In a class action involving an allegation that an employer failed to give the “stand-alone” disclosure that is required under the Fair Credit Reporting Act (“FCRA”) before obtaining a consumer report, the Ninth Circuit clarified what is necessary in order to have Article III standing in this context.

Section 604(b)(2)(A)(i) of the FCRA requires that before a consumer report may be obtained on a consumer for employment purposes, the employer must provide the consumer with a “clear and conspicuous disclosure ... in a document that consists solely of the disclosure,” that a consumer report may be obtained about such consumer. In Ruiz v. Shamrock Foods Co., No. 18-56209 (9th Cir., Mar. 2020), plaintiffs alleged that their employer violated the FCRA by including extraneous information in the disclosure they received. With respect to some of the plaintiffs, such extraneous information consisted of information regarding state law entitlements. In other cases, a liability waiver was included.

Relying on the Ninth Circuit’s decision in Syed v. M-I-, LLC, 852 F.3d 492 (9th Cir. 2017), plaintiffs argued that the extraneous information rendered the form confusing and plaintiffs were therefore concretely injured, for purposes of establishing Article III standing. However, the Ninth Circuit clarified that Syed stands for the proposition...
that to establish Article III standing, applicants must demonstrate that because of the alleged FCRA violation, they had been “deprived of their ability to meaningfully authorize a credit check.” In Syed, the Ninth Circuit found that the plaintiff had adequately alleged that he had been so deprived, because he produced evidence that allowed the court to infer that he would not have signed the authorization had he been provided only the disclosure and nothing else, as the FCRA requires.

In Ruiz, on the other hand, plaintiffs offered no evidence either that they were confused by the disclosure or that they would not have signed it had the disclosure complied with the FCRA. Accordingly, the Ninth Circuit found that the plaintiffs did not have Article III standing.

The lesson for employers from this case is that had the plaintiffs’ pleadings been more robust, the court may well have found standing under Syed, and thus, rather than dismissal, the employer may be facing FCRA liability for technically non-compliant forms. It’s worth pointing out as well that the extraneous disclosure found in many of the disclosure documents in this case was not self-serving liability waivers, but disclosure about consumers’ rights under state law! When even such consumer-friendly disclosure as that seems to be in violation of the FCRA, employers really need to scrutinize their disclosure and authorization forms very carefully to ensure that they are not inviting litigation.

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