

FCRA, Data Breach Suits Fuel Consumer Protection Docket

By **Allison Grande**

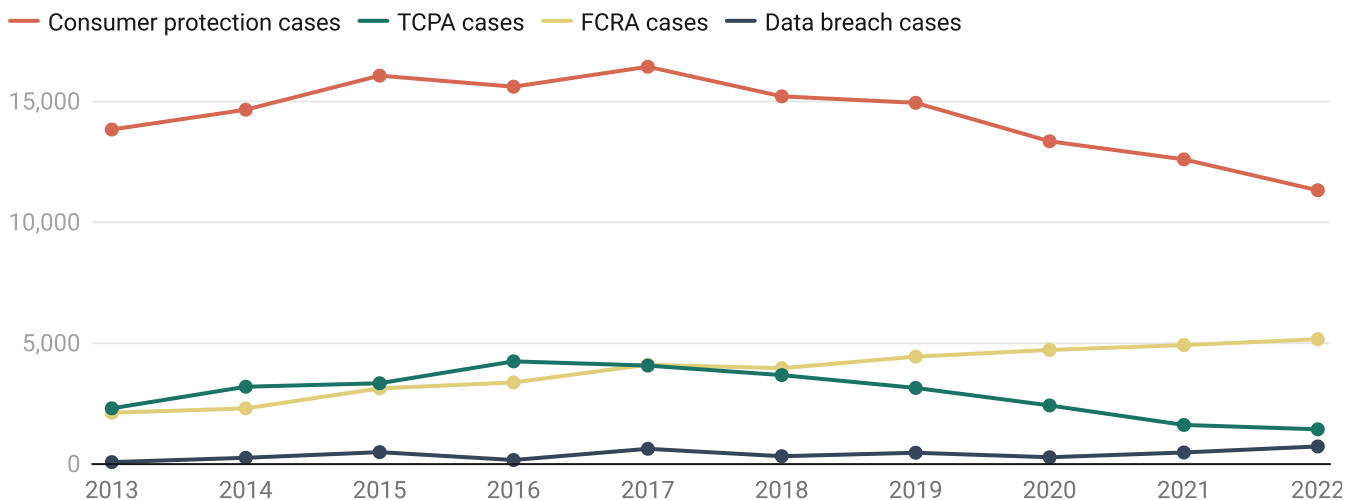
Law360 (March 29, 2023, 11:03 PM EDT) -- Federal lawsuits launched in the wake of data breaches and alleged violations of the Fair Credit Reporting Act continued to climb in 2022, even as consumer protection case filings in general hit a 10-year low, according to a Thursday report by Lex Machina.

Since reaching a high-water mark five years ago, the number of consumer protection cases brought in federal court has slowly declined, with the 11,327 lawsuits initiated by plaintiffs in 2022 clocking in as the fewest such disputes filed in any year over the past decade, according to **Lex Machina's Consumer Protection Litigation Report 2023**.

Class action consumer protection filings have followed a similar pattern, with the 2,339 of these disputes lodged last year being the lowest since 2013 and marking a 44% decline from the 4,213 cases filed in 2017, the busiest year of the past decade, the report said.

FCRA, Data Breach Suits on the Rise

Despite new consumer protection case filings reaching a 10-year low in 2022, suits alleging credit reporting violations and seeking to hold companies liable for data breaches continued their upward trajectory.



Source: Lex Machina · Created with [Datawrapper](#)

The dip in filings runs across almost every subcategory of the consumer protection space, including cases brought under the Telephone Consumer Protection Act, Fair Debt Collection Practices Act and matters appealed to federal circuits, according to the report. However, the trend doesn't extend to filings under the FCRA or data breach litigation, which both hit 10-year highs in 2022, according to the report.

Troutman Firm founder Eric Troutman, who specializes in defending consumer protection and privacy

disputes, told Law360 that it was "no surprise FCRA cases are on the rise, given the prevalence of online mortgage applications — that sometimes lead to erroneous reporting and pulls [when a lender checks a prospective borrower's credit score] — and the use of highly questionable 'credit trigger' products."

These "credit trigger" products, offered by some reporting agencies, are designed to help lenders' marketing efforts by providing them with leads about consumers who may be interested in certain offers or services.

"These sorts of tools are leading to impermissible uses of credit information on a mass scale, and consumer lawyers are taking notice," Troutman said.

According to the Lex Machina report, the 5,166 FCRA cases lodged in 2022 marked not only a 10-year high but also a 143% increase from the lowest annual number from the past decade, which was recorded in 2013. The report cited as a possible driving factor of this boom the growing movement by consumers to exercise "greater monitoring power over their credit reports."

"In addition, there continued to be questions of law under the FCRA that were subject to different interpretations within different jurisdictions, which led to increased litigation over those issues," the report said.

Troutman Pepper partners David Anthony, Alan Wingfield and Cindy Hanson said in a joint email that the FCRA statistics "accurately reflect the litigation climate" they're seeing, although "these numbers may miss the distinct trend of increasing state court filings, particularly for class cases."

The attorneys also pointed out that the increased number of filings coincides with what they said was the plaintiffs bar "seeking to impose FCRA liability on a much wider universe of companies."

"All in all, the trends in FCRA filings confirm that this remains a serious litigation and increasing risk for businesses operating in or adjacent to the consumer reporting industry," Anthony, Wingfield and Hanson said, adding that the potential liability under the FCRA can be "unlimited" since the statute lacks a damages cap.

The spike in FCRA litigation, as well as the increased attention being paid to consumer finance issues in general, has also appeared to play a major role in determining the law firms that landed at the top of the list of those handling consumer protection disputes over the past three years, as well as the most popular venue for these suits and the companies that have faced the most litigation on this front.

Leaders of the Pack

Fueled by consumer reporting and debt collection disputes, Jones Day nabbed the top spot for most active defendants' firm in the consumer protection space from 2020 to 2022, while Chicago-based Atlas Consumer Law was the most active firm representing plaintiffs during this span.

Toggle between:

Plaintiff Firms	2020	2021	2022	Total	Districts
Atlas Consumer Law	799	609	367	1,775	35
Stein Saks	326	455	358	1,139	65
Price Law Group	254	310	366	930	54
Berry & Associates	316	313	227	856	6
The Law Offices of Jibrael S. Hindi	110	379	300	789	6
Law Offices of Robert S. Gitmeid	334	250	157	741	30
Law Offices of Todd M. Friedman	383	240	93	716	23
Cohen & Mizrahi	432	204	0	636	28
Sanders Law Group	290	185	91	566	22
Kazerouni Law Group	220	148	180	548	37

From 2020 to 2022, Jones Day led the pack as the most active defendants' firm in this space, taking on 3,769 cases during that period, according to the report. The firm defended clients in cases that "primarily involved claims under the FCRA," which the report noted was also the case for second-place defense firm Schuckit & Associates, third-place Seyfarth Shaw LLP and "the majority of the other most active defendants' firms."

On the plaintiffs side, Atlas Consumer Law, a Chicago-based firm that's a division of Sulaiman Law Group Ltd., led the pack as the most active law firm representing plaintiffs, handling 1,775 cases from 2020 to 2022, according to the report.

Mohammed O. Badwan, head of civil litigation at Atlas Consumer Law, told Law360 that his law firm filing "the most cases in the nation is not reflective of our desire to be litigious, but rather reflective of the vast and daily injustices faced by vulnerable consumers nationwide."

"We take pride in representing the most consumers in the nation and will continue seeking justice for our clients one case at a time," Badwan said.

A "large bulk" of the cases on Atlas Consumer Law's docket were brought under the FDCPA, the report said. The debt collection statute also fueled "a large majority of cases" filed by the other plaintiffs firms on the list, which include Stein Saks PLLC in second place and Price Law Group in third, the report said, even though overall FDCPA case filings dipped from 6,313 in 2021 to 4,818 in 2022.

These results are consistent with the last Consumer Protection Litigation Report that Lex Machina **released in 2021**, which also put Jones Day and Atlas Consumer Law atop the list of law firms that were most active in the space from 2018 to 2020.

The top five most active defendants in cases filed from 2020 to 2022 also reflected this enhanced focus on financial matters, according to the report.

The list was headlined by credit reporting giants. Equifax Information Services LLC came in first with 6,258 cases, followed by Experian Information Solutions Inc. with 5,424 cases and TransUnion LLC with 5,335 cases, with all facing claims mostly under the FCRA.

Several debt-related services companies, including fourth-place Midland Credit Management Inc. and fifth-place Portfolio Recovery Associates LLC, also appeared in the rankings, fueled largely by FDCPA disputes, according to the report.

While these and other companies are still facing FDCPA suits, the lower litigation numbers in this area reported by Lex Machina "may be largely attributed to a long period of relatively good economic times and the emergence of clearer rules that have led to better compliance," said Anthony, Wingfield and Hanson, the Troutman Pepper partners.

However, "as foreclosures reemerge post-COVID and should inflation continue at high rates, we expect an increase in FDCPA litigation," the attorneys said.

Sunshine State Tops List of Hottest Venues

The Middle District of Florida fielded the most federal consumer protection lawsuits from 2020 to 2022, buoyed by an influx of credit reporting and debt collection disputes, while the Central District of California rode a strong showing in data breach litigation to a second-place finish.

District	2020	2021	2022	Total	Percent
Middle District of Florida	831	982	874	2,687	7.2%
Central District of California	1,022	867	682	2,571	6.9%
Northern District of Illinois	868	817	644	2,329	6.3%
Northern District of Georgia	673	674	630	1,977	5.3%
Southern District of Florida	602	742	618	1,962	5.3%
Eastern District of New York	655	800	351	1,806	4.8%
District of New Jersey	559	555	440	1,554	4.2%
Southern District of New York	450	478	368	1,296	3.5%

While consumer protection litigation has been spread across the country, the Middle District of Florida claimed the top spot as the most active district court for these filings, with 2,687 from 2020 to 2022.

The bulk of these disputes contained claims under the FCRA or the FDCPA, according to the report. The next two districts on the list — the Central District of California and Northern District of Illinois — also fielded a large quantity of these cases, although the report noted that the California district had a more even distribution of cases and boasted a "significantly higher" number of data breach cases than those filed in most other districts.

One factor that's likely behind that trend is the California Consumer Privacy Act, which took effect in 2020 and created a limited private right of action that allowed consumers to seek statutory damages of up to \$750 per violation for data breaches that result from a company's failure to implement reasonable security procedures. That law has since been replaced by the Consumer Privacy Rights Act, which contains the same lawsuit mechanism.

The Lex Machina report noted that, like FCRA disputes, data breach suits were also generally on the rise between 2020 and 2022.


Although cases involving data breaches represent "a smaller subset" of consumer protection cases and there have been "several spikes and dips in filings" over the years, the 731 data breach cases filed in 2022 were by far the most recorded during the past decade, crushing the 82 lodged in 2013 and beating out the previous record of 633 lodged in 2017, when a massive data breach at Equifax exposed the personal information of roughly 147 million people, according to the report.

The report offered no possible explanation for the spike in data breach cases filed in 2022, although it did note that they were "spread across a fairly wide range of defendants, with loan agencies and banks comprising several of the top defendants."

Mark Eisen, partner and co-chair of the class action practice at Benesch Friedlander Coplan & Aronoff, said the data breach statistics may be "a little bit misleading" because they appear to include multiple cases filed over the same data security incident.

"There are certainly more data breach filings, but most data breach incidents tend to result in multiple cases, so it's unclear how many of these filings are pertaining to new data breaches," Eisen said.

On the other end of the spectrum, TCPA litigation continued the downward slide it's been on since 2016, when 4,250 cases were filed in the wake of a declaratory order issued by the Federal Communications Commission that broadened the scope of the statute.

Since then, several court decisions — including the U.S. Supreme Court's **April 2021 ruling** in [Facebook v. Duguid](#) , which narrowly defined the types of dialing equipment covered by the TCPA — have reduced the scope of the statute, leading TCPA case filings to hit a 10-year low of 1,439 in 2022, according to the report.

The case filing trend for TCPA disputes "loosely mirrors the case filing pattern for general consumer protection cases and class action cases" over the past decade, according to the report.

The TCPA volume drop "is also predictable following the Supreme Court's Facebook decision, which slammed the door on most autodialer cases in federal court," according to Troutman.

However, Troutman noted that the rise of state law corollaries, like Florida's "mini-TCPA," have "led to a huge number of state-level filings that have largely offset the decline in federal TCPA suits."

"And those that remain are particularly dangerous as they focus on prerecorded calls, which are tougher suits to defend," Troutman added.

Eisen, the Benesch Friedlander partner, agreed that as TCPA cases have declined, more disputes have popped up under Florida's mini-TCPA, which the legislature amended in July 2021 to set specific

requirements for obtaining prior express written consent for automated telemarketing and texts and establish tighter new limits on the timing and quantity of call attempts, among other things.

"It's a trend we're going to see continue unless the Florida legislature amends the statute, and we may see it in other states as well if similar laws are passed there," Eisen said.

While federal TCPA and telemarketing disputes are currently on a downswing, the plaintiffs bar continues to bring suits in this area, including ones alleging violations of the law's do-not-call provisions, creating a "baseline level" of TCPA litigation that is likely to continue into the foreseeable future, Eisen said.

And these numbers could be further boosted by changes in technology and legal precedent, including the Eleventh Circuit's recent decision **to review en banc** a prior full circuit court decision that a single unsolicited text message does not confer standing to sue under the TCPA.

That dispute, which centers on allegedly unwanted automated promotional calls and texts placed by GoDaddy.com, marks the second time the full Eleventh Circuit has reviewed the issue of standing in the TCPA context and could throw open the door to the filing of more suits in the litigation hub of Florida, according to Eisen.

"Florida, which has a strong and active plaintiffs bar, has been a big center for federal statutory consumer protection cases, and the Eleventh Circuit seems to be the most active with regard to standing decisions," Eisen said.

The 182 consumer protection disputes considered by the Eleventh Circuit between 2020 and 2022 were second only to those in the Ninth Circuit, which docketed 281 such matters during that time, according to the Lex Machina report.

The GoDaddy decision is poised to shut down one side of the ongoing standing debate in the Eleventh Circuit, which will likely also have a "big impact" across other statutes and types of claims in the circuit, Eisen said.

Anthony, Wingfield and Hanson of Troutman Pepper also pointed out that while the Supreme Court's Facebook autodialer decision and "effective compliance strategies" are driving down TCPA litigation, they've observed "the severity of the average claim seems to have gone up from previous years."

"Thus, this remains an important area of risk, which the raw numbers might not fully reveal," they said.

Both Eisen and Troutman also cautioned consumer protection attorneys to pay close attention to the **influx of litigation** not highlighted in the Lex Machina report that accuses a wide range of companies of violating wiretap and video privacy laws through the technology they deploy on their websites.

Driven by recent appellate court rulings that boosted statutes in California and Pennsylvania prohibiting the unauthorized interception of electronic communications, class actions accusing major brands of surreptitiously eavesdropping on users through "session replay" software and chatbots deployed on their websites have taken off in recent months.

"As [California's anti-wiretap statute] authorizes up to \$5,000 per violation, the plaintiffs bar is rushing to stake their claim in this new gold rush," Troutman said. "Indeed, the huge volume of cases being filed under the California Invasion of Privacy Act are reminiscent of the early days of the TCPA, when the promise of huge statutory damages brought a massive onslaught of litigation despite the lack of any clear damage to impacted consumers."

Additionally, there has been a sharp uptick in litigation accusing companies of violating the federal Video Privacy Protection Act by disclosing private information related to users' video-viewing habits to Meta through the social media giant's Pixel tool, attorneys noted.

"I expect these trends to continue, with privacy litigation more broadly forming the backbone of future consumer protection class litigation now and in the foreseeable future," Troutman said.

--Editing by Jill Coffey and Alanna Weissman.

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