
FCRA Focus: The Kirtz Decision: FCRA and Government Liability Unpacked**Hosts: Dave Gettings****Guest: Jonathan DeMars****Date Aired: May 14, 2024****Dave Gettings:**

Hey, everyone. Welcome to another edition of *FCRA Focus*, the podcast that discusses all things credit reporting.

Today, we've got a special guest. Jon DeMars is an attorney in Troutman Pepper's Consumer Financial Services Practice Group. Jon handles a lot of FCRA cases with me. He is an expert in most things FCRA. Sorry to try to oversell you, Jon. But the most important thing about Jon is he is a die-hard Mets fan. If anyone has listened to the podcast before, they know I am a long-suffering Mets fan. So, they know Jon can commiserate. Apparently, Jon has been to a lot of really classic Mets games, including the 2006 NLCS, which we talk about frequently.

Today on the podcast, we're going to focus on one case specifically. From time to time, we like to just focus on one case that may be important and that clients and listeners can put into practice and sort of assess how it affects them. Today's case, we're going to talk about is the *Kirtz* case. It's a case that came out of the Supreme Court in 2024. We actually don't get that many Supreme Court decisions on the FCRA. When we do, we think it makes sense to talk about them. That case deals specifically with whether the government can be held liable under the FCRA.

Without further ado, I will kick it over to Jon to introduce himself and say one interesting fact about himself for our listeners to put them on the spot. Then we'll go from there. Jon, welcome.

Jon DeMars:

Thanks, Dave. The only thing I'll disagree with there is that I'm a Mets fan. I've been to a lot of important Mets games, but I don't count myself as one of their faithful.

Dave Gettings:

I'm sorry. Before we pass over that, so what team do you root for?

Jon DeMars:

Well, canonically, I'm a Yankees fan. But we have Mets fans in the family, and I have no ill feelings for any Mets fans.

Dave Gettings:

Let me understand this. You've been to way more games and cooler games than I have. Yet you put yourself in the category of Yankees fans. Is that right?

Jon DeMars:

Yes, that's right.

Dave Gettings:

All right. We will talk about this offline, Jon.

Jon DeMars:

Great.

Dave Gettings:

Jon, tell us something else interesting about yourself before we start on credit reporting.

Jon DeMars:

Sure. Maybe one interesting fact is I've been running a lot outside of work, and I'm currently training for a triathlon this June.

Dave Gettings:

Oh, nice. What is your best event in the triathlon?

Jon DeMars:

I'd like to say it's cycling, but I think just finishing the race is probably enough of an accomplishment for now.

Dave Gettings:

Is the triathlon in Richmond or somewhere else?

Jon DeMars:

It is in Maryland.

Dave Gettings:

Nice. Tell the listeners, Jon, a little bit about your practice, what you tend to focus on from an FCRA perspective, so they can know where you're coming from.

Jon DeMars:

Sure. I've handled a couple different kinds of FCRA cases for clients here. The first are Section 1681s-2(b) claims, which is the kind of case that we're talking about today. I've also handled cases regarding whether a user has a permissible purpose to access someone's credit report and also just a handful of furnisher-type cases that also come under the statute.

Dave Gettings:

You've also got a significant background in white collar and government investigations, right?

Jon DeMars:

That's right. I've been an attorney going on six years. For the first four and a half years of practice, I was a white collar and government investigations defense lawyer with another firm.

Dave Gettings:

Got it. All right. Let's dive right into *Kirtz*. I'll just give the listeners a little bit of background on *Kirtz*. The plaintiff is Reginald Kirtz. Mr. Kirtz obtained a loan from the Rural Housing Services or Rural Housing Service, which is a division of the Department of Agriculture. Of course, the Department of Agriculture is a federal agency within the executive branch. Mr. Kirtz pled that he paid off his loan in full by mid-2018. At the district court, he alleged that his credit report showed the account was closed with a balance of zero.

However, the USDA continued to report the payment status as the account being 120 days past due. For those avid listeners, you know the payment status was a significant point of litigation in many circuits, including the Third Circuit in terms of whether the payment status historically was a historical element of data or a current element of data. But that's another episode. Plaintiff in *Kirtz* argued that the credit reporting was false on its face because the account could not have been simultaneously closed with a zero balance and also be past due.

We disputed the credit reporting with the agency and alleged that both the USDA and the agency had failed to undertake a reasonable investigation and update the status of the account. As often happens, he filed a lawsuit against the consumer reporting agency at issue and the Department of Agriculture in October 2020, alleging that the defendants had violated Section 1681s-2(b) of the Fair Credit Reporting Act.

Jon, I think that's a fair catch up to where we are. Let's talk a little bit about the background of the FCRA under s-2(b) that gives rise to these claims maybe for listeners who haven't been doing this for a long time.

Jon DeMars:

Sure. Well, the Fair Credit Reporting Act was first set up by Congress in 1970. Under the original version of the statute, it created duties for credit reporting agencies, charged them with ensuring accuracy and confidentiality of consumer information. The statute also focused on users of credit reporting information, which it defined as "persons". There it was talking about the people that basically rely on credit reports to make business decisions.

Again, back in 1970, "person" was originally defined to include any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency or other entity. Again, pretty broad. Under this original version of the statute, consumers were authorized to seek damages against credit reporting agencies and users of credit reporting data.

Skipping ahead a little bit, we kind of rejoined this story in 1996. In 1996, Congress passed the Consumer Credit Reporting Reform Act, which created new duties on “furnishers of information.” Those new duties set forth the modern approach to claims asserted under 1681s-2(b). In general, and frequent listeners will be very familiar with this process, if you're a consumer and you believe that you have something that's inaccurate in your credit report, the statute sets up a dispute process where you can contact the credit reporting agency. They're going to investigate. They send the dispute over to the person that originally provided that information. Then the furnisher is supposed to investigate, review all the information that's provided. If they discover anything is false or needs to be updated, then the statute requires them to do so.

Dave Gettings:

All right. Perfect, Jon. Thanks for the background. Let's just skip ahead to the basis of the arguments at issue in the district court. We don't have to cover the entire case in detail. But just at a high level, what was the issue the district court faced with respect to the government's motion to dismiss? Then we'll eventually get to the Supreme Court.

Jon DeMars:

Sure. Well, Mr. Kirtz filed suit in the Eastern District of Pennsylvania, and he named the Department of Agriculture as a defendant. The government came in to represent the Department of Agriculture and filed the Rule 12(b)(1) motion to dismiss, arguing that the federal government had not waived sovereign immunity under the Fair Credit Reporting Act.

Dave Gettings:

Meaning the federal government took the position that it could not be sued in a private cause of action, right?

Jon DeMars:

That's right. The basis of its 12(b)(1) motion to dismiss is that the court did not have any subject matter jurisdiction to decide Mr. Kirtz's claim. The case comes before District Judge Mitch Goldberg, and he kind of wades into this issue and sees that there's a pre-existing circuit split on whether the government has waived sovereign immunity in the context of the FCRA. On one hand, you have the Fourth and the Ninth Circuits which hold that there's no sovereign immunity waiver. On the other hand, you have the Seventh Circuit finding that there is a waiver.

Dave Gettings:

Let's dig in a little bit. The district judge highlighted the circuit split. What were those differing opinions in the circuits, and what were they based on?

Jon DeMars:

Sure. Well, in the Ninth Circuit, the court kind of looked at the potential results that would occur if the government was able to be held liable under the FCRA. It would occur if you read the term “person” to include government agencies.

Dave Gettings:

You're referencing "person" because "person" is definitionally part of the FCRA's definitions, correct?

Jon DeMars:

That's right. The statute authorizes basically damages against any person who fails to update their credit reporting in response to one of these disputes. Under the original version of the FCRA, the statute contemplated criminal liability but not civil liability against a person. When this same dispute came before the Ninth Circuit, that court said, if you read a person to include the United States, your position is that when Congress wrote the law, it intended to waive immunity only for the purposes of criminal prosecution, which would be absurd in the Ninth Circuit's telling.

Break that down a little bit. They're basically saying one government agency or the Department of Justice can go out and hold another branch or division of the United States government criminally liable under that interpretation of the statute, and that's absurd. Relatedly, that position also creates the possibility of punitive damages being assessed against the government. That did not withstand muster.

Dave Gettings:

All right. To cut to the chase, at the district court, Jon, ultimately, the district court granted the government's motion to dismiss, finding that the government did have sovereign immunity to be sued in an FCRA case, correct?

Jon DeMars:

Yes, that's right.

Dave Gettings:

Then we get to the Third Circuit. I wanted to talk a little bit about what happened at the Third Circuit before we get to the Supreme Court.

Jon DeMars:

Sure. Well, the Third Circuit unanimously reversed, and it started its opinion off with I thought an interesting sentence which says there are profound implications to throwing open the doors to the United States Treasury. Before we do so, we need to be sure that is what Congress intended. That kind of header line is referring back to the possibility of punitive damages being available to private litigants who sue the government.

Here, I think the Third Circuit panel set aside some of the absurd results that were prominent in the district court's reasoning, and it focused it on the language of the statute itself. It lists government or government agency as a person. So, if you apply the traditional rules of statutory construction and the first thing you do is see if it leads to ambiguous results. If the results are

not ambiguous, you simply apply the waiver of statutory immunity or sovereign immunity as written. If the result is ambiguous, then courts are freer to consider the possibility of immunity.

Dave Gettings:

What did the Third Circuit ultimately decide before we got to the Supreme Court?

Jon DeMars:

Well, it took a look at some of the arguments that the district court found persuasive and ultimately rejected them. As I said, unanimously overturn the district court opinion and permitted the suit to go forward.

Dave Gettings:

Against the government agency.

Jon DeMars:

That's right.

Dave Gettings:

Eventually get to the Supreme Court, and it turns out to be a 9-0 decision by Justice Gorsuch, correct?

Jon DeMars:

That's right.

Dave Gettings:

Ultimately, what did Judge Gorsuch decide and really just turned on the definition of person under the FCRA, right?

Jon DeMars:

That's right. I think I'm used to reading very long Supreme Court opinions, and this is not one of them. I think we get to the bottom line by page seven of the opinion. Reading it, you really have a sense that the Court is almost incredulous. I think pretty much everyone understands that we have a very text-first Court. That Court looked at the statutory definition. It looked at the architecture of the statute and basically concluded very quickly that the FCRA does contain a waiver of sovereign immunity. For that reason, the government can be sued.

Dave Gettings:

Yes. Makes sense, especially when you look at the textual Court and the use of the word "person" and the way the statute defines "person". A lot of our listeners are probably not working for government agencies and probably not working for the US Department of Agriculture. Let's

talk a little bit about practical impact for private entities, now that the government can be sued under the FCRA. A lot of times, our listeners are just looking for takeaway messages.

I actually found one of these takeaway messages pretty quickly after the decision. I was litigating a case for a consumer reporting agency. We were trying to reach a settlement related to the reporting of a loan that involved the U.S. Department of Education. The plaintiff's counsel in that case ultimately agreed to our settlement number because he said, well shoot. I can now go sue the U.S. Department of Education and get whatever money I'm not getting from your client.

I think one of the most significant practical impacts for our clients and for private parties is that there's now another pocket and remarkably a deeper pocket than what a lot of plaintiff's counsel think our clients are. One takeaway is if the case potentially involves the government entity, plaintiff's counsel may conceivably be more willing to settle quicker if they think they can go after the government who's got a deeper pocket. Jon, what do you think the other takeaways are from your perspective for private parties?

Jon DeMars:

Well, I think there's a big one which deals with basically how the federal government reacts to adverse decisions from the United States Supreme Court. A few years ago, one thing the Supreme Court did was find that a statute of limitation applicable in the securities context applied to the United States Securities and Exchange Commission when they were going out to seek remedies. In response to that, the government wanted to do pretty much as little as possible to preserve their rights as much as possible. What it started doing was requiring private litigants to sign tolling agreements much earlier in the investigative process.

I think in this context, the overall approach is going to be somewhat similar. The government does not want to create additional exposure under the FCRA to the extent that it can be mitigated. The easiest way for it to do that is to limit the information that it provides to consumer reporting agencies. One possible reaction here is that the government is going to reduce the amount of information that it supplies to the ecosystem. The net effect of that would be to degrade the information that's available to users of credit reports. There would be in a sense less information available when a business is making a decision, whether to write an insurance policy, whether to restrain credit and for all the other uses of a credit report.

Dave Gettings:

Yes. I think that that makes sense, and I think that's probably likely to happen. Two other ramifications I was thinking about when the decision came out is, one, are clerks' offices more likely to get sued now because so many of our cases in the tenant-screening space and the employment-screening space relate to the accuracy of information coming out of the courthouse. So is it possible we'll see disputes to local courthouses? I don't know, but I think that this decision certainly opens up the door to it.

Another practical consideration I was thinking about was, are we going to see more claims that government agencies are consumer reporting agencies? Because as you mentioned "person", "person" is used in the definition of consumer reporting agency. I know it's not the only element of the definition, but it is one. For example, are we going to see cases suggesting the FMCSA,

the Federal Motor Carrier Safety Administration, is a consumer reporting agency because it does produce consumer information on truck drivers, for example?

I think there's a lot of ground that we've yet to cover and a lot that will need to be unpacked. But I do think this decision is interesting not only for our private party clients but for the ramifications it's going to have on them if the government is subject to lawsuits under the FCRA. Jon, any more parting thoughts from you?

Jon DeMars:

Yes. I guess my last thought would be, of course, however unlikely Congress could decide to amend the FCRA in response to this decision. It may ultimately depend on just how liable the government is in this new world where it can be sued freely.

Dave Gettings:

Yes, I think that makes sense. All right, Jon. We appreciate your time. Thank you for your inaugural visit to the *FCRA Focus* Podcast. I'd like to thank everyone for listening to the podcast today. Don't forget to visit our blogs, ConsumerFinancialServicesLawMonitor.com and TroutmanPepperFinancialServices.com, for all sorts of up-to-the-date information on all things consumer financial services, not just credit reporting. Please subscribe to our podcast at all your favorite podcasting locations. Thanks again for listening. Take care.

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