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ARTICLES

# Fair Credit Reporting Act Class Actions: Standing and Class Certification in the Wake of Pitre v. Wal-Mart Stores, Inc.

Defendants facing an FCRA class action may launch a factual attack on standing similar to the one that was successful in Dolison v. SavaSeniorCare Administrative Services.

By Steven Moore and David Yudelson



In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the U.S. Supreme Court described a certified class of one and a half million plaintiffs asserting claims that Wal-Mart's female employees faced discretionary, but systemically discriminatory, decisions about pay and promotions as "one of the most expansive class actions ever." *Id.* at 367. The colossal class in *Dukes* could not remain a class, however, because a common question capable of class-wide resolution did not exist, and the outsized class threatened Wal-Mart's ability to litigate individualized defenses against so large a field.


But on January 17, 2019, in *Pitre v. Wal-Mart Stores, Inc.*, No. SA CV 17-1281, 2019 WL 365897 (C.D. Cal. Jan. 17, 2019), the Honorable David O. Carter certified a class of *five million* current, former, and prospective employees of Wal-Mart who applied for jobs with Wal-Mart as far back as June 2012 and who all claim now that Wal-Mart violated 15 U.S.C. § 1681b of the Fair Credit Reporting Act (FCRA) when Wal-Mart allegedly failed to disclose to them—in a "stand-alone document" that consists "solely of the disclosure"—that a consumer report would be obtained. The class alleges that when they applied for jobs, Wal-Mart performed a background check without proper and legal authorization from the plaintiffs because the FCRA disclosures they were provided contained extraneous information, which violated Federal Trade Commission (FTC) guidelines that disclosures must be both "clear and conspicuous" and "not be encumbered by any additional information other than the disclosure itself." *See* FTC 1997 Advisory Opinion to Steer ("[A] [disclosure] document should include nothing more than the disclosure and the authorization for obtaining a consumer report."); FTC 1998 Advisory Opinion to Leathers ("A disclosure that is combined with many items in an employment application—no matter how "prominently" it appears—is not "in a document that consists solely of the disclosure. . . .").

FCRA class actions alleging violations of the stand-alone document requirement led to notable seven-figure settlements in 2018:

- Costco paid $2,490,000 to settle an FCRA class action involving claims that Costco failed to use proper stand-alone disclosure notices to obtain background reports about job applicants.
- Petco Animal Supplies, Inc., agreed to pay $1.2 million to resolve roughly 37,000 individuals' claims that Petco's web-based job application contained a disclosure with a broad authorization for "any person" to provide "any and all information" to the consumer reporting agency, in addition to information relating to the laws of seven different states.

- Omnicare, Inc., shelled out about $1.3 million to more than 50,000 class members based on claims that its FCRA disclosure and authorization form contained a liability waiver that constituted "extraneous information."

- Frito-Lay, Inc., recently agreed to pay about $2.4 million to resolve roughly 38,000 class members' claims, relating to the following allegedly extraneous statement: "I have been given a stand-alone, consumer notification that a report will be requested and used for the purpose of evaluating me for employment or retention as an employee."

In the face of these settlements, the decision in *Pitre* cannot be ignored or overstated. Considering the text of the FCRA, the newness of the *Pitre* decision, and the shifting landscape of opinions surrounding what satisfies standing requirements under the FCRA after *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), this article examines the outcome of *Pitre*, set against the strategy and outcome reached a month later in *Dolison v. SavaSeniorCare Administrative Services, LLC*, No. CV 15-3135, 2019 WL 588699 (E.D. Pa. Feb. 13, 2019), which involved only an alleged section 1681b claim and in which the defendant met the plaintiff's motion to certify a class of 5 million with a successful Rule 12(b)(1) motion to dismiss for lack of standing.

## Defensive Maneuvering from Both Sides in FCRA Class Actions

The FCRA was enacted in 1970 "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). The FCRA imposes a host of requirements concerning the creation and use of consumer reports. In particular, section 1681b of the FCRA requires that (1) a "clear and conspicuous" disclosure be made to applicants and (2) the disclosure be made "in a document that consists solely of the disclosure." *See* 15 U.S.C. § 1681b(b)(1)(A)(i).

In the past, companies were often able to defeat claims alleging violation of the FCRA stand-alone requirement at the pleading stage with Rule 12(b)(6) motions, often obtaining court rulings that treated the claims as alleging nothing more than "a bare procedural violation" and insufficient to state a claim for relief under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). *See, e.g.*, *Lee v. Hertz Corp.*, No. 15-4562, 2016 WL 7034060, at *5 (N.D. Cal. Dec. 2, 2016) (holding that alleging disclosure form contained "extraneous" information was insufficient, without more, to demonstrate standing); *Nokchan v. Lyft, Inc.*, No. 15-3008 JCS, 2016 WL 5814287, at *9 (N.D. Cal. Oct. 5, 2016) (holding that allegations that disclosure form contained extraneous information and that defendant failed to inform plaintiff of right to request summary of rights were insufficient to create standing).

But plaintiffs like those in *Pitre* got creative and started relying on the FTC opinions on the stand-alone document requirement and *Spokeo*'s concepts of "informational injury" and "right to privacy" to overcome Rule 12 (b)(6) motions, which has left employers with little margin for error if seeking dismissal at the pleading stage. *See, e.g.*, *Sharp v. Technicolor Videocassette of Mich., Inc.*, No. 2:18-CV-02325-CGC, 2019 WL 168402, at *2 (W.D. Tenn. Jan. 10, 2019) (denying motion to dismiss where allegations included claim that extraneous information in disclosure precluded employer from taking adverse action based on the report results because information was obtained without statutory disclosure); *Meza v. Verizon Commc'ns, Inc.*, No. 1:16-CV-0739 AWI MJS, 2016 WL 4721475, at *3 (E.D. Cal. Sept. 9, 2016) (overruling 12(b)(6) motion and concluding that allegation that defendants procured a consumer report on plaintiff that did not involve providing Meza with a document that consisted only of the required clear and conspicuous disclosure sufficiently alleged Meza was affected "in a personal and individual way"). And 12 days after the opinion in *Pitre* was released, the Ninth Circuit reversed a summary judgment order in favor of the defendant in *Gilberg v. California Check Cashing Stores, LLC*, concluding in part that "the statute meant what it said: the required disclosure must be in a document that 'consist[s] 'solely' of the disclosure'" and that "the ordinary meaning of 'solely' is '[a]lone; singly' or '[e]ntirely; exclusively.'" *See* 913 F.3d 1169, 1175 (9th Cir. 2019) (adding that the fact "[t]hat other FCRA provisions mandating disclosure omit the term 'solely' is further evidence that Congress intended that term to carry meaning in 15 U.S.C. § 1681b(b)(2)(A)(i)").

## The Class Certification Decision in *Pitre*

Randy Pitre was employed by Wal-Mart as an hourly, nonexempt employee from early November 2015 through mid-August 2016. Two additional class representatives, added at the time of class certification with leave of court, include Cassandra Walters, who

applied and was hired for a job with Wal-Mart around February 2014, and Desirae Wilson, who applied and was hired for a job with Wal-Mart around December 2017. Collectively, their claims included allegations that Wal-Mart willfully included extraneous information in its disclosure forms and procured investigative reports or caused investigative consumer reports to be procured without informing class members of their rights to request a written summary of their rights under the FCRA. *Pitre*, 2019 WL 365897, at *1.

The district court found that the roughly 5,000,000-member class size satisfied Rule 23's numerosity requirement, that plaintiffs' claims that they suffered injury from Wal-Mart's use of a multipart background check containing extra language made their claims typical of the larger class, and that the three plaintiffs were adequate representatives who would vigorously pursue those claims. As for commonality, the court determined the question of law or fact common to the class was whether "all class members received improper disclosures regarding the background check that was to be performed by Wal-Mart (or agencies with which it contracted), and that such disclosures violated state and federal law[.]" *Id.* at *5. And the court found the proposed class satisfied Rule 23(b)(3)'s predominance requirement because the legality of Wal-Mart's forms comprised "the near totality of issues that will need to be decided to resolve this matter on the merits." *Id.* (whether Wal-Mart's disclosures "are stand-alone and clear and conspicuous is determinative of whether [Wal-Mart's] conduct is violative of state and federal law"). Finally, the court concluded the 5,000,000-member class met Rule 23(b)(3)'s superiority requirement, reasoning that whether Wal-Mart's "form disclosures were lawful is a singular question that can be adjudicated based on the disclosures themselves rather than individualized inquiries as to each class member's experience." *Id.* at *6.

## The Dismissal of Plaintiff's Section 1681b Claim in *Dolison*

The shift in some courts toward allowing alleged stand-alone violations of the FCRA to proceed past the pleading stage and class certification analysis calls for a retooling of the approaches toward challenging these peculiar FCRA claims asserting that receiving too much information about their legal rights caused the plaintiffs to become confused or leave them unaware that a consumer report is being sought. Enter the February 13, 2019, decision in *Dolison v. SavaSeniorCare Administrative Services, LLC*, No. CV 15-3135, 2019 WL 588699 (E.D. Pa. Feb. 13, 2019).

In *Dolison*, the defendant faced a motion for class certification from a plaintiff alleging only a section 1681b violation of the stand-alone disclosure requirement. But unlike what happened in *Pitre*, the defendant in *Dolison* opposed certification and launched a "factual attack" under Rule 12(b)(1) for lack of standing on the plaintiff's allegations that she was unaware of the disclosure because it came as part of a multipage booklet of documents and that, even if aware, the inclusion of the allegedly extraneous liability waiver in the disclosure also meant the disclosure was not contained in a stand-alone document. The court was careful to note that the defendant's factual standing challenge under Rule 12(b)(1) made the case "distinct" because the plaintiff's allegation that failure to provide a stand-alone document was the source of harm to her provided the court with the benefit of using the factual record in deciding this motion and no presumptive truthfulness attached to plaintiff's allegations. *Dolison*, 2019 WL 588699, at *8.

The court found allegations that the plaintiff was "unaware" of the disclosure not credible because the plaintiff testified in a deposition that she typically read documents before signing them and had signed the disclosures at issue, which she agreed did not omit any of the information required under the FCRA. The court in *Dolison* then concluded that because the plaintiff *did not* testify that she was confused about her rights because the disclosure was on a single page within a multipage booklet or that the addition of extraneous information caused her actual confusion, she had not suffered a concrete injury under *Spokeo*'s analysis and lacked standing to pursue her claims. *Id.* at *9. The court dismissed the plaintiff's claims with prejudice but dismissed the putative, uncertified class's claims without prejudice. An appeal was filed on March 13, 2019.

## Strategic Focus: Start at the End

At the certification stage in *Dolison*, the issue of whether there was a violation of the stand-alone requirement was not relevant to the court's analysis of the Rule 12(b)(1) motion because factual attacks that implicate subject matter jurisdiction typically do not reach the merits of the underlying dispute. *See Turkish Coal. of Am., Inc. v. Bruininks*, 678 F.3d 617, 621 (8th Cir. 2012) ("[S]tanding is a

jurisdictional prerequisite that must be resolved before reaching the merits of a suit."); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007) ("[T]he trial court may proceed as it never could under 12(b)(6) or [Federal Rule of Civil Procedure 56.] . . . Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case."). With facts resembling those in *Dolison*, the defense can consider mounting a significant challenge to a plaintiff's allegations, without having to face the issue of whether or not there is a technical violation of section 1681b.

*Spokeo* teaches that "[a] violation of one of the FCRA's procedural requirements may result in no harm." *See Spokeo*, 136 S. Ct. at 1550 ("For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm."). *Dolison* reconfirmed "that a violation of the FCRA's stand-alone disclosure requirement constitutes a bare procedural violation that is insufficient to create standing" and that "the type of structural variation is exactly the type of bare procedural violation that *Spokeo* warns against." *See Dolison*, 2019 WL 588699, at *10–11 Thus, *Dolison* demonstrates that a discovery plan targeting testimony inconsistent with the allegations can serve to refocus the analysis where it belongs, on what FCRA violation is being alleged and whether or not it can be linked to any harm. *See, e.g., In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.*, No. 2615, 2017 WL 354023, at *7, *10 (D.N.J. Jan. 24, 2017) (dismissing section 1681b claim and reasoning that the fact "[t]hat Michaels did not comply with the stand-alone requirement, unless it resulted in a deprivation of disclosure, adds nothing. Plaintiffs' theory collapses on itself; without the addition of nondisclosure in fact, it is indistinguishable from a bare procedural violation.").

In the context of FCRA stand-alone claims, courts have understood that "a statutory right to information is substantive," but "[a] statutory right to receive that information in a particular format is procedural." *See, e.g., Stacy v. Dollar Tree Stores, Inc.*, 274 F. Supp. 3d 1355, 1362 (S.D. Fla. 2017) ("While Congress chose to require the pertinent FCRA disclosure be in a stand-alone document, it could just as easily have required a particular font, color, type size, or any other distinctive feature. One is no less a matter of form than another, and each is capable of rendering a given disclosure 'clear and conspicuous.'"); *Landrum v. Blackbird Enters., LLC*, 214 F. Supp. 3d 566, 571 (S.D. Tex. 2016).

While the certification decision in *Pitre* rested on the allegations of Wal-Mart's alleged violations of section 1681b, defendants facing an FCRA class action may launch a factual attack on standing similar to the one that was successful in *Dolison* by keeping the focus on the plaintiff's alleged harm and away from whether a disclosure violates section 1681b or not.

*Steven Moore is a partner and David Yudelson is senior counsel for Constangy, Brooks, Smith & Prophete, LLP.*

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