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IN–DEPTH DISCUSSION

Eighth Circuit Holds Article III Standing Was Lacking for an Alleged Violation of the FCRA's "Pre-Adverse Action" Notice Provision

By William J. Simmons and Rod M. Fliegel on April 6, 2022

On April 4, 2022, the U.S. Court of Appeals for the Eighth Circuit joined the Ninth Circuit in holding that a plaintiff lacked Article III standing to prosecute her statutory claims under the Fair Credit Reporting Act (FCRA) in federal court. The Eighth Circuit's opinion in *Schumacher v. SC Data Center, Inc*. deepens the split between the circuit courts on standing and increases the chances that the U.S. Supreme Court eventually will have to weigh in on the issue again.

Background: *Spokeo* and *Ramirez*

Over the past several years, the U.S. Supreme Court has reinvigorated the constitutional concept of "Article III standing" in two decisions involving the FCRA. In this context, Article III standing requires that a plaintiff prove a concrete "injury-in-fact" from alleged unlawful conduct to establish a federal court's jurisdiction to hear the claim.

In May 2016, in *Spokeo v Robins*, the U.S. Supreme Court declared that a plaintiff does not "automatically" have the requisite injury-in-fact "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." The plaintiff had alleged that the defendant was a "consumer reporting agency" (CRA) (which it disputed) and had violated the FCRA by reporting inaccurate information about him. The Supreme Court held that the Ninth Circuit's analysis, which had found standing, was incomplete because it did not address the "concreteness" element of standing—*i.e.*, whether the statutory violation cause some "real" harm that "actually exists in the world."[1]

Then, in June 2021, the Supreme Court doubled down on the *Spokeo* standing principles. It held, in *Ramirez v Trans Union*, that each class member in a FCRA class action, not just the named plaintiff, had to prove Article III standing before a judgment could be awarded. *Ramirez* involved allegations the defendant, a CRA, inaccurately matched the named plaintiff and class members to the Office of Foreign Assets (OFAC) database. The CRA had provided the allegedly inaccurate matches in consumer reports to third parties for plaintiff and some class members, but had never disseminated the allegedly inaccurate information to any third parties for other class members. The Supreme Court held that where the information had not been published to any third party and the class members could not show any actual harm stemming from the allegedly inaccurate OFAC match, the class members had no standing to pursue their claims. The Supreme Court summarized: "No concrete harm, no standing."[2]

The Eighth Circuit's Decision

The Eighth Circuit applied the Supreme Court precedent to FCRA claims against an employer in *Schumacher v. SC Data Center, Inc*. On behalf of a putative class, the plaintiff alleged the all-too-familiar claims that (1) the defendant allegedly provided a background check disclosure form that was not "clear and conspicuous" and contained "extraneous" information, and (2) the defendant allegedly failed to provide a proper "pre-adverse action notice" before rescinding her contingent job offer based on a background check. The plaintiff also added a third, less-common, theory that the employer allegedly unlawfully procured her background check because the authorization she signed referred only to "an independent investigation of [her] criminal records maintained by public and private organizations," without using the phrase "consumer report." The Eighth Circuit held that the plaintiff lacked Article III standing as to each of her theories and remanded the case back to the district court with instructions to dismiss the case for lack of jurisdiction.[3]

As to the disclosure claim, the Eighth Circuit held that the mere fact the disclosure was in a small font and allegedly contained statements unrelated to the fact a consumer report would be obtained was not itself a concrete "injury-in-fact." The plaintiff failed to plead any specific facts of any "real-world harm" flowing from the alleged statutory violation of the FCRA's disclosure provision. Thus, even though the plaintiff alleged the form contained an unlawful release of liability, a statement that the company could terminate employment if she provided false information, and additional statements about potential rights that could apply if there was an adverse action, the plaintiff lacked standing.[4]

As to the pre-adverse action claim, the Eighth Circuit acknowledged that it was undisputed for purposes of its ruling that the plaintiff did not receive a copy of her background report before she was informed her offer was rescinded. But the plaintiff failed to allege she suffered any harm

material to the purposes of the FCRA's pre-adverse action provision. The plaintiff attempted to manufacture harm by asserting that she was deprived of the opportunity to discuss or explain the report before the employer decided to rescind the offer. But the Eighth Circuit found this alleged "harm" was immaterial; the only right the FCRA's text contemplated was to dispute inaccurate information with the CRA, not to discuss or explain the report with the employer. Since the plaintiff could not allege the report was inaccurate, the ability to dispute the accuracy of the report with the CRA would have made no difference to the plaintiff. Therefore, the plaintiff also lacked standing on her pre-adverse action claim.

As to the authorization claim, the Eighth Circuit held that the authorization did not have to specifically use the term "consumer report" to be valid. The authorization was broad enough to encompass all types of record searches that the employer had ordered in the background report on the plaintiff, as the authorization permitted the search of "criminal records maintained by public and private organizations." The court noted that the report consisted of criminal record searches, and even the sex offender registry search consisted of public record information from a national sex offender registry website that itself ultimately derived from criminal records. Even assuming, for the sake of argument, the sex offender search went beyond the language of the authorization—as the plaintiff claimed—the Eighth Circuit still found Article III standing would fail. The plaintiff had not pled any specific facts to show an actual invasion of privacy from the search; just referring to an "invasion of privacy" in a conclusory manner was insufficient to save the claim from dismissal.

Takeaways

Standing to proceed with FCRA claims in federal court is an evolving area of the law. While the Eighth Circuit found for the employer in this case, the Third Circuit reached the opposite conclusion with regard to the pre-adverse action claim.[5] Moreover, the FCRA allows lawsuits in federal or state court (known as "concurrent jurisdiction"). Thus, although Article III standing may be a potent defense in some federal and state courts, it is not necessarily a complete defense in jurisdictions with lax standing rules, such as California. The key to minimizing legal risk is thus to be hyper-vigilant about compliance with the employment-related requirements of the FCRA.

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[1] *See* Rod M. Fliegel and Phil Gordon, *U.S. Supreme Court Holds Not Every Violation of a Federal Statute is a Ticket to File a Federal Court Lawsuit*, Littler Insight (May 17, 2016).

[2] *See* Rod M. Fliegel, *"No Concrete Harm, No Standing": The Supreme Court Reinforces the Requirement for Injury-in-Fact Even for Violations of Federal Statutes*, Littler Insight (June 28, 2021).

[3] Although not related to the ultimate holdings, the procedural posture of *Schumacher* was fairly unique: the parties had actually reached a tentative class action settlement just before *Spokeo*. Following *Spokeo*, the defendant moved to dismiss. The district court then approved the settlement, but on appeal, the Eighth Circuit vacated the settlement approval, ordering the district court to address standing. The district court found the plaintiff had standing, and the defendant appealed.

[4] The Eighth Circuit had previously applied the same principle to FCRA disclosure claims. *See* Rod M. Fliegel and Julie A. Stockton, *Eighth Circuit Holds Individual Plaintiff Lacks Standing for Alleged Violations of the FCRA's Authorization and Disclosure Requirement*, Littler Insight (Sept. 10, 2018).

[5] Rod M. Fliegel and William J. Simmons, *Third Circuit Holds Individual Plaintiffs Lack Standing for Some Alleged Violations of the FCRA's Pre-Adverse Action Notice Requirement*, Littler Insight (Sept. 11, 2018).