SEYFARTH SHAW

One Minute Memo®

California Supreme Court Upholds Constitutionality of State Consumer Reporting Statute

By Pamela Devata, Jennifer Mora, and John Drury

Seyfarth Synopsis: *After several years of litigation, in Connor v. First Student, Inc. the California Supreme Court decided that the California Investigative Consumer Reporting Agencies Act ("ICRAA") was not unconstitutionally vague as applied to employment background checks. It reached this conclusion notwithstanding its finding that there is some overlap between the ICRAA and the California Consumer Credit Reporting Agencies Act ("CCRAA"). As such, employers and consumer reporting agencies must abide by both statutes where applicable.*

Background

The ICRAA regulates information-gathering on consumers that employers and others use in their decisions regarding employment and other things. The ICRAA governs consumer reporting agencies (and those to whom they provide information) with regard to *investigative consumer reports*—reports containing information on a consumer's character, general reputation, personal characteristics, or mode of living. The CCRAA is a similar statute that governs *consumer credit reports*—reports containing information on a consumer's creditworthiness, credit standing, or credit capacity. The two statutes both impose duties regarding disclosure to consumers and limit when and where reports can go, but have different obligations, limitations, and remedies for violations. The ICRAA generally is more onerous and allows greater remedies.

The Facts

Eileen Connor drove a school bus. Her employer, concerned about the safe operation of school buses, performed an investigative background report on her. Connor sued her employer and the employer's background screening provider for failing to comply with the ICRAA. She filed her lawsuit on behalf of a class of current and former bus drivers.

The employer, before conducting any background check, had sent Connor a "Safety Packet" booklet. The booklet included a notice, entitled "Investigative Consumer Report Disclosure and Release," that authorized the background screening provider to prepare a consumer report or investigative consumer report. The notice advised Connor of her right to view the file maintained on her, to receive a summary of her file by telephone, and to obtain a copy of her file. The notice also stated that Connor could request an "investigative consumer report" that included "names and dates of previous employers, reason for termination of employment, work experience, accidents, academic history, professional credentials, drugs/alcohol use, [and] information relating to [Connor's] character … which may reflect upon [her] potential for employment."

The notice generally described ICRAA rights and informed Connor that, if she checked a box, she could request copy of the report and would release the employer from all claims related to the background investigation.

The Trial Court's Decision

The employer moved for summary judgment, arguing that the ICRAA was "unconstitutionally vague" as applied to employment screening reports because the information included in those reports relate "to both creditworthiness and character." The ICRAA and the CCRAA require that information in consumer reports be categorized as either information bearing on character (which is regulated by the ICRAA) or information bearing on creditworthiness (which is regulated by the CCRAA). According to the employer, because information in an employment background check can be categorized as both character information and creditworthiness information, the "statutory scheme" could not be constitutionally enforced without adequate notice of which statute regulates the information in the report.

The trial court granted the employer's motion, but in 2015 the Court of Appeal reversed, holding that nothing in either the ICRAA or the CCRAA precludes both statutes from applying to information that relates to both character and creditworthiness.

The Supreme Court's Decision

Three years later, the California Supreme Court agreed with the Court of Appeal and 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." The Supreme Court reasoned that if an employer seeks only credit records, then the employer must comply with the CCRAA. If an employer seeks other information (for example, criminal history) that is "obtained by any means," then the employer must comply with the ICRAA. In a situation where an employer requests ***both*** categories of information and, thus, the two laws overlap, the employer "is expected to know and follow the requirements of both statutes, even if that requires greater formality in obtaining a consumer's credit records (e.g., seeking a subject's written authorization to conduct a credit check if it appears possible that the information ultimately received may be covered by ICRAA)."

The Supreme Court rejected the employer's argument that, because the ICRAA and the CCRAA cover the same subject matter, it is unclear which statute applies in the context of employment background checks. According to the Supreme Court, "such a duality does not make legal compliance particularly difficult, much less impossible."

In sum, although Connor's background check qualified as a "consumer credit report" under the CCRAA because it contained information bearing on her creditworthiness, the background check also qualified as an "investigative consumer report" under the ICRAA because it included information bearing on her "character, general reputation, personal characteristics, or mode of living." The application of the CCRAA did not relieve employer from the duty obtain written authorization under the ICRAA before ordering the background check. Simply put, both laws would apply.

What The Decision Means For Employers

Before *Connor*, courts split on whether the ICRAA was unconstitutionally vague in light of its overlap with the CCRAA. *Connor* eliminates one threshold defense for employers and consumer reporting agencies defending ICRAA claims. In light of *Connor*, both the ICRAA and the CCRAA may apply to companies who request or process background checks that include credit, criminal, and other background information on employees. Accordingly, employers should ensure they know each statute's requirements. In a situation where an employer requests ***both*** categories of information and, thus, the two laws overlap, the employer "is expected to know and follow the requirements of both statutes, even if that requires greater formality in obtaining a consumer's credit records (e.g., seeking a subject's written authorization to conduct a credit check if it appears possible that the information ultimately received may be covered by ICRAA)."

If you have any questions, please contact Pamela Q. Devata at pdevata@seyfarth.com, Jennifer L. Mora at jmora@seyfarth.com, or John Drury at jdrury@seyfarth.com.

www.seyfarth.com