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# "Stand-Alone" REALLY Does Mean Stand-Alone - Ninth Circuit Court of Appeals Interprets the FCRA

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On January 29, 2019, the U.S Court of Appeals for the Ninth Circuit (covering a number of states and territories bordering the Pacific Ocean) issued a far-reaching opinion that will likely impact the hiring process of prospective employers who conduct background checks on applicants.

In the case at issue, Desiree Gilberg (Gilberg) brought a class action suit against prospective employers (collectively, "CheckSmart") alleging violations of the Fair Credit Reporting Act (the FCRA) and California's Investigative Consumer Reporting Agencies Act (the CICRAA). The FCRA requires employers who use consumer reports as part of the hiring process to provide an applicant with a "*clear* and conspicuous" disclosure that the consumer report will be used "in a document that consists *solely* of the disclosure." 15 U.S.C. 1681b(b)(2)(A)(i) (emphasis added). The CICRAA has similar requirements. *See* Cal. Civ. Code §§1785.20(5)(a) & 1786.16(a)(2)(B).


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Gilberg alleged that CheckSmart violated the FCRA and the CICRAA by including in its Disclosure Regarding Background Investigation (the Disclosure Form) extraneous information comprised of certain state-mandated disclosures related to consumer reports. CheckSmart's Disclosure Form included the information required under the FCRA as well as state-mandated disclosures for New York, Maine, Oregon, Washington, California, Minnesota, and Oklahoma. Using a method that may be typical of entities operating in multiple jurisdictions, the state-mandated disclosures each began with bold language such as "**New York and Maine applicants or employees only**" followed by the required disclosure. For example, in New York and Maine, there is mandatory language identifying the employees' right to inspect and receive a copy of an investigative consumer report. The particular disclosure for each relevant state was individually listed on CheckSmart's Disclosure Form.

Gilberg successfully argued two points that prospective employers who use consumer reports should consider. First, she argued that including the state-mandated disclosures on the Disclosure Form violated the FCRA and the CICRAA stand-alone requirements. Citing the definition of "solely" as provided by the American Heritage Dictionary of the English Language (5th ed. 2011), the court stated that because the Disclosure Form "does not consist solely of the FCRA disclosure, it does not satisfy FCRA's standalone document requirement."

Second, Gilberg successfully argued that the use of the bold headings for state-mandated disclosures was not reasonably understandable and therefore did not satisfy the FCRA and the CICRAA "clear and conspicuous" requirement. While conceding that the bold language was conspicuous, the court found the language was not clear; thus, the language failed to satisfy the requirement that it be both clear and conspicuous. A key factor considered by the Court was the use of the bold headings for the different states. The court stated, for example, that "[a] reasonable reader might think that *only* New York and Maine applicants could contact the consumer reporting agency to get a copy of the report [and s]uch an understanding would be contrary to both FCRA and ICRAA" (emphasis added).

In summary, the court held that state-mandated disclosures may not accompany the FCRA required disclosure to employees and prospective employees. Furthermore, including the mandatory disclosures of multiple states may give rise to confusion that violates the FCRA.

## What does this mean for prospective employers in the meantime?

Whether these interpretations are adopted by other circuits or withstand appeal remains to be seen. But, based on the Ninth Circuit's decision, it is very likely that similar challenges will be brought in other jurisdictions.

We recommend that any employer that requires background screening or credit checks for employment purposes, not just those in the Ninth Circuit, review their applications and separate their state-mandated disclosures from the federal FCRA disclosures. Additionally, prospective employers that operate in multiple states should review their applications and disclosure materials to ensure that the state disclosures clearly and conspicuously identify the rights of the applicant (or employee).