Court Upholds Constitutionality of Fair Credit Reporting Act

By Paul Kharmats*

To the surprise of many in the Consumer Law community, the United States District Court for the Eastern District of Pennsylvania recently upheld the constitutionality of the provision of the Fair Credit Reporting Act ("FCRA") that places limitations on the length of time information may be reported.

The Statute

The FCRA[1] governs the way in which consumer reporting agencies collect, maintain, and disclose consumer reports. Section 1681c, the specific provision of the Act challenged, provides that when producing a copy of a consumer's report, the consumer reporting agency is required to exclude certain items of information, such as "adverse items of information, other than records of convictions of crimes which antedates the report by more than seven years."[2] The statute provides for limited exceptions in which the reporting agency may disclose these otherwise-prohibited pieces of information.[3]

The Challenge

In *King v. General Information Services, Inc.*,[4] the defendant raised the issue of the constitutionality of section 1681c. General Information Services, Inc. ("GIS") is a consumer reporting agency that sells consumer reports to employers wishing to investigate the criminal histories of their job applicants and is regulated by the FCRA.[5] The plaintiff in the case, Shamara King ("Ms. King") applied for a job with the United States Postal Service. In the course of Ms. King's application for the job, GIS sold the Postal Service a background check consumer report that contained ten *nolle prossed* charges from July, 2000 after an arrest for a criminal incident.[6] Ms. King filed suit against GIS on behalf of herself and other similarly situated plaintiffs, alleging failure to comply with §1681c of the FCRA by willfully reporting outdated adverse public information that was required to have been excluded from the consumers' reports. GIS in turn challenged the constitutionality of §1681c on First Amendment grounds.

The Court's Reasoning

The court addressed each of GIS' arguments in turn. The major argument of GIS against the constitutionality of section 1861c, relied on recently "heightened" constitutional scrutiny regarding the dissemination of truthful commercial information, endorsed by the Supreme Court in *Sorrel v. IMS Health, Inc.*[7]. The court in *King* noted that, while the Supreme Court has recognized consumer report information as "speech" for First Amendment purposes in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[8], there are varying degrees of protection afforded to consumer report information depending on whether the contents of those reports are of public or private concern.[9] *Dun & Bradstreet* suggests that when the information in credit reports is only of concern to the speaker and its business audience, and available only to a limited number of subscribers, the information contained in those credit reports warrants a reduced degree of First Amendment protection.[10] The court in *King* found the consumer report information in this case similarly private and specific in its scope of interest, and therefore deserving of reduced constitutional protection.

Turning next to GIS's argument that the *Sorrel* case had reconfigured the standards for analyzing commercial speech, the court noted that the standard of review for analyzing regulations of such speech was "intermediate scrutiny."[11] GIS, on the other hand, urged the court to apply a strict scrutiny standard of review in the instant case, citing *Sorrel*. The court, however, rejected GIS's argument, noting that in *Sorrel*, the Supreme Court looked to *Central Hudson* as the standard for the review of commercial speech precedent.[12] Finding that the Supreme Court would not have adopted strict scrutiny as an express new standard for commercial speech, the *King* court refused to "take … such a leap" without express affirmation from the Supreme Court.[13]

To be sure, the FCRA directly advances a government interest. The statute's purpose is to meet the needs of businesses, which have reasons for performing background checks, while simultaneously ensuring consumer privacy.

The court also limited *Sorrel* to its facts. Noting that *Sorrel* involved the state of Vermont's attempt to "restrain … a certain form of speech communicated by a certain speaker solely because of the State's disagreement with it," on a matter of public concern, the court was not persuaded that the issues in the case at hand were sufficiently of public interest to fall under the reach of *Sorrel*.[14]

With GIS's argument about the *Sorrel* standard refuted, the court continued its analysis of the *King* facts in the light of the *Central Hudson* standard. Thus, the inquiry to be applied to §1681c is whether the statute directly advances a government interest, and does so without excessively restricting freedom of speech. To be sure, the FCRA directly advances a government interest. The statute's purpose is to meet the needs of businesses, which have reasons for performing background checks, while simultaneously ensuring consumer privacy. The court treated these twin purposes as clearly legitimate interests before moving on to an analysis of whether the statute was also narrowly tailored to achieve a balance between the competing interests of the consumers' free speech.[15]

To examine this prong of the commercial speech inquiry, the court turned to the argument of the Government, which had intervened in the case to defend the constitutionality of §1681c. The Government suggested that the restrictions of §1681c were the only means of achieving the proper balance of interests, because "'the speech itself (dissemination of…data) causes the very harm the government seeks to prevent (invasion of privacy)'"[16]. The court looked favorably on this argument, while rejecting GIS's counter-argument that the Government's interest could better be advanced by simply declining to make criminal records public at all, noting the Supreme Court's clear indication that restrictions must not be the "least restrictive," but instead ones with a "reasonable fit"[17].

GIS's next argument, that the Government could not punish private parties for disseminating otherwise publicly available information, was rejected on numerous grounds. First, the court found a significant difference between "public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country, and a computerized summary located in a single clearinghouse of information."[18].

The court next moved to a broader analysis of why §1681c is actually an attempt by Congress to enact a coherent policy regarding use of criminal arrest records across the entire regulatory scheme. In light of a congressional mandate that anyone who receives a consumer report certify that they will not use it in violation of any "Federal and State equal employment opportunity law or regulation,"[19], the court noted that there are a variety of laws, both state and federal, that prohibit considering criminal arrest records in employment decisions.[20] In the court's opinion, Congress' attempt to regulate the dissemination of these criminal records through the FCRA is just another example of the same types of restrictions on the use of criminal arrest records, even if Congress left other sources of that same information unregulated.[21]. The FCRA targeted consumer reporting agencies simply because those agencies are such a significant source in the dissemination of consumer credit reports, with "members of one major credit bureau trade association maintaining credit files on more than 10 million individuals" and issuing over 97 million reports in 1967.[22] Furthermore, the fact that the FCRA targeted a major source of the potentially harmful information, rather than every possible source of that information, was consistent with First Amendment standards.[23]

Finally, the court found that by using §1681c to regulate credit reporting agencies, congress was not specifically casting those credit reporting agencies as "disfavored" sources. In the court's opinion, because §1681c was not meant to either influence public debate or to favor one speaker over another, the statute should be upheld. Congress was merely attempting to advance its interest in keeping potentially harmful information about arrest records from getting out into the public, and it singled out credit reporting agencies due to their "unique impact on American commerce and personal privacy."[24] The court concluded, "Through a coherent policy that has been justified on such neutral grounds, this Court finds section 1681c to sufficiently comport with First Amendment standards."

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1 15 U.S.C. §1681 *et seq.*

2 15 U.S.C. §1681c(a)(5).

3 The exemption applies to (1) credit transactions involving a principal amount of $150,000 or more; (2) the underwriting of life insurance involving a face amount of $150,000 or more; and (3) the employment of an individual at an annual salary which equals, or which may be reasonably expected to equal $75,000 or more. 15 U.S.C. §1681c(b).

[4] *King v. Gen. Info. Services, Inc.*, CIV.A. 10-6850, 2012 WL 5426742 (E.D. Pa. Nov. 6, 2012).

[5] *King,* 2012 WL 5426742, at *2.

[6] *Id.*

[7] 131 S. Ct. 2653 (2011).

[8] 472 U.S. 749 (1985).

[9] *King,* 2012 WL 5426742 at *5.

[10] 472 U.S. at 762 n.8.

[11] *Central Hudson*, 447 U.S. at 562, 566 ("At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

[12] *King,* 2012 WL 5426742 at *8.

[13] *Id.*

[14] *Id. at *9.*

[15] *Id. at *11.*

[16] *Id. at *12*.

[17] *Id*. (citing *Posadas de P.R. Assocs.*, 478 U.S. at 341).

[18] *Id*. at *13 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749. 764 (1989)).

[19] *King,* 2012 WL 5426742 at *15 (citing 15 U.S.C. §1681b(b)(1)(A)(ii)).

[20] *See* 42 U.S.C. §2000(e), *et seq*. (Title VII of the Civil Rights Act of 1964, which places restrictions on excluding individuals with criminal records from employment as impermissible race discrimination).

[21] *King,* 2012 WL 5426742 at *16.

[22] *Id.* (citing S. Rep. No. 91-517 at 2 (1969) (quotation omitted)).

[23] *See Mariani v. United States*, 212 F.3d 761, 774 (3d Cir. 2000).

[24] *King,* 2012 WL 5426742 at *16.