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FROM VAGUE TO VOGUE: IN *CONNOR V. FIRST STUDENT*, THE CALIFORNIA SUPREME COURT BRINGS ICRAA COMPLIANCE, AND RISK, BACK TO TENANT SCREENING

BACKGROUND

Since the 1970s, California and the Federal government have been regulating the collection and use of information related to the character and creditworthiness of consumers, especially in credit, employment, and rental contexts. Two of the California statutes that emerged as part of this patchwork of state and federal law were the Consumer Credit Reporting Agencies Act (CCRAA) and the Investigative Consumer Reporting Agencies Act (ICRAA).

ICRAA, amended several times over the years, was designed to promote disclosure and accuracy in background checks. The ICRAA covers investigative consumer reports containing information on a consumer's "character, general reputation, personal characteristics, or mode of living," information that is routinely obtained when screening tenants. Between 2007 and 2013, several challenges were brought against companies for violations of ICRAA related to unlawful detainer information. Until 2015, however, courts uniformly rejected those challenges on the basis that ICRAA was unconstitutionally vague, which meant that compliance was not necessary. Accordingly, courts observed a distinction between "character" information under ICRAA and "creditworthiness" information under CCRAA, effectively requiring only compliance with CCRAA. Then came *Connor*.

CONNOR V. FIRST STUDENT

Connor was an employee of First Student, a transportation company that conducted

background checks on its employees for hiring and retention purposes. Connor was one of 1,200 plaintiffs who filed a class action against First Student, alleging that the company failed to obtain proper authorization and failed to make proper disclosures under ICRAA when it conducted these checks. Adopting the vagueness rationale of earlier decisions, the trial court (Superior Court of Los Angeles County) initially granted First Student's motion to dismiss the case. On review, however, the Court of Appeal (Second District) broke with precedent and concluded in 2015 that ICRAA was not vague and that it could and must be complied with. The California Supreme Court accepted First Student's petition for review.

On August 20, 2018, the California Supreme Court upheld the *Connor* appeals court ruling and rejected earlier cases that found ICRAA unconstitutionally void for vagueness, thus altering the compliance landscape. For housing providers, property management companies, and their affiliates who perform, or contract for, tenant screening services, ICRAA compliance is now in vogue.

WHAT DOES THIS MEAN FOR ME?

Tenancy application forms and consent notices will have to be changed and expanded; penalties under ICRAA could include damages of \$10,000 per violation, plus costs, attorney's fees, and punitive damages. Most lawsuits to-date have alleged that the users of reports from an investigative consumer reporting agency (1) failed to get proper written authorization to obtain the information, and (2) failed to provide a check box that consumers could use to indicate that they wanted to receive a copies

of reports. To protect against these claims, users of this type of report should review tenant application packages, including forms requesting applicant authorization of credit and criminal background checks as well as denial letters, to ensure that the authorizations and disclosures are both ICRAA and CCRAA compliant. Management contracts and tenant screening service provider contracts or license agreements should also be reviewed to ensure compliance with both.

In addition, property owners and management agents should review and analyze their policies, procedures, and practices to determine whether their organization

meets the definition of an "investigative consumer reporting agency." If so, they have greater compliance responsibilities and greater legal exposure. The analysis is fact-dependent, so a case-by-case evaluation is necessary in order to be able to develop appropriate best practices that help minimize potential liability in each individual situation.

For further information regarding the effects of the *Connor* decision or revision of existing documentation and processes, please contact Dave Kroot, Celia Lee, Jeff Streiffer, or any other attorney at Goldfarb & Lipman LLP.

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