

The Fair Credit Reporting Act and Criminal Background Checks

I. Background

In recent years, a large number of landlords have started to conduct criminal background checks on prospective tenants. In 2005, the National Multi-Housing Council, one of the largest rental housing professional associations, found that 80 percent of its member landlords conduct criminal background checks on applicants. Most landlords that conduct background checks hire consumer reporting agencies (CRAs), such as ChoicePoint or First Advantage Safe Rent, to compile the information and/or provide a recommendation on prospective tenants. When landlords use CRAs to conduct background checks, the Fair Credit Reporting Act (FCRA) applies.¹ *See* 15 U.S.C. § 1681 *et seq.* The FCRA imposes obligations on both CRAs and landlords. The FCRA does not protect prospective tenants from being denied admission on the basis of a criminal record. It does, however, aim to ensure that background reports are fair, accurate, and transparent.

Some states have passed their own version of the FCRA.² In California, landlords and CRAs must follow the Investigative Consumer Reporting Agencies Act (ICRAA).³ *See* Cal. Civ. Code § 1786 *et seq.* The outline below highlights the relevant provisions of the FCRA and indicates where the ICRAA imposes further obligations on landlords or CRAs.

II. CRA Obligations

A. Stale Information

The FCRA seeks to prevent CRAs from reporting stale information. A report made for a potential landlord cannot include arrests over seven years old. 15 U.S.C. § 1681c(a)(2). The FCRA does not impose restrictions on the disclosure of old convictions. CRAs must maintain “reasonable procedures” to avoid reporting stale information. § 1681e(a).

California: The ICRAA prohibits CRAs from reporting arrests that are no longer pending. In addition, CRAs cannot disclose convictions over seven years old.⁴ Cal. Civ. Code § 1786.18(a)(7).

¹ *See* § 1681a(f) for the definition of a CRA.

² The FCRA contains express preemption language. *See* § 1681t. For example, state laws enacted after September 30, 1996 cannot regulate the information included in consumer reports. § 1681t(b)(E).

³ The term “investigative consumer report” does not have the same meaning under the FCRA and the ICRAA. Under the FCRA, the term refers to a report on the character, general reputation, personal characteristics, or mode of living of the consumer, when the information is obtained through personal interviews with neighbors, friends, or associates. 15 U.S.C. § 1681(e). Under the ICRAA, the term refers to a report on the character, general reputation, personal characteristics, or mode of living of the consumer, regardless of how the information is obtained. Cal. Civ. Code § 1786.2(c). Thus, a standard criminal background check is a “consumer report” under the FCRA and an “investigative consumer report” under the ICRAA.

⁴ The California anti-SLAPP statute could pose a barrier to enforcement of these restrictions. In *Mendoza v. ADP Screening and Selection Services, Inc.*, 107 Cal. Rptr. 3d 294 (Cal. Ct. App. 2010), the defendant CRA disclosed information from the state’s sex offender website to a prospective employer. The plaintiff filed suit under a section of the penal code that prohibits the use of information from the website for purposes of employment, and the CRA filed a motion to strike under the anti-SLAPP statute, claiming a constitutional right to provide information from the website to its clients. The court granted the motion, finding that the CRA’s conduct constituted protected speech under the First Amendment. The court noted that to fall outside of the anti-SLAPP statute, the defendant’s conduct must be criminal in nature.

B. Inaccurate Information

CRAAs must maintain “reasonable procedures to assure maximum possible accuracy of the information” in the report. § 1681e(b). To state a claim for a violation of § 1681e(b), a prospective tenant must show that: (1) the report included inaccurate information; (2) the report included the inaccurate information because the CRA did not maintain reasonable procedures; (3) he or she suffered injury; and (4) the inaccurate information caused the injury. *Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 (3rd Cir. 1996). The harm need not be financial – a prospective tenant is entitled to recover for emotional distress. *See, e.g., Cousin v. Trans Union Corp.*, 246 F.3d 359, 369 (5th Cir. 2001), *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998). Courts are split on who bears the burden of proof as to the second element of the claim.⁵

A number of reported cases involve a CRA giving inaccurate or incomplete criminal background information to a potential employer, including:

Dalton v. Capital Associated Indus., Inc., 257 F.3d 409 (4th Cir. 2001) – A subcontractor of the defendant CRA ran a computer search on Dalton and found a conviction. Because the database did not reveal the nature of the charge, the subcontractor called the court for more information. A court clerk gave the subcontractor inaccurate information about the degree of the conviction, and the CRA sent the erroneous information to the potential employer. The court denied the defendant’s motion for summary judgment, finding that a reasonable jury could conclude that the CRA did not follow reasonable procedures as required under § 1681e(b). The CRA could, for example, instruct its vendors how to confirm information obtained from court clerks.

Obabueki v. Choicepoint, Inc., 236 F. Supp. 2d 278 (S.D.N.Y. 2002) – The defendant CRA sent IBM a report on Obabueki that included a conviction, but did not indicate that the court dismissed the conviction pursuant to Cal. Pen. Code § 1204.3. IBM asked Obabueki about the conviction, and Obabueki sent IBM proof of the dismissal. Nevertheless, IBM withdrew its conditional offer of employment, citing Obabueki’s failure to report the conviction in his application materials. A jury found that the CRA did not maintain reasonable procedures and awarded the plaintiff \$450,000. The court, however, overturned the verdict, holding that it was not improper for the CRA to report the dismissed conviction. The court also found that the CRA’s negligence did not cause the plaintiff’s injury, as IBM made the decision to withdraw its employment offer after Obabueki sent IBM complete and accurate information about his criminal background.

Wilson v. Prudential Fin., 603 F. Supp. 2d 163 (D.D.C. 2009) – The defendant CRA sent Prudential a report on the plaintiff showing “pending” charges in Oklahoma, when in fact, there were no charges pending against Wilson. As a result of the report, Prudential withdrew its conditional offer of employment. The plaintiff informed the defendant of the error, and although the CRA sent Prudential an amended report, Prudential chose not to hire the plaintiff. The CRA claimed that the background report was not inaccurate or misleading, as the word “pending” referred to the background investigation itself, and Prudential understood its meaning. Wilson, however, presented evidence that both a Prudential employee and a CRA employee told him that

⁵ Cf. *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984), *Dalton v. Capital Associated Industries, Inc.*, 257 F.3d 409 (4th Cir. 2001) (holding that the plaintiff bears the burden of proof) and *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991), *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) (suggesting that the defendant bears the burden of proof).

the background report included “pending” charges in Oklahoma. The court thus denied the defendant’s motion for summary judgment, finding a triable issue of material fact on each element of the plaintiff’s claim.

See also Smith v. Hireright Solutions, Inc., 2010 WL 1903753 (E.D. Pa. 2010) (denying motion to dismiss a class action complaint alleging willful violations of § 1681e(b) where the CRA reported single incidents multiple times, misleading potential employers); *Christensen v. Acxiom Info. Sec. Serv., Inc.* 2009 WL 2424453 (W.D. Ark. 2009); *Adams v. National Engineering Serv. Corp.*, 2010 U.S. Dist. LEXIS 35489.

C. Disclosure

Upon request, CRAs must give a prospective tenant a copy of his or her file, disclose the sources of the information in the file, and identify each landlord that procured a report within the past year. § 1681g(a), 1681h(a). Unless the prospective tenant specifies otherwise, the disclosure must be in writing. § 1681h(a).

California: CRAs must identify each landlord that procured a report within the past three years. § 1786.10(c). In addition, upon request, CRAs must give a prospective tenant a copy of each report sent to a landlord within the past two years. § 1786.11

D. Dispute process

When a prospective tenant notifies a CRA that an item of information in the report is inaccurate or incomplete, the CRA must, free of charge, conduct a reasonable reinvestigation to determine if the information is inaccurate or incomplete and update the file within 30 days. § 1681i(a)(1). The CRA must consider all relevant information that the consumer submits. § 1681i(a)(4).

If the CRA finds that the dispute is frivolous or irrelevant, it can terminate the reinvestigation, but must provide the prospective tenant with a notice stating the reasons for the decision. If the CRA concludes that the dispute is frivolous or irrelevant because the prospective tenant did not provide information needed to investigate the dispute, the notice must indicate the nature of the information needed. § 1681i(a)(3).

If the reinvestigation reveals that the item in dispute is inaccurate, incomplete, or cannot be verified, the CRA must change or delete the item as appropriate and inform both the prospective tenant and the source of the information of the deletion or change. If the item is deleted, the CRA must maintain “reasonable procedures” to prevent the reappearance of the item in the file. The CRA cannot reinsert the item unless the source of the information certifies that the information is complete and accurate. If the item is reinserted into the file, the agency must inform the prospective tenant within five business days. The notice must include contact information for the source of the information and explain that the consumer is entitled to add a statement to the file that disputes the accuracy or completeness of the information. § 1681i(a)(5).

Within 5 days after the reinvestigation is complete, the CRA must inform the consumer of the result of the reinvestigation. The notice must, among other things, include a copy of the revised report and explain that the prospective tenant is entitled to add a statement to the file that disputes the accuracy or completeness of the information. § 1681(a)(6). If an item is deleted

within three business days after the prospective tenant contacts the CRA, the CRA can opt to follow a less onerous set of notice requirements under § 1681(a)(8).

If the prospective tenant does add a statement to the file that disputes the accuracy or completeness of the information, or if an item is deleted from the file, the prospective tenant can require the CRA to inform landlords who procured a report within the past six months of the change to the report. § 1681i(d). In California, CRAs must inform landlords who procured a report within the past year. Cal. Civ. Code § 1786.24(k).

III. Landlord Obligations

A. Adverse Action

If a landlord denies a prospective tenant in whole or in part on the basis of information obtained from a CRA, the landlord must provide oral or written notice to the applicant. The notice must include the name, address, and phone number of the CRA that furnished the report and explain that the CRA did not make the decision to reject the prospective tenant. § 1681m(a). In addition, the landlord must inform the applicant of his or her right to obtain a free copy of the report from the CRA within 60 days and to contest the accuracy or completeness of the information in the report. Just as CRAs must maintain reasonable procedures to assure that reports do not contain inaccurate, incomplete, or stale information, landlords must maintain reasonable procedures to assure compliance with the adverse action notice requirements. § 1681m(c).

California: Landlords must follow certain procedures before a report is made. Within three days after requesting a report from a CRA, a landlord must inform the prospective tenant that the CRA is going to compile a report. The notice must include the name and address of the CRA and explain how the prospective tenant can access his or her file. § 1786.16(a)(3). In addition, the landlord must give the prospective tenant, on the disclosure form or on a separate form, the option to receive a copy of the report. If the prospective tenant does opt to receive a copy, the landlord must send the report, along with the name, address, and telephone number of the CRA that produced the report, to the prospective tenant within three business days after the CRA delivers the report. § 1786.16(b)(1). Under the FCRA, landlords must follow similar procedures when a CRA produces an investigative consumer report. 15 U.S.C. § 1681d. *See* FN 1.

IV. Damages and Enforcement

The Federal Trade Commission enforces most of the provisions of the FCRA. § 1681s(a)-(b). The FTC is entitled to file suit to recover civil penalties from a CRA or a landlord for a knowing violation that constitutes a pattern or practice.⁶ § 1681s(a)(2). In certain circumstances, states are entitled to file suit to enjoin a violation of the FCRA and/or to recover damages. § 1681s(c).

⁶ In January 2010, for example, the FTC filed an enforcement action against First Advantage SafeRent, Inc. On multiple occasions Safe Rent did not provide files to prospective tenants who asked for copies via fax, in violation of § 1681(g)(a). In addition, the CRA did not respond to prospective tenants who asked for a reinvestigation via fax, in violation of § 1681(i)(a). The CRA settled and paid \$100,000 in civil penalties.

Prospective tenants are entitled to enforce the FCRA in federal district court.⁷ § 1681p. For willful noncompliance by a CRA, a prospective tenant can recover: (1) actual damages or between \$100 and \$1000; (2) punitive damages; and (3) attorney's fees and costs. § 1681n(a). For negligent noncompliance by a CRA, a prospective tenant can recover actual damages and attorney's fees and costs. § 1681o(a). The statute of limitations is the earlier of two years after the prospective tenant discovers the violation or five years after the date of the violation. § 1681p.

California: Prospective tenants are entitled to enforce the ICRAA in court. For noncompliance by a landlord or a CRA, a prospective tenant can recover: (1) the greater of actual damages or \$10,000; (2) punitive damages in the case of gross negligence or willful noncompliance; and (3) attorney's fees and costs. § 1786.50. The statute of limitations is two years after the prospective tenant discovers the violation. § 1786.52. A prospective tenant cannot recover against a landlord or a CRA under both the FCRA and the ICRAA. § 1786.52

⁷ Advocates should be aware that the Seventh Circuit found that no private right of action exists under 15 U.S.C. § 1681m, the adverse action notice provision. *Perry v. First National Bank*, 459 F.3d 816, 823 (7th Cir. 2006).