

What Really Is The FCRA's 'Willfulness' Standard?

Law360, New York (May 06, 2015, 11:28 AM ET) --

The surge of class actions against employers for Fair Credit Reporting Act violations is largely due to the availability of statutory damages that can reach up to \$1,000 per class member where "willfulness" is shown, even where no injury exists. At the same time, district courts are beginning to provide guidance on the nuanced issues these lawsuits raise, with a number of recent decisions treating FCRA willfulness as a question of law in class actions against employers. An understanding of these decisions will aid employers in reviewing their compliance with FCRA obligations and in forming their litigation strategy.

FCRA Requirements and Liability for Employers

The FCRA imposes requirements on employers who obtain "consumer reports" (i.e., a credit or background report) from third-party consumer reporting agencies for "employment purposes" (i.e., hiring, promotion, etc.).



Galit A. Knotz

An employer who intends to obtain a consumer report must provide the employee or applicant (otherwise known as "consumer") a "clear and conspicuous disclosure ... in writing" in a document that consists "solely" of the disclosure that a consumer report may be obtained for employment purposes, as well as written authorization.[1] Lawsuits alleging disclosure violations typically claim that the disclosure is not a stand-alone document or includes "extraneous" information, such as a release of liability or state law requirements.

An employer must follow a two-step process if it intends to take an adverse action based on the information learned from the report. This process requires a pre-adverse action notice that gives the consumer opportunity to contest the contents of the report and a post-adverse action notice if the employer ultimately decides to take the adverse action after a "reasonable period" passes.[2] Lawsuits alleging post-report violations typically claim that the notices are insufficient or that the employer did not give the consumer sufficient time to respond before moving forward with the adverse action (five business days is generally considered sufficient).

The FCRA allows consumers to bring a private right of action against employers who fail to comply "with any requirement" imposed by the FCRA. A negligent violation can expose an employer to actual

damages as well as costs and attorneys' fees. A willful violation, however, can expose an employer to statutory damages "of not less than \$100 and not more than \$1,000," as well as punitive damages and attorneys' fees. The statute of limitation is the earlier of two years after the date of discovery of liability, or five years after the violation occurred.[3]

While individual recoveries are relatively low, large class sizes can mean high exposure. Recent class action settlements are reaching \$5 million and can include well over 100,000 class members, demonstrating that the stakes for employers are very high.[4]

Guidance for "Willfulness"

Given the potential for substantial statutory damages, a key issue in the rising tide of class actions is whether the employer's violation is "willful." Several circuit courts have held that a plaintiff need not show — or even allege — actual harm to sue for a willful violation of the FCRA.[5] The U.S. Supreme Court has a writ of certiorari before it seeking review of the issue, but has not yet ruled on the writ.[6]

For now, the key question remains: What is "willfulness?"

In *Safeco Ins. Co. of America v. Burr*, the Supreme Court held that willfulness under the FCRA requires a plaintiff to show that the defendant's conduct was intentional or reckless, where "reckless" consists of "action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." In applying this standard, the court considered whether the defendant's interpretation, "albeit erroneous," nevertheless "has a foundation in the statutory text" and whether the defendant had "guidance from the courts of appeals or the [FTC] that might have warned it away from the view it took." Finding "a dearth of guidance and ... less-than-pellucid statutory text," the court declined to hold that the defendant's interpretation was "objectively unreasonable." The court held that there was no need to remand the case for further factual development because, as a matter of law, "Safeco's misreading of the statute was not reckless." Notably, the court observed that the presence or absence of subjective bad faith was irrelevant where more than one reasonable interpretation exists. [7]

Even though the existence of willfulness is generally a question of fact, *Safeco* strongly suggests that the issue of whether a defendant's reading of the FCRA was "objectively unreasonable" is a question of law. Courts have been applying *Safeco* in this manner for a few years, and several recent decisions in FCRA class actions against employers are providing guidance.

For example, in 2014, a California district court granted a motion to dismiss a claim that the defendant had willfully violated the FCRA by combining the disclosure and release into one document, despite "knowing" about its legal obligation under the FCRA. Citing *Safeco*, the court determined that the "dearth of authority" from the Ninth Circuit and the "varying conclusions" of district courts across the country on the disclosure issue demonstrated a lack of legal clarity. Such uncertainty, the court ruled, rendered the defendant's interpretation of the FCRA is "not objectively unreasonable," as a matter of law. [8]

Not surprisingly, when an employer strays far from the statutory requirements, courts will deny motions to dismiss claims of willful violations. For example, courts seem to agree that a disclosure that includes extraneous information, such as state-mandated consumer report information, administrative sections, a liability waiver and/or release language, clearly violates the FCRA. In these cases, courts hold that employers' use of such forms is not "objectively reasonable." [9]

As a question of law, willfulness can also play a significant role at the class certification stage. Citing *Safeco*, a Virginia district court held in 2014 that “[t]he question of willfulness is ... a common question” with regards to an employer’s allegedly improper disclosures and pre-adverse action notices because the inquiry hinges on the employer’s understanding of a particular statutory requirement, not “[t]he behavior of individual plaintiffs.”[10] For the same reason, in preliminarily approving a FCRA class action settlement, last month a district court in California cited *Safeco* in and held in dicta that the question of willfulness in the FCRA context is a “common” question of law that met both the commonality and predominance requirements of Rule 23.[11]

On the other hand, earlier in February 2015, a district court in Ohio denied class certification after holding that the named plaintiff could not be an adequate representative where he intended to pursue damages under only a willful violation theory. The court held that the plaintiff, who did not allege actual damages, “would likely pursue the willful violation theory at the expense of an alternative negligent violation theory” at the liability phase of trial.[12]

Not all courts agree that willfulness should be determined as a question of law. But, in holding that the willfulness issue is a question of fact, some of these courts conspicuously fail to address — or even cite — *Safeco*. [13] The persuasiveness of these decisions, therefore, is questionable.

By adhering closely to the FCRA’s requirements, an employer can increase its chance of using their reasonable interpretation of the law as a sword in attacking claims of willfulness at an early stage of litigation. If a class action proceeds beyond the pleadings stage, however, employers should consider the legal risk in forming their litigation and settlement strategies.

—By Galit A. Knotz, Akin Gump Strauss Hauer & Feld LLP

Galit Knotz is counsel in Akin Gump Strauss Hauer & Feld's Los Angeles office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 15 U.S.C.A. § 1681b(b)(2)(A).

[2] 15 U.S.C.A. § 1681b(b)(3) & 1681m(a).

[3] 15 U.S.C.A. §§ 1681n-o. Note that only successful plaintiffs may recover attorneys’ fees.

[4] Examples include: Food Lion, February 2015: \$2.99 million (58,000 class members); Dollar General, October 2014: \$4 million (112,000 class members); Publix, July 2014: \$6.8 million (90,633 class members); Swift Transportation, April 2014: \$4.4 million (161,000 class members).

[5] See *Robins v. Spokeo Inc.*, 742 F.3d 409 (9th Cir. 2014); *Hammer v. Sam’s East Inc.*, 754 F.3d 492, 500 (8th Cir. 2014); *Beaudry v. TeleCheck Servs. Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009).

[6] *Spokeo* filed a petition for certiorari with the Supreme Court in May 2014, but the court has not yet ruled on the writ. Rather, in October 2014, the court invited the solicitor general to file an amicus brief, which was filed on March 13, 2015, opining that the writ of certiorari should be denied. See here.

[7] 551 U.S. 47, 57, 68-71 (2007).

[8] Syed v. M-I LLC, Civ. No. 1:14-742 WBS BAM at *3 (E.D. Cal. Aug. 28, 2014). But see Speer v. Whole Food Market Group Inc., No. 8:14-cv-3035-T-26TBM at *4 (M.D. Fla. Mar. 30, 2015) (denying motion to dismiss a claim of willful violation of the FCRA's disclosure requirement where the complaint had very similar allegations as the Syed complaint and distinguishing Safeco by noting that that case was decided at the summary judgment stage).

[9] E.g., Jones v. Halstead Management Co. LLC, No. 14-CV-3125 VEC (S.D.N.Y. Jan. 27, 2015); Miller v. Quest Diagnostics, No. 2:14-cv-04278-SRB (W.D. Mo. Jan. 28, 2015).

[10] Milbourne v. JRK Residential America LLC, No. 3:12cv861 * 5-6 (E.D. Va. Oct. 31, 2014).

[11] Kirchner v. Shred-It USA Inc., No. 2:14-1437 WBS EFB (E.D. Cal. Mar. 31, 2015).

[12] Cox v. TeleTech@Home Inc., No. 1:14-CV-00993 *7 (N.D. Ohio Feb. 5, 2015).

[13] E.g., Miller v. Johnson & Johnson, Janssen Pharmaceuticals Inc., No. 6:13-cv-1016-Orl-40KRS *10 (M.D. Fla. Jan. 14, 2015) (without citing Safeco, denying summary judgment on issue of willfulness because "the question of whether an employer acted willfully or negligently is understood to be a question of fact for the jury.") (citation omitted).