

**SHOW NAME: CONSUMER FINANCE PODCAST**  
**EPISODE TITLE: CURRENT TRENDS IN FCRA LITIGATION**  
**HOST NAME: CHRIS WILLIS**  
**GUEST NAMES: CINDY HANSON AND TIM ST. GEORGE**

[CHRIS WILLIS]

Hello, and welcome to the *Consumer Finance Podcast*. We have a great episode for you today about FCRA litigation which is really one of the dominant forms of litigation in the consumer finance industry. But before we jump into that topic, let me remind you to visit and subscribe to our blog, [ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com), where we post constant updates about everything that's going on in the consumer finance industry. And, don't forget about our other podcast, *FCRA Focus*, which is, as the name suggests, dedicated to FCRA-related topics, and it's released monthly on all the popular podcast platforms. *FCRA Focus*, you'll want to subscribe to that as well if you're interested in today's episode. And, if you like our podcast today, let us know. Feel free to leave us a review on your podcast platform of choice.

Now, as I said, today we're going to be talking about FCRA litigation and Troutman Pepper is blessed with a huge number of experts in that kind of litigation, and I have two of them on the podcast with me today. So, I have my partners, Cindy Hanson and Tim St. George, who are in our Atlanta and Richmond offices, respectively. They both handle a tremendous amount of FCRA litigation and give clients a lot of advice about how to avoid that litigation. So, Tim, Cindy, thanks for joining the podcast today.

[TIM ST. GEORGE]

Thank you, pleasure to be here.

[CINDY HANSON]

Thanks for having me. Great being here.

[CHRIS WILLIS]

Tim, let me start with you. Can you just give the audience an overview of what you're seeing in terms of FCRA litigation? Like what kinds of cases are you seeing, both from an individual and a class action standpoint?

[TIM ST. GEORGE]

Sure, great, again, thanks for having me. FCRA litigation continues to be the year over year leader in cases filed, and in the increased percentage of filings that happen every year. While we've seen a dip in TCPA litigation and FDCPA litigation, the FCRA continues to rise and ascend and that's not surprising given that the world is becoming more and more digitized and connected and the fact that the FCRA, unlike the TCPA and the FDCPA, for instance, has no cap on damages, so it's an attractive statute. In terms of what we're seeing, of course we continue to see a steady stream of individual inaccuracy claims, you know, that's not me;

you're reporting my balance wrong; I was the victim of identity theft. Those cases proceed with a regular clip. In terms of what we're seeing that's maybe a little bit more trendy and new, we've seen a lot of focus on cases challenging public record reporting. And so by that, I mean criminal records, civil judgments, whether they're being picked up from the courthouse or by a vendor, there's been a lot of cases challenging the completeness and accuracy of that information. Particularly in the wake of the 2017 settlements with the Big Three where they agreed to largely modify and in large part discontinue reporting civil judgments. The plaintiffs' bar have taken that theory that was applying to the credit bureaus and have really taken it nationally and are applying it to CRA's more generally. That's a real trending area of litigation for us is the reporting of public records and challenges to their completeness and the accuracy or the delivery of forms that must go to consumers in connection with those. That continues to generate a huge volume of work.

[CHRIS WILLIS]

So thanks, Tim. And so Cindy, turning to you. You know, hearing from Tim what we already knew, which is that FCRA cases are really prevalent, is it really something where we should have our focus mostly just on the class cases, or should we worry about the individual ones too?

[CINDY HANSON]

Thanks, Chris. I would continue to worry about your individual cases in that docket. While the class cases tend to get the most press and the most attention because of the statutory damages under the FCRA which are \$1,000 a violation, and if you have a class case, and you can have thousands in theory of violations, the numbers can get quite large. But individual cases really for a couple of reasons should remain at your forefront. First, an individual case can lead to a very large judgment. There have been judgments in the seven figures that have been affirmed on appeal and even settling, they sometimes can settle within six figures. So, they are not necessarily all a couple thousand dollars and the case is over. The other thing is individual cases are sometimes brought by plaintiffs' counsel to test out a new theory or they're a precursor of a class case that they want to bring. So they bring that first individual case just to ferret around the company a little bit, get some discovery, shore up the claim and then they'll bring the class case. And another thing that can happen in individual litigation is that during discovery, plaintiffs' counsel might discover a completely new issue that lends itself to a class case. So even though the class cases tend to get most of the time and attention, don't ignore your individual cases because sometimes a little thing can develop into something much bigger.

[CHRIS WILLIS]

Thanks, Cindy. I think that's really good advice for the industry. And, Tim, let me ask you about another sort of aspect of current FCRA litigation. You talked about some of the sort of standby and trendy theories that you're seeing right now. Are you also seeing any particular focus on specific industries covered by the FCRA that are being targeted by the plaintiffs' lawyers right now?

[TIM ST. GEORGE]

Yes, definitely. There's a significant emphasis at this moment in time on the background screening industry as being a focus of both regulatory oversight, investigations, enforcement actions, as well as litigation by the private plaintiffs' bar. And I think that's really the combination of a number of factors that have really created kind of a perfect storm around that industry and then it led to litigation. If you think about the past couple of years, we've been in a pandemic, of course, which has raised a number of issues in terms of renters' rights, eviction moratoriums, concerns about forcing people out of their homes, court closures. All of those have really drawn attention to the tenants' rights and the tenant screening industry and the effect that it might have on people who are either facing foreclosure or who would be evicted and the reporting of those evictions that could bar them from future apartments. We've also gone through a really significant racial justice moment in this country, starting with the George Floyd protests. Kind of an awakening in this country in large part of the Black Lives Matter movement and that movement getting a lot of attention nationally. And it's no secret, it's well documented that minority populations tend to concentrate in rental environments. African American and Hispanic communities have much lower rates of home ownership than their White counterparts and that racial justice movement has really shone a spotlight on minority rights and the situation of minorities in this country which has indirectly shone a spotlight on tenant screening as well. And then we've just seen a lot of regulatory attention on the tenant screening industry. We've seen Senate committee investigations, we've seen CFPB comment directly on it, we've seen a focus on fair housing law and how that intersects with tenant screening, and there's a lot of novel and untested theories under the Fair Housing Act that are currently being advanced against tenant screening companies that will be potentially harbingers of future litigation in that industry. So there's a lot of different factors combined with the new administration and their focus on consumer protection and minority rights that have come together at the same time to really create a moment for the screening industry in particular a tenant screening industry that really has put that industry under a lot of litigation and regulatory pressure.

[CHRIS WILLIS]

That's really interesting, Tim. And thanks for sharing that. You know, Cindy, we've been talking about the large number of FCRA cases and some of the factors that are driving the total upward. Is there any light at the end of the tunnel? I mean, do you see the number of FCRA lawsuits as likely to decrease in the future?

[CINDY HANSON]

No, Chris, I do not. And I think it will only increase for a variety of reasons. One is, one of the things that Tim mentioned. The area of focus for FCRA plaintiffs' counsel just continues to change. So while 20 years ago it may have been the Big Three credit reporting agencies and then they moved on to the classic credit furnishers, we've moved on now to public record companies, to the rental industry, to the criminal record background screening industry. There's a lot of FCRA litigation and I think it will continue to grow against companies who are involved in just big data and who have a tremendous amount of data that is being sold and whether those companies are trying to be consumer reporting agencies or actively trying not to be consumer reporting agencies. They're under a lot of scrutiny and the plaintiffs' bar will continue to find them. The other thing is over my over 20 years of doing this litigation,

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regardless of the economy, whether it's a good economy or a bad economy, there's still a tremendous number of people seeking credit and when people seek credit that's when they will find issues on their consumer credit report and that will drive litigation. So, I only see this increasing as there are just more and more uses of this data across everyday life.

[CHRIS WILLIS]

Okay, so we're stuck with a large volume of FCRA litigation for the foreseeable future. Tim, if we want to, as an individual company, avoid getting sued or put ourselves in the best position to defend ourselves if we are sued, what are some of the tips that you'd share to try to achieve that goal?

[TIM ST. GEORGE]

You really want to build just a culture of compliance and that culture of compliance is gonna serve you in two ways. The first is it's gonna prevent litigation. If you have a consumer focused, responsive company that reacts to consumer complaints and demands, addresses them fairly, of course, not resolving disputes in favor of the consumer that don't have merit, for instance, but really taking the time to listen to the company and listen to your customers and figure out ways you can really help the consumer navigate the credit or screening process in a way that minimizes the speed bumps and promotes transparency, that culture of compliance is gonna serve you well in minimizing lawsuits. The second way that the culture of compliance is gonna help you is when you do get sued. If you have documented policies and procedures that set forth the specific ways that people are supposed to operate. If you have training manuals and modules that are annually offered with attendance required and documented. If you have a compliance team that regularly interacts with the legal team and builds up road maps and always has sort of working to-do lists, then you're gonna be able to tell a good story when that litigation does come through the door and that story can be particularly important, for instance, in fighting off a claim of a willful violation seeking punitive damages. You know, maybe the customer service representative didn't act in a way that is consistent with the manual. It may be you have a bad story to tell with that individual representative and that individual consumer, but, behind that, you've got a well documented process of how this was supposed to go and how the company has directed and trained people to operate. That really allows you to paint something as much more of a one-off situation that should not have happened as opposed to one that's reflective of how the company operates as a whole. So, if you take care of the consumer, you put yourself in their shoes and you build a culture of compliance, that's gonna serve you well to hopefully ward off litigation but also to put you in the best light in front of the court and a jury should you ultimately get there.

[CHRIS WILLIS]

Thanks, Tim. And so, Cindy, let's assume we're gonna take Tim's advice, set up a culture of compliance, have documented policies and procedures and training. Once we get those documents in place are we basically done with FCRA compliance?

[CINDY HANSON]

Not at all, Chris. FCRA compliance is something that requires constant attention and monitoring, even once you get your compliance program in place, there will be subsequent decisions from the court or there might be pronouncements from the CFPB or FTC that require you to change your forms or to change your approach or there's been recent guidance from the CFPB on how you should match to data that is within your database and so you need to be keeping abreast of all of those decisions and developments and improving your compliance. And the other thing is you need to monitor your own compliance. So you need to make sure that while you put policies and procedures in place, that you're constantly monitoring to make sure that your employees are actually doing what you think they should be doing. That can be, as Tim said, very important should you be sued in a case where an employee wasn't doing or didn't quite follow your policy and procedure, it's very persuasive if you can show that you're constantly testing and monitoring your employees to show that they are doing what they should be doing and this really was just a one-off situation. So unfortunately, it is not a one-and-done when it comes to FCRA compliance.

[CHRIS WILLIS]

Yeah, I have to agree with you, Cindy, based on my experience in dealing with the CFPB and other regulators on this. That monitoring component is really a critical one and I would say it's not just a question of monitoring employees, but also monitoring systems. You know, for a furnisher, for example, monitoring the system that creates the Metro 2 file from the system of record. Or for a CRA. You know, monitoring the data sources and the accuracy and integrity of the data in the database. That kind of monitoring of automated systems I think is also really important. But there's one other thing, Cindy, that I think also is important too in terms of monitoring that can be very insightful for companies, and that's disputes. So like, how are consumer disputes useful to a company from an FCRA compliance standpoint?

[CINDY HANSON]

I think consumer disputes, companies should look at them as their friend. You're gonna get disputes so you really might as well learn from them. And companies should learn from them. So not only should they figure out what was a mistake actually made in a certain case, but then why was that mistake made. Chris, to your point, is there a system problem out there that some code is being read the wrong way and therefore it's allowing for a set of data to be interpreted improperly? Or was it simply, you know, human error? There's going to be human error in the volume of data that we're dealing with - that is okay - the FCRA is not a strict liability statute. But if there is human error you want to go back, figure out who the person was, retrain them if necessary. Keep records of how frequently people are making mistakes because if somebody is making mistakes too frequently, then you need to deal with that employee. The other thing that you can see from disputes is also how well your systems are working and if you do put in a new process or a new procedure, see if your disputes go down. That you've now rectified an issue at the front end and you no longer see those disputes. But it is really critical that you learn from your disputes and I think the information that we're seeing coming out of the CFPB and from case law again is really counseling in favor of looking at your disputes and learning from them because if you're not learning from them and you're not looking at them, if you are in litigation or you are in a regulatory context, that will work against you in any negotiations.

[TIM ST. GEORGE]

Cindy, those are all great points. I'll just add two other additional litigation-specific insights on disputes that again supports Cindy's statement that disputes are your friends. Sort of ironically, the first is if you're tracking disputes and you have a very low dispute volume and you can prove it, you can show it, courts have become willing to look at low dispute volumes as indicative of reasonable procedures or at the very least supportive of a showing that there was no willful violation here. If you maintain a dispute percentage that's steady, it's low, it's decreasing, as Cindy mentioned, that becomes a powerful sword in litigation and a shield against a claim of punitive damages. The second thing I'll mention is disputes are your friend because those are future litigants. If you can take a disputing consumer, lower the temperature in the situation, and rectify it, the odds are that person is not going to sue you. But I will say in almost every piece of litigation that we see, it is usually preceded by a consumer dispute and often preceded by a consumer dispute that wasn't handled correctly. So, the dispute process is really integral to litigation, both preventing it in the first place but also then supporting your culture of compliance and the monitoring of that compliance should you get into litigation.

[CHRIS WILLIS]

Those are great points and great pieces of advice, Tim. And I would just add one other thing to the idea of how disputes can help us. And that is, I often advocate to clients that they should perform tracking and trend analysis and root cause analysis of the portion of their disputes that are found to be meritorious. So, we all know that the industry is awash in disputes that don't have any merit to them. But there are some that are meritorious where you actually have to change something because the consumer was right. There was something wrong with their consumer report. And so, if we do our tracking and trending and root cause analysis on those, then it can really point us to whether, as Cindy said, there's a systemic problem that may have affected other people or it's a training issue or a problem with a particular employee or whatever the case may be. But we gain those insights only by doing those analyses on the complaints that we find to be meritorious. So that's just the piece that I would add to the excellent points that the two of you just made. And so now I think it's time to close out the podcast. So, Cindy, Tim, let me thank both of you for sharing your insight, experience and wisdom on this incredibly important issue to the industry. And, of course, let me thank our listeners for tuning in and downloading the podcast. Be sure to visit us at our blog, [ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com), subscribe to it so that you can get our updates. We post new content there every day. And be sure to visit us either on the blog or at [troutman.com](http://troutman.com) to get on our Consumer Financial Services email list so that you can get our client alerts and our webinar invitations. And, most of all, stay tuned for a great new episode of this podcast every Thursday. Thank you all for listening.