleging violation of the stand-alone disclosure provision of the FCRA and improper procedures for taking adverse action based on information contained in a consumer report.

• Hathaway v. Whole Foods Market California, Inc., Case No. 14CV0663, was filed in federal district court for the Southern District of California on March 21, 2014. This lawsuit alleges that online background check disclosures containing a waiver of the employer's liability violated the FCRA's stand-alone provision. The putative class consists of every employee or applicant who completed the online application. The complaint seeks damages of $9,999,000.

• Ford v. CEC Entertainment, Inc. d/b/a Chuck E. Cheese's, Case No. 14CV0677, was filed in federal district court for the Southern District of California on March 24, 2014. This lawsuit alleges that the required FCRA disclosure was provided as part of a multipage printed employment application rather than as a stand-alone document. The putative class consists of every employee or applicant who completed the offending application within the United States in the last two years.

• Camacho v. ESA Management LLC, Case No. 14CV1089, was filed in federal district court for the Central District of California on April 30, 2014. This lawsuit alleges that the company managing Extended Stay America hotels failed to include the required disclosure in any form and did not seek written permission from applicants prior to obtaining consumer reports.

• Saye v. CSK Auto Enterprises LLC, Case No. 2:14cv3470, was filed in California state court on December 15, 2011, and was subsequently removed to the federal district court for the Central District of California. This lawsuit alleges that extraneous information was included on the employer's disclosure form and that the employer took adverse action based on consumer reports without providing proper notification. The alleged amount in controversy for this nationwide class action exceeds $5 million.

• Cox v. TeleTech Holdings Inc., Case No. 1:14cv993, was filed in federal district court for the Northern District of Ohio on May 7, 2014. This lawsuit alleges that the employer took adverse action based on information contained in consumer reports without providing proper notification.

• Cox v. Ozburn-Hessey Logistics, LLC, Case No. 3:14cv1443, was filed in federal district court for the Middle District of Tennessee on July 10, 2014. This lawsuit alleges that the employer combined the FCRA disclosure with other sections of the employment application instead of providing a stand-alone document.

• Poole v. Axcess Financial Services Inc. dba Check 'N Go, Case No. 1:14cv1582, was filed in federal district court for the Southern District of Ohio on July 16, 2014. The lawsuit alleges that the employer failed to obtain authorization and to provide a stand-alone disclosure document prior to obtaining consumer reports. The offending documents allegedly contained nine paragraphs of information in small font covering two pages.

• Rumph v. Nine West Holdings, Inc., Case No. 0:14-CV-61673, was filed in federal district court for the Southern District of Florida on July 23, 2014. This lawsuit alleges the employer's application materials failed to use the term "consumer reports" or to provide the stand-alone disclosure. The lawsuit further alleges that the application's authorization form was included on a page with multiple unrelated provisions.

• Mack v. Panera, LLC, Case Number 0:14-cv-61672, was filed in federal district court for the Southern District of Florida on July 24, 2014. This lawsuit alleges that the application materials failed to use the term "consumer report" and did not contain a stand-alone disclosure.

• Mack v. American Multi-Cinema, Inc. (AMC), Case Number 0:14-cv-61676, was filed in federal district court for the Southern District of Florida on July 24, 2014 by the same plaintiff who filed the case against Panera. This lawsuit alleges that the application materials failed to use the term "consumer report" and did not contain a stand-alone disclosure. The putative class consists of all employees and applicants who completed applications within the last five years.

The takeaway is that employers need to be sure to check employment applications, especially online applications, for compliance with the requirements of the FCRA. Be sure to provide the required FCRA disclosure in a stand-alone document that contains only the appropriate FCRA disclosure and the written request for authorization to obtain a consumer report.

2. Constitutional Challenge to Statutory Damages

A second topic to watch concerning the FCRA involves the question of whether the statutory damages provided in the Act confer Article III standing on a plaintiff absent an actual injury. If the U.S. Supreme Court grants the petition for certiorari currently pending in Spokeo, Inc. v. Robins, Docket No. 13-1339 (U.S.), the Court could render a decision that would dramatically stem the tide of FCRA (and other consumer protection) litigation. In Spokeo, the U.S. Court of Appeals for the Ninth Circuit held that a plaintiff had standing to pursue a claim for statutory damages under the FCRA, even in the absence of actual harm. Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014). The decision reversed

the judgment of the district court, which had dismissed the lawsuit on the basis that the plaintiff's mere recitation of a violation of the FCRA was not sufficient, by itself, to constitute injury in fact under Article III.

Spokeo is not the first opportunity the Supreme Court has had to decide the constitutional limit of Congress' power to create statutory causes of action. Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010), involved a constitutional challenge against a claim for statutory damages under another federal consumer protection statute, the Real Estate Settlement Procedures Act ("RESPA"). Edwards considered whether a homeowner could seek statutory damages from a title insurer who allegedly violated the RESPA anti-kickback provisions even when the homeowner had not been overcharged or otherwise suffered harm. Just as it did in Spokeo, the Ninth Circuit held in Edwards that the statute conferred Article III standing even if the plaintiff had not suffered actual injury. In 2011, the Supreme Court granted certiorari in Edwards, received briefing, and heard oral arguments. The case remained undecided until the final day of the Court's 2011-2012 Term, when the Court dismissed the writ of certiorari as improvidently granted, thereby declining to decide the case and leaving the Ninth Circuit's decision intact.

Multiple amicus briefs have been filed by interested parties addressing whether the Supreme Court should grant certiorari in the petition currently pending in Spokeo. In the latest development, in a brief filed in March, the Solicitor General of the United States has recommended that the court deny certiorari.

Be sure to watch this case's progress, as it may significantly affect your risk of liability in private litigation for technical violations of the FCRA for which no one suffers actual harm. If the Court grants certiorari, and rules that the plaintiff lacks Article III standing, it could likely signal the end of a significant portion of class action litigation under the Act, as well as similar federal statutory schemes in which Congress has provided for statutory damages in lieu of actual damages.

David Esquivel

Member
Bass Berry & Sims (Nashville, TN)

615.742.6285 | desquivel@bassberry.com
http://www.bassberry.com/professionals/e/esquivel-david-r

David Esquivel concentrates his practice on counseling, investigations, and litigation in the financial services sector, with a particular emphasis on matters relating to the Fair Credit Reporting Act (FCRA).

He provides counsel to nationwide consumer reporting agencies (CRAs) and furnishers of consumer data on how to ensure regulatory compliance under ever-increasing demands of federal regulatory agencies. David settled the claims of 120,000 consumers on behalf of a CRA in a nationwide class action and successfully defended a CRA against a variety of FCRA claims tried to jury verdict.

David's experience in FCRA compliance programs, government investigations, and regulatory proceedings is complemented by his engagement by the New York Stock Exchange (NYSE) to serve as a regulatory auditor. For seven years, David frequently worked on-site at the NYSE conducting interviews, reviewing regulatory programs, providing recommendations, and rendering bi-annual reports to the NYSE and Securities and Exchange Commission regarding the NYSE's compliance with federal securities laws and regulations.

David is very active in civic and pro bono matters. He currently serves on the Mission and Advocacy Committee of the Saint Thomas Health Services Board of Directors. He chairs the firm's Pro Bono Committee and is President of the Board of Directors of the Duke Law Alumni Association. In 2012, David was appointed by the Tennessee Supreme Court as a commissioner on the state's Access to Justice Commission. He has served as President of the Board of Directors for Conexión Américas and the Tennessee Justice Center. David was a member of the 2011 Class of Leadership Nashville.

From 2003 to 2009, David represented victims of torture and other human rights abuses in El Salvador during the early 1980s in a civil lawsuit. David was lead counsel in a three-week trial in 2005 in which a federal court jury found the former Vice-Minister of Defense for El Salvador liable for crimes against humanity. The verdict was upheld on appeal. For his work on this case, David was named the Tennessee Bar Association's "Pro Bono Attorney of the Year" in 2005.

David received his undergraduate and law degrees from Duke University. After law school, he served as a law clerk for Judge Sam J. Ervin, III, on the U.S. Court of Appeals for the Fourth Circuit. Before moving to Nashville in 2001, David practiced law in Washington, D.C. with the firm of Shea & Gardner.

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Education
- Duke University School of Law - J.D., 1997
- Duke University - B.A., 1992