

SECOND CIRCUIT REVIEW

Expert Analysis

## Court Defines ‘Consumer Reporting Agency’ Under the FCRA

In *Kidd v. Thomson Reuters*, No. 17-3550, 2019 WL 2292190 (2d Cir. May 30, 2019), the U.S. Court of Appeals for the Second Circuit determined for the first time that an entity must specifically intend to furnish a “consumer report” to qualify as a consumer reporting agency under the Fair Credit Reporting Act (FCRA). In a unanimous opinion, written by Judge Guido Calabresi, and joined by Judges Christopher F. Droney and Stefan R. Underhill (sitting by designation), the Second Circuit held that the specific and subjective intent to act as a consumer reporting agency is required to bring such an entity within the purview of the FCRA.

### Background

Lindsey Kidd applied for a job with the Georgia State Depart-



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ment of Public Health (the department) and part of the application process included passing a background check. Kidd was informed that she was a top candidate for the job and received an expected start date, pending the results of her background check. Kidd’s background check was conducted using Thomson Reuters’s research platform, Consolidated Lead Evaluation and Reporting (CLEAR). The CLEAR report inaccurately indicated that Kidd had a previous conviction for theft. Relying on the report, the department rejected Kidd’s application and informed Kidd that she would no longer be considered for the position because of the purported theft conviction.

CLEAR, primarily used by government agencies, is a subscription-based program that provides its subscribers with access to public records for investigative purposes. CLEAR also provides information that is regulated by the Gramm-Leach-Bliley Act and the Driver’s Privacy Protection Act. Consequently, subscribers may use CLEAR only after certification that the intended use is permitted under applicable laws. Thomson Reuters prohibits using CLEAR for any purpose that is covered or regulated by the FCRA. Despite this express prohibition, subscribers would occasionally use the platform for impermissible FCRA purposes. Whenever such uses were suspected, Thomson Reuters conducted an investigation, which sometimes led to the termination of that subscriber’s account.

### Prior Proceedings

Following the denial of her application, Kidd brought a putative class action against Thomson

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Reuters in the Southern District of New York, alleging that, as a consumer reporting agency, Thomson Reuters is subject to the FCRA, which it violated by providing an inaccurate background report. Kidd and Thomson Reuters agreed to bifurcate the proceedings, with the first part of the action limited to the threshold issue of whether Thomson Reuters is a consumer reporting agency.

Thomson Reuters filed a motion for summary judgment, arguing that it was not subject to the FCRA because CLEAR was not designed to provide consumer reports for FCRA-regulated purposes. Kidd, however, argued that Thomson Reuters's subjective intentions about CLEAR's use were irrelevant, and that as long as CLEAR is in fact used for FCRA-regulated purposes, such as determining employment eligibility, Thomson Reuters is in fact a consumer reporting agency, and thus within the purview of the FCRA.

The District Court rejected Kidd's argument and granted summary judgment in Thomson Reuters's favor. The court held that whether Thomson Reuters could be considered a consumer reporting agency depended largely on whether its reason for assembling the information on CLEAR was to furnish consumer reports to third parties. In sup-

port of its position, the court relied principally on the plain text of the statute, which "applies only to a person or entity that regularly assembles consumer information with a particular purpose or subjective intention—namely, of providing it to third parties for use (actual or expected) in connection with an FCRA-regulated end, such as employment eligibility." *Kidd v. Thomson Reuters*, 299 F. Supp. 3d 400, 404 (S.D.N.Y. 2017).

Importantly, the District Court clarified that an entity cannot avoid the application of the

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In addition to clarifying that subjective intent is an important factor in determining whether an entity intended to provide services for FCRA-related purposes, the ruling also provides examples of what entities can do to ensure that their programs are not being used for purposes that would make them subject to the FCRA.

FCRA by simply stating that it does not intend to act as a consumer reporting agency. Rather, the court explained, one must examine the totality of the circumstances to determine whether an entity in fact regularly assembles consumer reports to furnish to third parties. In this case, the

record was clear that Thomson Reuters did not intend to act as a consumer reporting agency. In addition to requiring subscribers to certify that they did not intend to use the CLEAR reports for FCRA-regulated purposes, Thomson Reuters also regularly trains and tests its employees on the acceptable uses for CLEAR. The District Court found that these factors supported Thomson Reuters's position on CLEAR's use.

Kidd also argued that because Thomson Reuters had become aware of 46 instances in which CLEAR was potentially being used for FCRA-related purposes, the company knew or should have known that CLEAR was being used for prohibited FCRA reasons. The court, however, found this argument unpersuasive and noted that the 46 instances were minuscule when compared to the 80,000 subscribers to whom Thomson Reuters provided CLEAR, and that Thomson Reuters took affirmative action to redress each instance in which it learned of an impermissible use of CLEAR. The court concluded that Thomson Reuters was not a consumer reporting agency and the FCRA was inapplicable. Kidd appealed to the Second Circuit.

### The Second Circuit Opinion

On appeal, the Second Circuit considered "[w]hether, to

qualify as a ‘consumer reporting agency’ under the FCRA, an entity must specifically intend to furnish a ‘consumer report.’” *Kidd v. Thomson Reuters*, No. 17-3550, 2019 WL 2292190, at \*3 (2d Cir. May 30, 2019). The court concluded that an entity “must have such an intent.” *Id.* The court first reviewed the applicable text of the FCRA. The FCRA defines a consumer reporting agency as “any person [who]... regularly engages...in the practice of assembling or evaluating... information on consumers for the purpose of furnishing consumer reports to third parties...” 15 U.S.C. §1681a(f).

Relatedly, the FCRA defines a consumer report as any communication of information by a consumer reporting agency that bears on a consumer’s “character, general reputation, personal characteristics” used, or expected to be used, “as a factor in establishing the consumer’s eligibility for... employment purposes.” 15 U.S.C. §1681a(d)(1). Reading these two parts of the FCRA together, the court explained that a report is considered a consumer report if it is primarily used for FCRA-related purposes, such as determining employment eligibility.

The court then addressed the definition of “purpose” as used in the relevant portions of the FCRA. The court noted that “purpose” ordinarily corresponds with the

concept of specific intent, which may be found when a person intends to accomplish a “precise act.” *Kidd*, 2019 WL 2292190, at \*4. Thus, the court explained, a person is said to have acted purposefully if he “consciously desires” a result from his conduct, “no matter the likelihood of that result occurring.”

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an entity that intends the information it furnishes to constitute a ‘consumer report.’” Like the District Court, the Second Circuit noted that simply expressing contrary intent will not shield a company from the reach of the FCRA. Rather, as with other scientist determinations, the totality of the circumstances will be dispositive, and a court could find that an entity is a consumer reporting agency, even if it claims not to be one.

Finally, the Second Circuit agreed with the District Court that, in this case, the totality of

circumstances demonstrated that Thomson Reuters did not intend the reports it generated to be used for FCRA-regulated purposes. Like the District Court, the Second Circuit found Thomson Reuters’s affirmative acts to prevent impermissible uses particularly persuasive.

## Conclusion

The Second Circuit’s decision in *Kidd v. Thomson Reuters* provides useful guidance to entities that furnish information in a manner similar to Thomson Reuters’s CLEAR program. In addition to clarifying that subjective intent is an important factor in determining whether an entity intended to provide services for FCRA-related purposes, the ruling also provides examples of what entities can do to ensure that their programs are not being used for purposes that would make them subject to the FCRA.