SEYFARTH SHAW

Management Alert

The Ninth Circuit Demands Simplicity: Background Check Disclosure Forms That Contain State-Law Notices or Improper Grammar Violate the FCRA

By Pamela Q. Devata, Esther Slater McDonald, John Drury and Connor Bateman

Seyfarth Synopsis: *As part of an evolving trend of narrowly interpreting the FCRA's "standalone" disclosure and "clear and conspicuous" disclosure requirements, the Ninth Circuit has held that users of consumer reports may violate the FCRA and ICRAA by including "extraneous" state law notices and potentially "confusing" language in background disclosure forms.*

Both the Fair Credit Reporting Act (FCRA) and California's Investigative Consumer Reporting Agencies Act (ICRAA) regulate background screening and the process employers must follow when procuring background reports on applicants. Under both statutes, before procuring a consumer report (i.e., a criminal or other background report) on an applicant, employers and other users of consumer reports must provide the applicant a "clear and conspicuous disclosure" that "a consumer report may be obtained for employment purposes" and further require that the disclosure must be "in a document that consists solely of the disclosure."

Yesterday, the Ninth Circuit Court of Appeals held that this statutory language, whether derived from the FCRA or ICRAA, prohibits employers from including *any* superfluous information in the disclosure document. Thus, at least within the Ninth Circuit, employers cannot include disclosures required by other state laws in the same document that contains the disclosure required by the FCRA. The court also indicated that any language in the disclosure document that could confuse a reasonable person about his or her rights under the FCRA or ICRAA likely will violate the laws' "clear and conspicuous" requirement.

Discussion of the Facts & Opinion

The case, *Gilberg v. California Check Cashing Stores LLC*, involves a putative class action filed by Desiree Gilberg, a former employee of CheckSmart Financial, LLC. Before starting work, Gilberg signed a form entitled "Disclosure Regarding Background Investigation," which stated that CheckSmart may obtain the applicant's background report, and that the applicant had the right to request a copy of his or her report. The form also included information regarding the applicant's right to obtain a copy of the report under various state laws. Gilberg alleged that this disclosure violated the FCRA and ICRAA. The Ninth Circuit agreed and reversed the district court's grant of summary judgment to CheckSmart.

First, the court held that by including other state-mandated disclosure information, CheckSmart's disclosure form violated the FCRA's standalone document requirement. Citing its earlier decision in *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), the court reiterated that "the statute [means] what it [says]: the required disclosure must be in a document that consists 'solely' of

the disclosure." *Id.* at 496 (internal alterations omitted). Although *Syed* involved an employer who included a *liability waiver* in the same document as the disclosure, the court held that the FCRA's use of the word "solely" prohibits "any surplusage" in the disclosure document, including any state-mandated disclosure information. The court rejected CheckSmart's argument that the inclusion of such additional information furthers the FCRA's disclosure purposes, noting that CheckSmart's form included information on state laws that were inapplicable to Gilberg and referenced documents that were not part of the FCRA-mandated disclosure. The court held that such "extraneous information is as likely to confuse as it is inform . . . [and] does not further FCRA's purpose." In any event, the court held that the statute's purported purpose could not overcome its plain language.

Second, the court held that the disclosure, though "conspicuous," was not "clear." Analyzing the clarity requirement, the court explained that a reasonable person would not understand the following language in the disclosure:

> The scope of this notice and authorization is all-encompassing; however, allowing CheckSmart Financial, LLC to obtain from any outside organization all manner of consumer reports and investigative consumer reports now and, if you are hired, throughout the course of your employment to the extent permitted by law.

The court took particular issue with the use of the term "all-encompassing," noting that CheckSmart failed to explain the meaning of that language or how it could impact an applicant's rights. The court further noted that the second half of the sentence, after the semicolon, lacked a subject and was incomplete. Although it appears that CheckSmart intended to use a comma instead of a semicolon, the court held that the sentence, as drafted, "suggests that there may be some limits on the all-encompassing nature of the authorization, but it does not identify what those limits might be."

The court further noted that the following language would likely confuse a reasonable reader:

> ***New York and Maine applicants or employees only:*** You have the right to inspect and receive a copy of any investigative consumer report requested by *CheckSmart Financial, LLC* by contacting the consumer reporting agency identified above directly.

In the court's view, this language could be construed to mean that *only* New York and Maine applicants have the right to inspect and receive a copy of the report rather than to mean that only New York and Maine require consumers to be notified of their rights at this stage of the application process.

The court's reasoning appears inconsistent with the statutory text. The FCRA and ICRAA require that the disclosure *that a background check will be obtained* to be "clear and conspicuous," and the first two sentences of the CheckSmart disclosure plainly disclose that a report may be obtained for employment purposes:

> CheckSmart Financial, LLC may obtain information about you from a consumer reporting agency for employment purposes. Thus, you may be the subject of a 'consumer report' and/or an 'investigative consumer report' ….

Rather than considering the disclosure form as a whole, the court focused on discrete sentences without considering them in the context of the entire form. The court also did not explain how a state-law notice that a consumer has a right to obtain a copy of the report made it unclear that a report would be obtained.

Interestingly, it appears that neither the Court nor the parties addressed whether the plaintiff even had standing to sue. Unlike in *Syed,* Gilberg did not allege that the disclosure confused her or that she did not understand that she would be subject to a background report. Thus, the more appropriate route for the Ninth Circuit would have been to dismiss the claim under *Syed*, which held that a consumer has standing to sue if she was confused or did not understand that she was authorizing a background check. Instead, the court took the opportunity to hold that the disclosure form could have confused a consumer even though no one, not even the plaintiff, had made such an allegation.

Employer Outlook

This case serves as yet another reminder to employers to carefully review their background check disclosure and authorization forms and processes. Both the FCRA- and ICRAA-mandated disclosures should be set out in separate, standalone documents, entirely distinct from any other application paperwork, including even applicable disclosures mandated by other state laws. Further, although courts apply a "reasonable person" standard to assess a disclosure's clarity, *Gilberg* may portend a movement toward an even more exacting standard. In light of this evolving trend, employers should make sure to use language that is impeccably clear, concise, and free from any typographical errors or wording that could confuse the least sophisticated consumer about his or her rights under the FCRA or any comparable state laws.

Pamela Q. Devata is a partner in Seyfarth's Chicago office, John Drury is Senior Counsel in the firm's Chicago office, Esther Slater McDonald is a partner in the Firm's Atlanta office, and Connor M. Bateman is an Associate in the firm's Atlanta office. If you would like further information about Fair Credit Reporting Act disclosure and authorization forms or best practices for compliance with the FCRA, please contact your Seyfarth attorney, or Pamela Devata at *pdevata@seyfarth.com*, Esther McDonald at *emcdonald@seyfarth.com*, John Drury at *jdrury@seyfarth.com*, or Connor Bateman at *cbateman@seyfarth.com.*