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# U.S. Supreme Court Decision May Sharply Curtail the Wave of FCRA Employment Litigation

**The Recent Surge of FCRA Employment Lawsuits**

The Fair Credit Reporting Act (FCRA) requires employers to take important compliance steps before obtaining and using consumer reports to make employment-related decisions such as hiring, promotion, and termination. Consumer reports include, but are not limited to, criminal records, motor vehicle reports, credit checks, reference checks, education verification, employment verification, and professional license or certification verification.

Recently, the number of FCRA lawsuits has significantly increased. There were 1,940 FCRA lawsuits filed in 2011; 2,223 filed in 2012; 2,289 filed in 2013; and 2,327 filed in 2014. As of Sept. 30, 2015, 2,446 FCRA lawsuits have been filed.

The growing popularity of FCRA employment lawsuits is not surprising. The overtly plaintiff-friendly law is riddled with perplexing, technical obligations for employers. Moreover, the FCRA offers plaintiffs potential actual or statutory damages, as well as the ability to recover costs, attorneys' fees, and punitive damages. A plaintiff may allege that a defendant negligently or willfully violated the FCRA. A plaintiff alleging a negligent violation is limited to recovering actual damages, which compensate for the harm, loss, or injury *actually* suffered by the plaintiff. A plaintiff alleging a willful violation may recover either actual damages or statutory damages of $100 to $1,000 per violation.

Notably, plaintiffs who plead a willful violation may recover statutory damages without ever having to prove harm, loss, or injury suffered. As FCRA violations are highly technical in nature, proving harm, loss, or injury is difficult for the majority of plaintiffs. We will discuss how these unharmed plaintiffs have insinuated themselves into federal courts later on.

**FCRA Class-Action Employment Lawsuits**

For a host of reasons, FCRA employment lawsuits are typically filed as class-action lawsuits. Employers generally follow routine procedures when obtaining and utilizing consumer reports. Consequently, if these procedures do not comply with the FCRA, they affect a whole class of employees or applicants, as opposed to a single person. Additionally, unlike other consumer protection statutes, the FCRA has no limits on the amount of damages that can be recovered. The more plaintiffs involved, the bigger the defendant's exposure.

**Employers' Liability Exposure Under the FCRA**

An employer's potential exposure under the FCRA can be daunting. Think about the hundreds or thousands of people who simply fill out an employment application at any given company each year. It is common for many companies to run background checks on all applicants. The FCRA has a two-year statute of limitations. If an employer fails to follow the FCRA before obtaining a background check or using background check information to make employment-related decisions, the employer may be subject to a class-action lawsuit involving tens of thousands of plaintiffs.

Let's put this in perspective. Assume a large employer runs background checks on 4,000 job applicants every year without following the directives of the FCRA. Applying the two-year statute of limitations, the employer faces a class of 8,000 plaintiffs. If the plaintiffs allege a willful violation of the FCRA, the hypothetical employer faces a minimum exposure of 8,000 x $100, or $800,000. Alternatively, the hypothetical employer could face potential damages of up to 8,000 x $1,000, or $8,000,000. Now, assume a small employer runs background checks on 300 job applicants every year. With the two-year statute of limitations, the hypothetical small company could face a class of 600 plaintiffs. Even this small employer may be exposed up to $600,000 in damages.

***Spokeo, Inc. v. Robins***

The United States Supreme Court could put a dent in the growing number of FCRA employment cases. The Supreme Court is scheduled to hear oral argument in *Spokeo, Inc. v. Robins* Nov. 2, 2015. The issue is whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

Article III, Section 2 of the United States Constitution establishes the case-or-controversy requirement to invoke the jurisdiction of Article III courts. It is well-settled that "standing" is an essential part of the case-or-controversy requirement. A person has standing only if he or she can demonstrate a concrete, personal stake in the outcome of the controversy. One component of standing is an injury-in-fact. The United States Supreme Court has held that a plaintiff must show that he or she suffered an actual or imminent harm that is concrete and particularized. However, the majority of plaintiffs seeking damages for bare statutory violations of the FCRA cannot allege concrete, personal harm. The circuit courts of appeals are split on whether these unharmed plaintiffs can bring suit in federal courts based solely on an injury-at-law.

The United States Supreme Court's decision will have broad implications for plaintiffs seeking statutory damages under the FCRA against employers in federal courts. The decision will also resolve the same constitutional issue arising under a wide range of federal statutes containing statutory damages provisions, including, but not limited to, The Truth in Lending Act, The Fair Debt Collection Practices Act, The Telephone Consumer Protection Act, The Employee Retirement Income Security Act, The Real Estate Settlement Procedures Act, The Lanham Act, The Fair Housing Act, The Americans with Disabilities Act, and The Video Privacy Protection Act.

**Avoiding Liability Under the FCRA**

The best way for employers to defend against lawsuits alleging FCRA violations is to ensure that their procedures are FCRA-compliant. Prior to obtaining a consumer report, employers must provide notice to applicants and employees that they intend to solicit such a report, and that they might use information in the report to make employment-related decisions. The notice must be in writing and in a stand-alone document; the notice cannot be part of an employment application. The notice should not contain any information that confuses the applicant, or detracts from the notice. Also, prior to obtaining a consumer report, the employee or applicant must provide written authorization to the employer. Finally, before taking an adverse employment action based on a consumer report, employers must provide a copy of the

consumer report and a written description of consumers' rights under the FCRA to the applicant or employee.

This *Alert* was prepared by **Peter W. Zinober** and **Sara G. Sanfilippo.** Questions about this information can be directed to:


- Peter W. Zinober| +1 813.318.5725 | zinoberp@gtlaw.com
- Sara G. Sanfilippo| +1 813.318.5749 | sanfilippos@gtlaw.com
- Or your Greenberg Traurig attorney

**Albany**
+1 518.689.1400

**Amsterdam**
+ 31 20 301 7300

**Atlanta**
+1 678.553.2100

**Austin**
+1 512.320.7200

**Berlin¬**
+49 (0) 30 700 171 100

**Berlin-GT Restructuring¯**
+49 (0) 30 700 171 100

**Boca Raton**
+1 561.955.7600

**Boston**
+1 617.310.6000

**Chicago**
+1 312.456.8400

**Dallas**
+1 214.665.3600

**Delaware**
+1 302.661.7000

**Denver**
+1 303.572.6500

**Fort Lauderdale**
+1 954.765.0500

**Houston**
+1 713.374.3500

**Las Vegas**
+1 702.792.3773

**London***
+44 (0)203 349 8700

**Los Angeles**
+1 310.586.7700

**Mexico City+**
+52 55 5029.0000

**Miami**
+1 305.579.0500

**New Jersey**
+1 973.360.7900

**New York**
+1 212.801.9200

**Northern Virginia**
+1 703.749.1300

**Orange County**
+1 949.732.6500

**Orlando**
+1 407.420.1000

**Philadelphia**
+1 215.988.7800

**Phoenix**
+1 602.445.8000

**Sacramento**
+1 916.442.1111

**San Francisco**
+1 415.655.1300

**Seoul∞**
+1 82-2-369-1000

**Shanghai**
+86 21 6391 6633

**Silicon Valley**
+1 650.328.8500

**Tallahassee**
+1 850.222.6891

**Tampa**
+1 813.318.5700

**Tel Aviv^**
+03.636.6000

**Tokyo¤**
+81 (0)3 3216 7211

**Warsaw~**
+48 22 690 6100

**Washington, D.C.**
+1 202.331.3100

**Westchester County**
+1 914.286.2900

**West Palm Beach**
+1 561.650.7900