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# FCRA Year in Review: Key FCRA Appellate Decisions

## In 2020, the appellate courts had numerous opportunities to weigh in on many unanswered questions that remain in litigation after over 50 years since the statute was first enacted.

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The case law surrounding the Fair Credit Reporting Act (FCRA) is ever-changing. Last year, the appellate courts had numerous opportunities to weigh in on many unanswered questions that remain in litigation after over 50 years since the statute was first enacted. Here, we dare to relive 2020 by revisiting the top appellate FCRA decisions.

## *Williams*, Eleventh Circuit: Accuracy

In *Williams v. First Advantage LNS Screening Solutions*, the U.S. Court of Appeals for the Eleventh Circuit affirmed a compensatory damages award and drastically reduced a punitive damages award in an individual mixed-file claim brought under section 1681e(b) of the FCRA. 947 F.3d 735 (11th Cir. 2020). In *Williams*, the plaintiff sued First Advantage for alleged violations of the FCRA for twice attributing the criminal background information of another individual to the plaintiff.

The court recognized that although First Advantage had a policy requiring use of a third identifier before attributing criminal information to a subject with a common name, evidence indicated that this policy was not followed in practice. Based on this evidence, the court affirmed the district court's denial of First Advantage's motion for judgment as a matter of law with respect to willfulness under the FCRA.

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## *Crabtree*, Seventh Circuit: Standing

In *Crabtree v. Experian Information Solutions, Inc.*, the U.S. Court of Appeals for the Seventh Circuit determined that a consumer reporting agency's (CRA) inclusion of a consumer's name on a prescreen list, after the contract permitting the creditor to receive such lists from a CRA terminated, wasn't sufficient to establish a concrete injury needed for standing. 948 F.3d 872 (7th Cir. 2020).

The case focused on claims that Experian provided consumer report information without a permissible purpose because its third-party service provider delivered a prescreen list 12 days after the lender's contract with Experian expired. The list included the name of the plaintiff, Quentin Crabtree. Crabtree later learned from his lawyer that his name was included on the list.

The court held that Crabtree didn't sufficiently allege a concrete injury for standing purposes because he hadn't adequately alleged that Experian shared his credit report with a lender that didn't intend to make a firm offer of credit. Instead, Crabtree admitted that the lender likely made a firm offer of credit to him after receiving the prescreen list and that he would have thrown the offer in the trash upon receipt. Based on these facts, the court found that the contractually unauthorized exchange of information is the type of "bare procedural violation" contemplated in the Supreme Court's *Spokeo, Inc. v. Robins* decision.

## *Ramirez*, Ninth Circuit: Standing

*Ramirez v. TransUnion LLC* involved a product offered by TransUnion to identify consumers with names designated by the Department of the Treasury's Office of Assets Control (OFAC) as posing a national security threat. 951 F.3d 1008 (9th Cir. 2020). A jury decided in favor of the class, finding that TransUnion failed to comply with specific disclosure requirements under the FCRA.

The U.S. Court of Appeals for the Ninth Circuit held that "every member of a class certified under Federal Rule of Civil Procedure 23 must satisfy the basic requirements of Article III standing." *Id.* at 1017. The court went on to rule that a "material risk of harm" was sufficient to confer standing to each class member. *Id.* at 1027. The court held that "a real risk of harm arose when TransUnion prepared the inaccurate reports and made them readily available to third parties," even though most class members' reports were never actually disclosed to a third party. *Id.* at 1028.


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The Supreme Court has granted certiorari.

## *Walker*, Ninth Circuit: Employment Notices

In *Walker v. Fred Meyer, Inc.*, the Ninth Circuit issued guidance for employers obtaining background checks on potential or current employees. 953 F.3d 1082 (9th Cir. 2020). The plaintiff in *Walker* claimed that his employer violated the FCRA by not disclosing its background check process in a "clear and conspicuous" disclosure contained "in a document that consists solely of the disclosure." *Id.* at 1084.

The court agreed, finding that certain provisions in the disclosure form referenced other rights under federal and state law and, in so doing, violated the FCRA's requirement that the document consist "solely of the disclosure." *Id.* at 1091. The court held that in addition to a "plain statement" that a report may be obtained for employment purposes, a stand-alone disclosure may include a "concise explanation" of that statement. *Id.* at 1084. However, the explanation must not be so long or confusing such that it detracts from the disclosure or makes the disclosure not clear and conspicuous.

## *Luna*, Ninth Circuit: Employment Notices

In *Luna v. Hansen & Adkins Auto Transport, Inc.*, the Ninth Circuit issued another decision interpreting the FCRA's disclosure requirements for employers conducting background checks. 956 F.3d 1151 (9th Cir. 2020). *Luna* focused on the format of the disclosure and its accompanying authorization.

The disclosure form in *Luna* was a separate page included within a larger group of application materials. The plaintiff argued that including the disclosure page alongside other materials violated the FCRA's "stand-alone" requirement. The court disagreed, stating that "no authority suggests that a disclosure must be distinct in time. . . ." *Id.* at 1153.

The court also weighed in on the "clear and conspicuous" prong of the FCRA's disclosure requirement, finding that a disclosure must be "readily noticeable" and in a "reasonably understandable form." *Id.* The court found the employer's disclosure (featuring a bold, all-caps heading and simple explanatory statement) to meet the clear and conspicuous requirement.

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## *Denan*, Seventh Circuit: Dispute Handling

In *Denan v. Trans Union LLC*, the Seventh Circuit affirmed that the accuracy and reinvestigation provisions of the FCRA don't require CRAs to determine the legal validity of disputed debts. 959 F. 3d 290 (7th Cir. 2020).

Joseph Denan and Adrienne Padgett brought a lawsuit against TransUnion based on its reporting of loans from online payday lenders affiliated with Native American tribes. After the plaintiffs stopped making payments on their loans, the lenders reported their debts to TransUnion. The plaintiffs disputed the accuracy of the debts, contending that the loans were void under state usury laws and, therefore, that any obligations incurred under those loans were legally invalid.

The Seventh Circuit held that section 1681e(b) doesn't explain what it means to be "inaccurate" and doesn't distinguish between factual and legal accuracy. The court found that "the FCRA does not require unfailing accuracy from consumer reporting agencies. Instead, it requires a consumer reporting agency to follow 'reasonable procedures to assure maximum possible accuracy' when it prepares a credit report." *Id.* at 294 (quoting 15 U.S.C. § 1681e(b)).

The court emphasized that CRAs aren't tribunals, and the power to resolve the legal issues presented by the plaintiffs regarding the collectibility of the plaintiffs' loans "exceeds the competencies of consumer reporting agencies." *Id.* at 295.

The court also addressed the requirement for CRAs to "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate" after receiving a dispute from a consumer. *Id.* at 296. This provision also doesn't distinguish between factual and legal accuracy, so the court interpreted "inaccurate" information in this provision to mean factually inaccurate information, not legally inaccurate information. *Id.*

## *Younger*, Eleventh Circuit: Dispute Handling

In *Younger v. Experian Information Solutions, Inc.*, the Eleventh Circuit found that a CRA didn't willfully violate the FCRA when it didn't reinvestigate a disputed item on a consumer's credit report pursuant to its suspicious mail policy. 817 F. App'x 862 (11th Cir. 2020). Still, the court found that the CRA's handling of the dispute was negligent.

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Shaun Younger sued Experian for negligently and willfully violating section 1681i(a)(1)(A) of the FCRA by failing to reinvestigate a debt that he disputed on his credit report. Younger wrote a letter to Experian disputing the debt, but Experian ignored the dispute under its "suspicious mail policy," which allows it to divert disputes that don't appear to come directly from consumers.

The court concluded that there was insufficient evidence to support the trial court's finding that Experian willfully violated the FCRA. Even though Younger presented evidence that Experian misclassified his dispute letter under its suspicious mail policy, that evidence didn't support a finding that Experian ran an "unjustifiably high risk" of violating its duty to reinvestigate. Younger offered no evidence of a broad or systemic problem with Experian's suspicious mail policy.

The court noted that, in addition to a CRA's duty to reinvestigate a dispute from a consumer, Experian must provide the consumer "a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation." CRAs have an additional duty under section 1681b(a) to adopt reasonable procedures to guard against the furnishing of a consumer report for an impermissible purpose. Therefore, because of these two duties under the FCRA, Experian didn't recklessly disregard its reinvestigation duty by diverting Younger's dispute letter under its suspicious mail policy. Experian's actions were founded in the statutory text, even if the application of its policy was negligent as applied to Younger. The court concluded that Experian's conduct was not willful, but the court upheld the negligence claim.

## *Hammer*, Fifth Circuit: Accuracy

In *Hammer v. Equifax Information Services, L.L.C.*, the U.S. Court of Appeals for the Fifth Circuit addressed whether the FCRA applies to the accuracy of information that doesn't appear in a consumer report. 974 F.3d 564 (5th Cir. 2020). In 2010, Scott Hammer obtained a credit card from Capital One Bank and made timely payments every month. The three major CRAs included the Capital One account on Hammer's credit report until 2017. After learning that the CRAs stopped reporting the account, Hammer disputed the omission of the account and alleged that his credit score fell due the omitted information.

The court affirmed the dismissal of the plaintiff's claim, noting that a credit report isn't inaccurate merely because a single credit item is omitted—no credit report reflects all relevant information. The appellate court noted that Hammer didn't allege that the defendants "violated their stated disclosure policies or maintained an undisclosed policy of deleting certain favorable items." *Id.* at 569. With respect to the plaintiff's claim regarding

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the handling of his dispute, the court noted that section 1681i(a)'s reference to "item of information" refers to credit entries. *Id.* While Hammer's Capital One account is an "item of information," Hammer didn't dispute its accuracy or completeness.

## *Domante*, Eleventh Circuit: Legitimate Business Need

In *Domante v. Dish Networks, L.L.C.*, the Eleventh Circuit held that requesting and obtaining a consumer report for verification and eligibility purposes is a legitimate business need under section 1681b of the FCRA. 974 F.3d 1342 (11th Cir. 2020).

Domante had settled an FCRA suit against Dish Networks, LLC (Dish) after Domante's personal information was stolen and used to open two accounts. Under the terms of the settlement, Dish entered Domante's Social Security number into an internal system designed to prevent the opening of unauthorized accounts.

When an attempt was made to open a new account using the last four digits of Domante's Social Security number but a different name, Dish submitted the applicant's information to a CRA to verify the applicant's identity. The CRA matched the information with Domante and returned her credit report to Dish, including Domante's full Social Security number. Dish then blocked the application and requested that the CRA delete the inquiry from Domante's credit record.

The court noted that the false applicant provided only the last four digits of Domante's Social Security number. Dish depended on the CRA's credit report to obtain the full Social Security number for cross-checking with its internal records. Using the report for this verification and eligibility purpose was a legitimate business need.

## *Muransky*, Eleventh Circuit: Standing

In *Muransky v. Godiva Chocolatier, Inc.*, an en banc Eleventh Circuit overturned the approval of a class action settlement in a card truncation case for lack of injury. 979 F.3d 917 (11th Cir. 2020).

David Muransky used his credit card at Godiva Chocolatier, Inc. The receipt he received contained the first six and last four digits of his credit card number. Under the Fair and Accurate Credit Transactions Act (FACTA), merchants may not print more than the last five digits of a credit card number on receipts. Muransky filed a class action against Godiva for violations of FACTA. Godiva responded that Muransky and the class didn't have standing

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because they hadn't suffered an injury. The parties ultimately settled. However, the settlement and its approval by the trial court occurred before the Supreme Court ruled on Article III standing in *Spokeo*.

Some class members objected to the class settlement, and a panel of the Eleventh Circuit ruled that, after taking *Spokeo* into account, the class had sufficient standing to sue. The case was reheard en banc ,and the Eleventh Circuit reversed its prior opinion, finding that the plaintiff didn't have standing because he hadn't suffered an injury in fact. The court also vacated the trial court's approval of the settlement, noting that the insufficiently truncated credit card number wasn't disclosed to a third party and didn't increase the plaintiff's risk of identity theft.

There were multiple dissenting opinions. The first argued that the violation of FACTA's truncation requirement was a concrete injury because it protects against both actual identity theft and a consumer's interest in using a credit card without a heightened risk of identity theft. The second dissent argued that Congress's judgment in deciding that printing any more than five digits was an "intolerable risk" should be given deference. The final dissent argued that the case should have been remanded to allow a standing argument to be made.

## *Erickson*, Eleventh Circuit: Accuracy

In *Erickson v. First Advantage Background Services Corp.*, the Eleventh Circuit confirmed that it isn't inaccurate for a CRA to report a criminal or sex-offender record without matching the record to a subject consumer as long as the CRA notifies the user of the report that the record needs further investigation before being attributed to the consumer.

Plaintiff Erickson applied to be a Little League coach and was subjected to a background check. Unfortunately, his report identified a sex offender record of his father, with whom he shared his name. In releasing the report, First Advantage explained to Little League that it was a name-only match and that further review was necessary to determine if the record belonged to Erickson. Erickson filed suit, arguing that First Advantage violated the FCRA's requirement that a CRA "follow reasonable procedures to assure maximum possible accuracy" of reported information. *Id.* at 1250.

The court weighed in on whether the FCRA's "maximum possible accuracy" requirement demands more than technical accuracy. The court held that it does, following a plurality of circuit courts by holding that the FCRA requires reported information to be both factually true and "unlikely to lead to a misunderstanding." *Id.* at 1252.

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The court affirmed, however, that First Advantage's report was neither inaccurate nor objectively misleading because no reasonable user would be misled given the cautionary disclaimer that further review was required.

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