
FCRA Focus: The FHA's Impact on Consumer Reporting Agencies**Host: Dave Gettings****Guests: Tim St. George****Date Aired: December 10, 2024****Dave Gettings:**

Hey, everyone. Welcome to another edition of [FCRA Focus](#), the podcast that discusses all things credit reporting. Today, we're going to discuss something we call FCRA adjacent, but something that's still critical to our tenant screening and potentially, mortgage consumer reporting agencies. That's the Fair Housing Act, or FHA, and its potential applicability to consumer reporting agencies. It's recently been a hot topic among the plaintiffs' bar and consumer advocacy groups, so we thought it'd be particularly interesting to discuss on today's podcast.

Joining me today is my partner, Tim St. George. He's one of our resident experts on the interplay between the FHA and credit reporting, having completed a multiday, or maybe even multiweek, federal bench trial on FHA claims pertaining to a consumer reporting agency. He also recently argued FHA issues, pertaining to a consumer reporting agency in the Second Circuit Court of Appeals. Tim is also recording this podcast the day after he returned from Orlando with his wife and kids. So, I'm sure he is well rested and certainly not even close to out of patience at all. Tim, appreciate you being here.

Tim St. George:

Thanks, Dave. Thanks for having me. I'm very well rested and ready to go.

Dave Gettings:

Did you at least fly or did you drive with your kids for 10 hours in the car?

Tim St. George:

We did fly, and I will say, thank the Lord, all of our flights were exactly on time, and so, we did just fine.

Dave Gettings:

You binge watch a lot of cartoons on the way down?

Tim St. George:

There was nonstop streaming during the flight and plowing them with whatever candy they wanted. So, even the three-year-old behaved pretty well, we were pleased. So, thanks for having me.

Dave Gettings:

Yes, of course. Happy to be here. Happy to have you, I should say. All right. So, for our listeners who may be very FCRA-centric, can you just introduce the concept of FHA claims and how it might relate to consumer reporting agencies?

Tim St. George:

Sure. The Fair Housing Act is an independent consumer protection statute. It's not in any way preempted by the Fair Credit Reporting Act, and it's got vague and broad terms, just like the Fair Credit Reporting Act. So, terms are not limited to housing providers. The Fair Housing Act can touch service providers, vendors, insurers, agents, et cetera. The Fair Housing Act is triggered whenever an entity acts in a manner that causes housing to be unavailable, or deprives individuals of an equal opportunity to secure housing, or deprives individuals of an opportunity to secure housing-related services.

The text of the FHA, of course, has at its core, housing, but there's no textual limitation that would have it relate only to housing providers or landlords. So, the Fair Housing Act typically has two species of claims. The first are what are called disparate treatment claims. The second are what are called disparate impact claims. Disparate treatment claims have at their core animus. I intentionally discriminated against you because of your race, ethnicity, gender, disability. So, think animus. Although, animus can be inferred from the circumstances. There doesn't have to be direct proof of racial discrimination, or disability discrimination.

Dave Gettings:

Are disparate treatment claims the ones typically brought against CRAs? Or, given the animus requirement, is that something plaintiffs' counsel have not tried pushing yet?

Tim St. George:

So, it's interesting, you asked, Dave, so given the animus requirement, it's something that should not have general application to consumer reporting agencies. I'm not aware, of course, of any consumer reporting agency that's accounting for something like an individual's race or disability when running algorithms, or software, or supporting their clientele. Now, that didn't stop there from being disparate treatment claims in the multi-week Fair Housing Act case that I tried. There still were disparate treatment claims. We had to beat them. But really, the action against the consumer reporting agency should come under the second iteration of the claim, which is disparate impact.

Disparate impact doesn't require any showing of animus. At its core, what disparate impact means is that there's a race or facially neutral practice that is having an outsized impact on one of the protected populations. So, minority populations by race or ethnicity, or disabled individuals. Once that statistical showing is made, there becomes this burden shifting analysis that kicks in. If someone can statistically show that someone was denied housing and the facially neutral practice is having an outsized, statistically significant impact on a particular group, then the burden shifts back to defendant to show a legitimate non-discriminatory reason for the practice. Assuming that that showing is made, the burden then shifts back to the plaintiff

to show that there are less discriminatory reasons for the practice. So, essentially, you could achieve those legitimate goals, but through less impactful ways.

This disparate impact type claim is really what we've been seeing in cases against mortgage providers and tenant screening companies, where the consumer reporting agencies

have been directly targeted. Those are really the bulk of what I would consider to be the claims that could viably be asserted against a screening company or consumer reporting agency.

Dave Gettings:

So, are these claims, are they based on the consumer reporting agency making recommendations or assigning scores to the reports, or is it purely based on the content of the reports even outside of scoring?

Tim St. George:

Again, another interesting question, Dave. I will say that, to date, the cases that have been kind of the bellwether proceedings in this space have dealt with consumer reporting agencies that have populated a score, or made a recommendation, or who are alleged to actually be making the decisions on behalf of the housing providers. Now, that isn't to say that the same arguments that are animating those disparate impact claims and those more narrow fact patterns couldn't apply more generally to a consumer reporting agency that is simply tendering the outcome of a screening without any accompanying rendered recommendation or decision, so to speak, or scoring applicant in any way. You could plausibly see, for instance, a consumer reporting agency who returns a record of a lower-level misdemeanor conviction and that consumer reporting agency could be caught up in a disparate impact case by saying that that type of reporting for that individual has a disparate impact because it's being de facto used as a basis to deny housing by the housing provider.

Long-winded way of saying, the cases to date have been intentional. They've targeted the recommendation or decisioning tools that have been in place, although, the fact of a decision has been fiercely contested. But there's no reason to suspect that any consumer reporting agency couldn't be targeted under some variation of this theory.

Dave Gettings:

Am I thinking about it correctly, that the general contours of this type of claim are, plaintiff alleges the CRA has a scoring algorithm they use to make recommendations to property management companies, and they allege that the scoring algorithm somehow has a disparate impact on some protected class, and then they bring a class claim on that basis.

Tim St. George:

So, it doesn't necessarily have to be a class claim, although we've seen class claims and we've seen individual claims. By its nature, a disparate impact claim implicates class-like proof, but an individual can simply assert it without wrapping in a putative class. But the gist of your question is, yes, that's correct. For instance, in the cases that I was litigating, I've typically seen some variation of a challenge to the reporting of non-conviction records or the reporting of records that

were older than a particular time period, after which time the plaintiff's bar claimed that it's not legitimate to recognize them at all.

I've also seen claims that say that, when these recommendations or "decisions" are reported, and the underlying records are not immediately populated along with the decision, that, that also frustrates the individualized review that's required under the Fair Housing Act when considering criminal backgrounds. So, you can get – and any number of different types of claims, they can target the types of the records, the length of the records, the failure to populate the records. But all of these ultimately boil down to some notion that this is a decisioning process that is impacting minority groups more than non-minority groups.

Once you start talking about criminal records, obviously, there is a fairly well-known statistical fact that minority populations are going to be more impacted by the criminal justice system than non-minority populations. So then, it becomes a very sophisticated and technical statistical fight as to whether or not that prima facie showing of disparate impact has been made when you look at subpopulations and which population does the plaintiff himself fit into, and how do those populations, how are they reflected in the particular graphic subarea. I'll say, it gets very complicated very quick, but it's all predicated generally on the notion that whether you're talking about credit or criminal, minority populations generally tend to be overrepresented in the criminal population, and underrepresented in the credit scores would be deemed to be good or excellent.

Dave Gettings:

There's something we actually didn't talk about before the podcast is, what's the – I'm sorry, I see you're scared when I'm asking this question. What's the interplay between the FCRA and the FHA? I take it you can have items that are 100% reportable under the FCRA, but plaintiffs claiming that they are still violating the FHA.

Tim St. George:

Yes, that's the theory. A lot of my clients, for instance, are reporting in a way that is 100% consistent with the Fair Credit Reporting Act. So, negative credit or criminal information that hasn't resulted in a conviction, is not being reported after seven years, bankruptcies for 10 years, and criminal convictions are being reported in perpetuity. All of which are fully allowed under the Federal Fair Credit Reporting Act. So, there certainly is an argument and one that I think is persuasive, and that we made. That if you're reporting consistent with the Fair Credit Reporting Act, that's a policy judgment that should be respected as a legitimate non-discriminatory practice under the Fair Housing Act. I will say that, generally, however, the Fair Housing Act is not going to be preempted by the Fair Credit Reporting Act, and the plaintiffs' bar will argue that, consistency with one statute does not necessarily insulate you from an alleged violation of the other.

Dave Gettings:

At this point, there aren't many decisions on it because it's a relatively new area of law as applied to the CRAs.

Tim St. George:

That's correct. There aren't many decisions on this. There's really only been a couple cases that have proceeded at length and have reached a decisioning phase. As I mentioned, there was the one multi-week FHA trial that we were involved in for a tenant screening company, where we actually got to final judgment. Judgment was entered in favor of the tenant screening company. As you mentioned, Dave, at the outset, I actually argued that case before the Second Circuit just a week and a half ago. So, we should be getting a Second Circuit decision. The argument before the Second Circuit was really whether the District Court properly found facts and applied the correct legal standards to whether or not the tenant screening company had caused housing to be unavailable based on the way that it had set up its software, and its recommendation products.

Ultimately, we were able to marshal the facts in our favor and show that it was simply a configurable software product that was being offered and all of the decisioning, and any denial of housing was all happening on the back end, and controlled completely by our customers. There's another case that recently resulted in a settlement, a class settlement where that targeted the credit side of the house. And the claim was that the screening company was not accounting for vouchers in determining its credit-like scoring product. There were denials that were being made on the basis of credit that traced largely back to the consumer's income. When in reality, the consumer's income was essentially inconsequential given the voucher.

So, that was a very narrow attack on the credit system in the context of vouchers. It did survive a motion to dismiss, but ultimately, the case resolved in a settlement fairly shortly thereafter. So, there weren't any findings of facts that were ever made. Beyond that, there's a fair number of federal, state, and local investigations that are going on directly for consumer reporting agencies, including tenant screening companies where these types of disparate impacts like allegations are certainly floating around and being made. But I'm not aware of any that have bubbled up yet, to the point of an enforcement action, but we'll see.

I think a fair number of eyes are on the Second Circuit right now in terms of how the Second Circuit will resolve the issues before it, in a case that was very much seen as a bellwether proceeding, and they had a lot of industry support behind it, including from the Department of Housing and Urban Development, and the Department of Justice, who jointly filed an amicus brief before the Second Circuit.

Dave Gettings:

You mentioned the second ago, Tim, the idea that the property is the one making the decision. Why does it matter in terms of applicability of the FHA?

Tim St. George:

It matters in two ways, Dave. The first is, if you look at the plain text of the statute, the statute only applies to those entities that make housing unavailable, that make a dwelling unavailable to actually use the text of the FHA. So, there's the statutory threshold. But even if the statutory text didn't compel that conclusion, there's a very settled body of law under the Fair Housing Act that speaks in terms of causation. So, you have to be the entity that caused housing denial and proximately caused the housing denial.

In 2018, the Supreme Court addressed that standard in a case called the *City of Miami*. In doing so, the Supreme Court held that a foreseeable denial isn't enough. There has to be a direct relation between the actions of the defendant and the housing denial. That's not to say that there can't be multiple proximate causes of a housing denial. I mean, that is well-established within the law, but causation, and a very strong showing of causation under Supreme Court precedent is required. So, it matters in that way as well. Whether you view it as a requirement of the statutory text, or as just an element of the claim that is equally well-established, you can't show that the consumer reporting agency caused the denial based on the facts of the relationship and how the product is set up, and how it's understood to operate, then you can't have FHA liability.

Dave Gettings:

Got it. It's really a threshold issue with respect to FHA liability for the most part.

Tim St. George:

It's a threshold issue, and if it's not a threshold issue, it's just an element of the claim. Either way, it's critical.

Dave Gettings:

Yes. A lot of our clients and listeners probably hang on to the end to talk about compliance steps tenant screeners can take to help protect themselves, although probably not fully insulate themselves from liability. What are some steps you've seen, either from a compliance perspective or in the litigation that tend to help defend these cases?

Tim St. George:

Yes. Thanks, Dave. So, the first thing I'll note is that compliance here is important. We have a couple court decisions. We have the one judicial victory right now that's currently on appeal. But I will note that the regulatory environment, at least under the current Biden administration, is quite hostile. The CFPB and the FTC have both issued joint guidance with HUD and the DOJ, where they indicate their views that tenant screening companies or consumer reporting agencies can and should be held liable under the Fair Housing Act.

In addition to the plaintiff's bar, this position is being adopted by the applicable regulators. As I mentioned, there's a fair number of investigations that are underway on these grounds, specifically. So, if you don't already have a compliance management program in place that accounts for the FHA, you really should. This is something that you need to pay attention to in connection with potential civil actions, but also, for potential CIDs and investigations. So, the way I would drive a compliance program in this area, of course, it's going to be hyper specific to the facts of any individual client. But I think there's a couple of things you should think about in terms of a really broad-brush approach and the factors that would drive any investigation.

The first is, you might want to consider a testing program for disparate impact. Is my algorithm as it's operating right now having a disparate impact on minority populations? There are complications to running that analysis to be sure because lots and lots of consumer reporting

agencies do not receive for instance the race of the applicant, and they would certainly not use it in any way.

Dave Gettings:

And they don't receive it on purpose, I think, to avoid some of these issues.

Tim St. George:

Exactly, they don't want it. But recognize that there are lots of other ways that

disparate impact would be tested by the plaintiff's bar or by regulators. There's a lot of geolocation data. There's a lot of information that can be gleaned from last names and census information. So, there are a fair number of tools that would still exist within the pool of PII that you're probably receiving, that could allow testing for disparate impacts to occur to just see what the current state of your systems might be. And whether or not there could be things that could be tweaked to avoid potentially even being subject to that step one of the burden shifting analysis, which is a prima facie statistically significant showing of disparate impact.

I would recommend that you do this analysis with counsel so that you can get the best advice and do it in a protected environment. The other thing that I think is really critical in this context is just recognizing how your suite of products operates and how you intend it to be used in educating your customer base in those regards. If you have a product that is, for instance, issuing some type of recommendation or issuing a score, you want to make sure that your customers know that it's simply a recommendation, that it's a score, that the thresholds are up to their determination, that the product is configurable, that they should be following fair housing law. For instance, the contractual term in that regard could go a long way. Training can go a long way.

Just imagine yourself building this trial-related narrative, which is what we did, based on the facts that we had, and we had good contractual terms, we had good training, we had good guardrails in terms of customer use, and who was doing the decisioning, and we were able to marshal all of those facts ultimately for our successful resolution. And I will say, this is a very tried and true area of compliance, but take consumer disputes seriously and make sure that you have a specific path for escalation or SOPs around individuals who claim discrimination. So, if someone writes in and says that they believe they've been discriminated against or they mentioned the Fair Housing Act, or something along those lines, taking that dispute very seriously and with care can go a long way to hopefully avoiding any lawsuit that claims discrimination or claims disparate impact.

Ultimately working the process to the extent you can, of course, as the CRA is to your benefit. And having defined policies around claims of discrimination, I think is also important in this day and age. Think about how your products are marketed and how customers use them, what contractual terms you have in place, what testing you might want to do, and how you interact with consumers who feel aggrieved. All of those are the basic building blocks. From there, we can get very, very granular in terms of marketing materials and default settings for products. In particular, criminal categories. There's a lot to consider, but those are the high-level guideposts that I would offer.

Dave Gettings:

Yes. I think, based on what I've seen in testing, be prepared to make tough decisions too, because a lot of this testing can reveal things that, like we talked about earlier, are completely neutral with no animus, yet there's a potential for someone to argue they've got a disparate impact. People sometimes are surprised when they do their testing and need to make sure they're prepared to make some tough decisions either way.

Tim St. George:

Yes. I mean, look, a lot of this stuff has significant business ramifications too. If a consumer reporting agency decided that it believed it was no longer, for instance, going to report a particular category of criminal records, then recognize that that can have business impact and it's at a competitive marketplace. So, it's always a tightrope, of course, with compliance between following the law. But when you get into these gray areas and you're talking about things like legitimate business justifications and less discriminatory alternatives, there are choices that are going to have to be made, and those choices are going to

have to consider compliance risks, but also the practical business considerations of not reporting, which can be negative.

To your point, Dave, failing to consider certain variables on the credit side has very real ramifications for your clients. That's something that just has to be considered and discussed.

Dave Gettings:

Yes, I think that makes sense. Well, I think we'll wrap it up today. Tim, appreciate your time. We'd like to thank everyone for listening to the podcast today. Don't forget to visit our blogs, ConsumerFinancialServicesLawMonitor.com and TroutmanPepperFinancialServices.com. Please subscribe to our podcast at all of your favorite podcasting locations. Thanks for listening and thanks for the time, Tim.

Tim St. George:

Thank you, Dave, appreciate it.

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