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Ninth Circuit Weighs In on Calculating the FCRA's Seven-Year Reporting Rule

By Pamela Q. Devata and Jennifer L. Mora

Seyfarth Synopsis: *On May 14, 2019, the Ninth Circuit Court of Appeals added to the ongoing line of decisions in the Moran v. The Screening Pros saga, holding that under the Fair Credit Reporting Act's rule prohibiting consumer reporting agencies from reporting any "record of arrest" older than seven years, the measuring period for a criminal charge runs from the date of entry rather than the date of disposition.*

Background

The Fair Credit Reporting Act ("FCRA") contains an entire section devoted to the time periods for which certain information may be included in a background check report. Specifically, consumer reporting agencies are prohibited from including, among other things, the following in a consumer report: "Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period." It also has a catch-all that prohibits consumer reporting agencies from reporting: "Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years." At issue in *Moran* was the appropriate measuring period for reporting certain criminal records that did not result in a conviction.

Facts

The plaintiff sued the consumer reporting agency for issuing a tenant screening background check report on him that contained his criminal history in violation of the California Investigative Consumer Reporting Agencies Act ("ICRAA"). The February 2010 report disclosed four criminal matters in the plaintiff's background: a May 16, 2000, misdemeanor charge for being under the influence of a controlled substance (2000 Charge), dismissed on March 2, 2004; two June 2006 charges for burglary and forgery, dismissed that same month; and a June 2006 conviction for misdemeanor embezzlement from an elder dependent adult.

The consumer reporting agency moved to dismiss, arguing that the ICRAA was unconstitutionally vague as to criminal history information, leaving persons of reasonable intelligence unable to tell whether that information is "character" information that the ICRAA governs or "creditworthiness" information that the California Consumer Reporting Agencies Act ("CCRAA") governs. This distinction matters because the ICRAA imposes stricter duties and more severe penalties—such as the option to seek $10,000 in statutory damages in lieu of damages. The case was stayed pending resolution of *Connor v. First Student Inc.*, a case in California state courts that considered the overlap and constitutionality of the ICRAA and the CCRAA. Ultimately, in *Connor*, the California Supreme Court held that the ICRAA is not unconstitutionally vague as applied to employment background checks. The Supreme Court concluded that "potential employers can comply with both statutes without undermining the purpose of either."

In *Moran*, the Ninth Circuit was asked to consider the constitutionality of the ICRAA and the CCRAA, and concluded that the *Connor* decision had resolved the issue and, thus, reversed the district court's decision to dismiss the plaintiff's complaint on that basis. However, the Ninth Circuit was also asked to consider whether the consumer reporting agency violated the FCRA's seven-year rule with respect to the criminal history information included in the plaintiff's report.

The district court had dismissed the plaintiff's claim that the consumer reporting agency violated the seven-year rule based on the court's determination that the reporting period for a criminal charge begins on the "date of disposition" instead of the date of entry. After an exhaustive review of the legislative history and the positions of federal agencies, such as the Federal Trade Commission, the Ninth Circuit disagreed and concluded that the reporting period for a criminal case begins on the date of entry, not the date of disposition. It went further and held that, "the dismissal of a charge does not constitute an adverse item and may not be reported after the reporting window for the charge has ended." This meant that the consumer reporting agency in *Moran* arguably violated the FCRA by reporting the 2000 charge in the plaintiff's report because the date of entry for that record was ten years older than the date of the report. The Ninth Circuit remanded the case to the district court for further proceedings in line with its opinion.

Implications

Given this new decision, consumer reporting agencies/background screening companies should evaluate their reporting procedures and processes especially as it relates to non-conviction records. While the Ninth's Circuit reasoning was supported in the earlier amicus briefs filed by the Federal Trade Commission and the Consumer Financial Protection Bureau, there is at least for the time being a definitive statement on what can be reported. Employers should also be aware that given this new opinion, they may not receive non-conviction information on consumer reports where a charge was entered more than seven years from the date of the report.

If you would like further information, please contact Pamela Q. Devata at pdevata@seyfarth.com or Jennifer L. Mora at jmora@seyfarth.com.

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