Employers' Background Checks and the Fair Credit Reporting Act – Recent Case Highlights The Cost of Non-Compliance

By Matthew Mitchell

This is a supplement to my prior post titled **"Employers Beware: Your Background Checks Could Provide More Than You Bargained For."** In that post, I emphasized that the U.S. Supreme Court's decision in *Spokeo v. Robbins* has not completely insulated employers from litigation risk relating to the Fair Credit Reporting Act's ("FCRA") requirement that employers use a stand-alone form to disclose to prospective employees that a consumer report will be obtained.

On April 23, 2018, the parties in *Feist v. Petco Animal Supplies, Inc.* (S.D. Ca. Docket No. 16-cv-01369) filed a Motion for Preliminary Approval of Class Action Settlement wherein Defendant Petco would pay the putative class $1.2 million dollars. In that case, the plaintiff alleged that Petco violated the FCRA by not using a stand-alone form to disclose to job applicants that Petco would obtain a consumer report for employment purposes. Petco apparently decided to settle the case after unsuccessfully challenging plaintiffs' standing under *Spokeo* in an early motion to dismiss. In its order refusing to dismiss the plaintiffs' complaint, the court only said: "Here, Plaintiffs allege that they were deprived of information because the Consent Form did not conform to the stand-alone requirement. Thus, Plaintiffs have alleged sufficient injury to survive a motion to dismiss." This type of circular reasoning from the District Court punctuates the folly of relying on Spokeo as an impenetrable shield against litigation risk in stand-alone disclosure cases.