On January 20, 2017, the Ninth Circuit became the first court of appeals to weigh in on several important legal issues for expensive, increasingly common background check class actions—specifically (a) the extraneous content and language in an employer’s background check disclosure forms and online screens that violate the federal Fair Credit Reporting Act (FCRA), and (b) the standing requirements to file background check claims. In Syed v. M-I, LLC, the Ninth Circuit held that (1) inclusion of a liability release in an employment background check disclosure is a willful violation of the FCRA, subjecting an employer to expensive statutory and punitive damages, and (2) this kind of violation results in a concrete harm that satisfies Article III standing, as recently clarified by the Supreme Court of the United States in Spokeo, Inc. v. Robins.

Although the extraneous language in Syed was a liability release (Syed waived his right to bring an FCRA claim against his prospective employer), this new Ninth Circuit case suggests a hard-line approach: that the inclusion of any extraneous language in a background check disclosure could be a willful violation of the FCRA. This may be further clarified by the Ninth Circuit when it is presented with other types of extraneous language (beyond liability releases). Because it is the first circuit court of appeals holding on these topics, the Syed approach—whether limited to liability releases or expanded to other allegedly extraneous language—may be adopted by other courts of appeals and already has been adopted by several federal district courts. Employers would be wise to ensure that their current disclosure and authorization forms, as well as their online screens, are legally compliant and do not contain any extraneous information.

**Background**

Sarmad Syed applied to work for M-I, LLC in 2011. At the time, M-I gave Syed a background check disclosure form that seemingly was provided to M-I by its background check provider, a consumer reporting agency (CRA) under the FCRA. The form notified Syed that M-I would be obtaining a background check and that his credit history and other background information would be used by M-I for employment purposes. The form also indicated that, by signing the form, Syed released M-I from any liability associated with the use of the form.

Syed brought a class action lawsuit against M-I alleging that the disclosure form violated the FCRA. Syed argued that the inclusion of the liability release violated the FCRA’s requirement that the background check disclosure consist solely of the federally mandated disclosure. He also argued that the violation had been willful, leading to both statutory and punitive damages.
The California federal district court twice dismissed Syed’s claims on the ground that M-I’s actions were not willful, particularly since there was very little legal guidance on this issue at the time of M-I’s alleged violation. Thus, the federal district court opined, M-I’s legal position in using the disclosure with the liability release was not objectively unreasonable.

The case was appealed to the Ninth Circuit.

**The Ninth Circuit’s Opinion**

*FCRA Disclosure “Extraneous Language” Allegations Are Enough to Satisfy Spokeo Standing Requirements*

In a January 20, 2017 opinion written by Judge Kim McLane Wardlaw for a Ninth Circuit three-judge panel, the Ninth Circuit held, for the first time at the circuit court level, that an alleged violation of the FCRA’s disclosure requirement is enough to establish standing under Article III of the U.S. Constitution. As such, Syed’s claims withstood the procedural requirement of establishing a concrete harm, most recently enunciated by the Supreme Court in Spokeo. This development seems to telegraph how the full Ninth Circuit will handle the Spokeo case, which currently is on remand to the lower court for further consideration.

*Liability Release in FCRA Disclosure Is Extraneous, Violates the FCRA, and Subjects Employer to Significant Statutory Damages*

The Ninth Circuit also held that (1) inclusion of the liability release in the same document as the disclosure violates the FCRA, and (2) this violation was willful. In reaching these conclusions, the court emphasized that:

1. the FCRA unambiguously requires that the disclosure “consist solely” of the federally mandated disclosure language;
2. the FCRA does not explicitly or implicitly allow a liability release in the disclosure; and
3. M-I’s interpretation of the FCRA (which allowed the inclusion of the liability release) was not objectively reasonable given the FCRA’s statutory language.

**Key Takeaways**

1. **Reexamine your background check forms and online screens and processes.** Given the approach taken by the Ninth Circuit and several district courts, many employers have begun to reexamine the legal validity of their own background check disclosure and authorization forms and screens. (While Syed focused on paper/hard-copy forms, at least one district court case has developed similar requirements for background check disclosures provided via online/online screens. In Newton v. Bank of America, the U.S. District Court for the Central District of California indicated that federal disclosures provided electronically should be separated from other language through the use of separate online screens.)

   Stephen Woods, the head of Ogletree Deakins’ Background Checks Team, reports that a significant number of employers are surprised to find that their background check forms are noncompliant. “Our background check lawyers review and analyze a few dozen disclosure and authorization forms and online screens every month, and they rarely are compliant with the hard-line approach suggested in Syed,” Woods stated. A majority of these problems stem...
from the “consist solely” requirement addressed in Syed. According to Woods, “Many of the forms and online screens we review include liability releases, state law disclosures, or other nondisclosure language in or alongside the federal disclosures.”

2. **Don't rely on forms or screens from your CRA or background check provider.** Woods explained, “CRA-provided forms and screens, like the one in Syed, can be problematic, leading to possible legal liability. Employers should be proactive to make sure that their forms and online screens are and stay legally compliant.” Despite the fact that most CRAs provide background check forms and screens to employers, the federal FCRA puts the legal responsibility—and the accompanying legal risks and damages—on employers that use those forms or screens. Likewise, most CRAs further limit their liability for an employer’s use of CRA-provided forms and screens in the contract between the CRA and the employer, including express non-indemnification provisions related to CRA-provided forms/screens.

The Ogletree Deakins Background Checks Team can be reached at backgroundchecks@ogletree.com. Federal, state, and locally compliant background check forms and letters, including disclosure and authorization forms, are provided in the O-D Comply: Background Checks subscription materials, which are updated and provided to O-D Comply subscribers as the law changes.