

Federal Court Certifies FCRA Class in Dispute Over Content of Disclosures

Thursday, July 13, 2017

In recent weeks, we have blogged about a number of employer-friendly decisions related to Article III standing under the Fair Credit Reporting Act (FCRA). (See [here](#) and [here](#)). We have highlighted the standing doctrine and the importance of strict FCRA compliance. Another recent decision highlights the importance of compliance when obtaining consumer reports.

In *Graham v. Pyramid Healthcare Solutions, Inc.*, 2017 WL 2799928 (M.D. Fl. June 28, 2017), the plaintiff alleged that the employer utilized an FCRA disclosure that contained extraneous information in violation of the law's standalone disclosure requirement. The employer's disclosure improperly included: (i) the logo of the consumer reporting agency; (ii) blank lines for "Organization Name" and "Account"; (iii) the address and phone number of the consumer reporting agency; (iv) a statement that a copy of "A Summary of Your Rights Under the FCRA" was attached; (v) various state law disclosures; and (vi) an authorization "requiring ... putative class members to forego their legal rights." *Id.* at *1.

The employer contended that the plaintiff did not have standing because the inclusion of extraneous information did not cause a concrete injury. The court rejected the argument in a three-paragraph analysis, concluding that the plaintiff established standing because the employer "procured a consumer report ... without following the FCRA's disclosure and authorization requirements." *Id.* at *2-3.

The court went on to certify a class of *all* applicants who received the non-compliant FCRA disclosure. It reasoned that whether the "disclosure forms violated the FCRA" and "whether Defendant's conduct was willful" did not require an individualized inquiry. *Id.* at *7. "[A]ny violations stemming from the same FCRA disclosure form were uniformly directed to all members of the putative class." *Id.*

The court's brief decision could be read to suggest that any number of technical FCRA violations (e.g., use of disclosures containing extraneous information) create Article III standing. However, this finding is arguably inconsistent with the Supreme Court's admonition in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016) that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" of the FCRA. *Id.* at 1544. In any event, given the unsettled nature of federal standing doctrine, employers should be careful to comply with the strict requirements of the FCRA.

What This Means for Employers

The *Graham* court's decision highlights the costly nature of FCRA violations. Once a plaintiff establishes a violation and convinces the court of Article III standing, the statutory violation (or lack thereof) is often apparent on the face of the FCRA-related document(s) (e.g., disclosures, pre-adverse action notices, etc.), and potentially renders the case susceptible to class treatment.

In cases based on the inclusion of extraneous information in mandatory disclosures, plaintiffs' counsel may find it relatively easy to certify several-thousand-member classes comprised of *all* individuals who underwent background checks after receiving the improper disclosure(s). Thus, employers should seek to minimize their



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FCRA exposure by:

- Updating FCRA documents (including disclosures, authorizations, and state and locality-specific notices) to ensure inclusion of only required information and exclusion of “extraneous information.”
- Training managers and human resources professionals regarding background check processes, including the presentation of required disclosures and providing appropriate notices when taking an adverse action based on information obtained in a background check.

Employers may also consider reviewing arbitration agreements to ensure individuals who undergo background checks sign arbitration agreements that contain class action waivers.

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