



# Get This Target Off My Back. How To Mitigate Your (and your client's) Risk of Being Named In the Next FCRA Class Action

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## Agenda

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### Hot Topics against CRAS:

- New Claims Targeting Section 613/1681K
  - Criminal Records
  - Public records in credit reports
- Credit Reports Being Targeted
- Permissible Purpose Challenges
- Data Providers Being Targeted as CRAS
- Dismissed Charges
- Full File Disclosures
- Certifications Challenged

### Hot Topics Against End-Users:

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## Challenges to 613/ 1681k

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- For all Public Record information for Employment purposes only, law requires EITHER:
  - At the time notice; **OR**
  - maintain **strict procedures** designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is **complete and up to date**
- The term up to date is current public record at the time
- The term "complete" is not defined
- Plaintiff's counsels arguing that NO CRA can meet the "strict procedures" prong because the information it reports is not "complete"
- Lawsuits don't allege failure to comply with "strict procedures" but instead say no notice was given so CRA violates law. CRAs defend generally by stating: we send notice or strict procedures.

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## Challenges to 613/ 1681k: Criminal History

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Theory is still developing: (changed multiple times in recent litigation)

- Plaintiff's claim that the information by data providers (national/multi-state databases) doesn't have certain data like: SSN, address or year of birth
- That going to the online repository isn't complete because it doesn't have certain data
- Argument confuses accuracy requirement of 607 with completeness. See *Henderson v. HR Plus* and *Henderson v. CoreLogic* (E.D. of VA)
  - We've argued that as long as the information relating to the record is complete that is all that matters—not a requirement that all the information in the record (ie height, weight, race, eye color, etc.)
- At least 4 class action lawsuits brought against CRAS
- Motion for Summary Judgment pending
  - Consider issues relating to "willfulness"

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## Challenges to 613/ 1681k: Credit History

Not only criminal history being challenged, now public records in Credit

Resellers are a “type” of CRA under FCRA, so must comply with 613.

- Being sued alleging failure to either: send at the time notice or strict procedures.
- At least 3 cases alleging this theory.
- New and novel theory early stages of litigation
- Credit Bureaus send notices to consumer so should cover CRA (but what if they don't) and Plaintiff's argue that doesn't matter

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## Response to Challenge Re 613/1681K

- Consider sending notices for all public record “hit” information
  - any criminal record
  - Judgment/Liens, etc. (any public record) in a credit report
- Determine how you will meet the “at the time” threshold
  - Challenges to same day processing of reports
  - Who will mail (internal or service)
  - How you will mail them (hard copy or email)
  - E-Sign concerns

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# Challenge to Reasonable Procedures for Credit Reports under 607/1681e(b)

CRA's while Resellers are also CRA

- Plaintiff's arguing Instant reports with no procedures to assure "accuracy" or up to date or complete
- Contracts with credit bureaus prohibit you from changing information
- No filtering information

Steps to Mitigate Risk:

- Consider separating credit reports from everything else
  - Allows for "pass through" theory
- Use different bureaus and analyze and then choose one.
  - Argument is that you did due diligence to ensure accuracy by comparing data from each
- Consider not doing tri-merge if you currently do
- Stop offering credit reports

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# Permissible Purpose

Permissible Purposes being challenged

- End User agreements/MSA's saying one thing while forms and documents say something else
- Failure to have permissible purpose at all
- Multi-use end users without separating of accounts
  - Employment has higher responsibility
  - If using for multiple purposes consider separating orders or accounts

Steps to Mitigate Risk:

- Consider separating accounts for users with multi use
- Only allow one permissible purpose for company
- Ensure certification of permissible purpose each time report is ordered
- Audit to ensure actual purpose is what you think it is

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## Data Providers/Furnishers Being Sued

- Data Providers and Furnishers are being challenged arguing they are CRAs
- Multiple lawsuits currently pending
- “Assemble or evaluate” information
- Based on where you market/clients, you “know” the permissible purpose
  - Similar to argument by FTC that marketing may cause the FCRA to apply
- Claims under 607 (Reasonable procedures); 604 (Certification), etc.

### Steps to Mitigate Risk:

- Don’t combine records
- Each record is independently passed through

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## Dismissed Charges and Non-Convictions

### Non-Convictions over 7 years being challenged

- CFPB and FTC’s argument is that the date of the charge or file starts the clock
- Moran v. Screening Pro’s still pending—but regulators view is clear

### Dismissed cases

- Seven year applies as these are non-convictions. Consider what is measuring date (ie: date of charge)
- What if there is a conviction attached in same case?
  - Challenges to these cases specifically
  - Open question but potential great risk
  - Many new cases especially in CA on this issue

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## Free File Disclosures

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More litigation under Section 609, free file disclosures

Does not only apply if you are a NCRA or NSCRA, but applies to ALL CRAs

- 612 applies to limited group, but 609 to all CRAs

No time limit (but recommend 30 days)

“File” is defined extremely broadly

Cases alleging these claims even when you don't have record or information on an individual.

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## Certification Challenges

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Increased Litigation Related to User Certification:

- Allegations that state law certifications were not explicit
  - CA cases
- Allegations that CRAs did not take “reasonable procedures” to ensure the permissible purpose OR obtain required certifications from users;
  - One time may not be enough
  - Consider each order or audit function
- Information in reports is being used to violate Federal or State equal employment opportunity law or regulations
  - N.Y. Cor. Law Article 23-A / Title VII
- Claims Asserting that CRAs lack sufficient certification
- Sample forms that are “noncompliant” used to argue that certification is not valid

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## Everything else

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Continued Challenges to Disclosures and Authorizations with “extraneous information”

Enough case law to argue “willfulness”

Adverse action letters being challenged as to language and timing (CRAs and End users)

Goode and Goodman Case Settles—CRA as an end user/making adverse determinations when adjudicating

Additional case law/Courts acknowledging reasoning

But FTC unofficially disagrees with reasoning

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## QUESTIONS

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