HOLDING CREDIT REPORTING AGENCIES ACCOUNTABLE:
HOW THE FINANCIAL CRISIS MAY BE CONTRIBUTING TO IMPROVING ACCURACY IN CREDIT REPORTING

David D. Schein *
James D. Phillips **

INTRODUCTION

A critical, and perhaps overlooked, outcome of the ongoing financial crisis has been the increasing emphasis being placed by lenders on consumers’ credit reports. Consumer credit reports are utilized to compile credit scores like FICO1 or Vantage, a more recent credit-scoring service.2 Similarly, the significance of credit scores has become a focus for many consumers due to the end of easy credit that began in late 2007. Credit scores are used for mortgages, car loans, credit cards, and other consumer credit, insurance, and employment. The cost of a poor credit score, if credit is offered at all, can be devastating. According to the Wall Street Journal, when getting a car loan, a consumer with a high credit score could receive an interest rate that is half the rate of a consumer with a score 160 points lower.3 Spread over millions of consumers, the impact of credit reports on credit scores justifies an examination of the legal

---

* Assistant Professor, Virginia State University.
** Associate Professor, Virginia State University.
3 Karen Blumenthal, How to Wreck Your Credit Score, WALL ST. J., Apr. 9, 2011, at B8.
exposure for the credit reporting agencies (“CRAs”) that provide these credit reports.

This article examines the Fair Credit Reporting Act (“FCRA”), the FCRA’s amendments included in the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”), and how the courts have interpreted the FCRA in response to consumers moving against the CRAs for sending out inaccurate credit information or failing to correct inaccurate credit information. The Consumer Credit Reporting Reform Act of 1996 (“CCRA”) is also discussed, because it added two important tools for consumers: the availability of statutory damages and the requirement that deleted information cannot be reinserted into the credit report without notice and verification.

The article then discusses important judicial decisions. It focuses on the decisions of the U.S. Circuit Courts of Appeals, interprets these statutes, and concludes with a discussion of the status of the potential legal liability of CRAs.

I. COMMON LAW AND EARLY AMERICAN DOCTRINE

With its adoption on April 25, 1971, the FCRA provided some relief for consumers who can prove an injury caused by false or inaccurate credit reports. To fully appreciate the purpose and significance of the FCRA and its amendments, it is instructive to examine the legal landscape that existed prior to the FCRA and its amendments.

At common law, credit bureaus had extremely limited responsibility for reporting errors, and when sued for defamation, a bureau was able to raise the defense of conditional privilege. The

---

9 Charles M. Ullman, *Liability of Credit Bureaus After the Fair Credit
common law provided no real remedy for false credit reporting, but sowed the seeds for today’s option to hold credit reporting agencies accountable.

An English case, *Toogood v. Spyring*, is one of the early decisions that set forth the idea that communication by an employer about an employee might be conditionally privileged if published during the conduct of his affairs or in his own interest. The *Toogood* theory, which would be followed in an early line of cases, was that the plaintiff could proceed under an action for defamation and its resulting damage to his commercial standing. The decision established an obviously broad standard, but the case further held that the plaintiff would have to show actual malice in order to recover. This standard led to other early decisions that held that the publisher of defamatory information first must be under a duty or interest before the conditional privilege could be successfully claimed.

Subsequently, two other British Commonwealth cases applied the defense of conditional privilege announced in *Toogood*. In the decision of *Robinson v. Dun*, the court accepted the theory of conditional privilege, but clarified that in order to enjoy the protection, the publisher must be under a duty to convey the offending statement. In *MacIntosh v. Dun*, an Australian case decided by the Privy Council, the court held that the credit bureau was not under a duty to report the information, but rather was under the sole motive of generating a profit, and therefore not able to assert the privilege articulated in *Toogood*.

These cases provided the foundations for the early legal standards in the United States. In addition to the defamation theory, the developing concept of an individual’s right to privacy was an additional rationale available for holding reporting agencies accountable. The term right to privacy was first coined by Samuel

---


11 *Id.* at 1050.

12 *Id.* at 1045.

13 *Id.* at 1050.

14 Ullman, *supra* note 9, at 45–46.

15 *Id.* at 46 & nn. 18–20 (discussing Robinson v. Dunn, 24 O.A.R. 287, 293 (1897)).

16 *Id*.


18 Ullman, *supra* note 9, at 46–47.

19 Van Fleet, *supra* note 8, at 462.
Holding Credit Reporting Agencies Accountable

Warren and Louis Brandeis in their article “The Right to Privacy,” and emerged as a legal theory used by plaintiffs attempting to hold parties responsible for a wide range of putative claims. Using a privacy theory was an attractive course of action for plaintiffs. Their success would not turn on whether the reported information was true, but rather, whether that the offending act, compiling and publishing personal financial data, was an intrusion into one’s private life.

Even with the existence of these common-law theories, courts were reluctant to hold reporting agencies liable for investigating or reporting consumer’s credit histories. One basis for this reticence was the issue of publication. Because the successful actions for the publication of private facts were traditionally based on unreasonable public exposure, courts seemingly were unwilling to find the necessary element of publication in a communication of a single credit report to a single subscriber.

In addition to courts’ declining to hold credit agencies accountable for consumer credit reporting abuses, the reporting agencies more importantly escaped legislative oversight for most of the twentieth century. In 1916, Oklahoma was the first state to pass any real legislative controls over reporting agencies, later followed by Massachusetts, New Mexico and New York. Accordingly, at the time FCRA was introduced in Congress—with the exception of these four state statutes—there was little protection for the consumer against the credit bureaus reporting inaccurate credit information.

---

21 Van Fleet, supra note 8, at 462–63.
23 Van Fleet, supra note 8, at 462–63.
24 Id.
28 N.M. STAT. §§ 50-18-1 through -18-6 (renumbered as N.M. STAT. §§ 56-3-1 through -7) (1953).
30 Van Fleet, supra note 8, at 464–65.
II. THE FAIR CREDIT REPORTING ACT OF 1970 AND ITS AMENDMENTS

The general intent of FCRA is to provide protection to the consumer by expanding the CRAs’ potential liability beyond that which existed at common law. The FCRA holds CRAs liable for negligent\(^{31}\) or willful violations of the statute\(^{32}\) with respect to preparing and reporting consumer credit information, provided that actual damages can be proven. Negligence may be found where there is a failure to adopt reasonable procedures to ensure the accuracy of the reports or where there is a failure to prevent the reports from being disclosed to unauthorized recipients.\(^{33}\) The plaintiff has the burden to show, by the preponderance of the evidence, that reasonable procedures were not followed rests with the plaintiff.\(^{34}\) In addition to actual damages, the FCRA allows for recovery of attorneys’ fees and costs,\(^{35}\) as well as punitive damages if willfulness is proven.\(^{36}\) In addition, a violation of the FCRA is considered to be a deceptive or unfair trade practice that can be enforced by the Federal Trade Commission.\(^{37}\)

The FCRA is limited in scope and affects only certain CRAs, typically those operating for fees, and regulates those CRAs only to the extent that the bureaus report on individuals.\(^{38}\) Partnerships, corporations, trusts, estates, cooperatives, associations and other legal entities were left to seek protection under state law.\(^{39}\)

The FCRA also creates a system of due process, whereby the consumer may learn of adverse reports, discover the information contained therein, and be able to correct or supplement false or misleading information.\(^{40}\) This system’s features include:

\(^{32}\) Id. § 1681n.
\(^{33}\) See id. § 1681o(a) (stating that any violation of this chapter is actionable); see also id. § 1681b ( enumerating permissible recipients and uses of reports); id. § 1681e(b) (requiring “maximum possible accuracy” for reports).
\(^{34}\) See id. § 1681n(a)(1)(A); see also Ashby v. Farmers Ins. Co. of Or., 592 F. Supp. 2d 1307, 1310 (D. Or. 2008) (holding that “[p]laintiffs’ burden-of-proof instruction [“plaintiffs bear the burden to prove their claim for damages under the Fair Credit Reporting Act by a preponderance of the evidence”] is a correct statement of the law”).
\(^{36}\) Id. § 1681n(a)(1)(B)(2).
\(^{37}\) Id. § 1681s(a).
\(^{38}\) Ullman, supra note 9, at 59.
\(^{39}\) Id. at 59–60.
\(^{40}\) Van Fleet, supra note 8, at 466.
1. Whenever credit is denied for personal, family or insurance purposes, or the cost of credit or insurance is increased as the result of a consumer report, the CRA must advise the consumer as well as provide the name, address and phone number of the CRA.

2. The CRA must notify the consumer within 3 days of anyone who requests the CRA to generate an investigative report concerning his reputation.

3. After receiving notice of an adverse action, the consumer can obtain the “nature” and “substance” of the information in his file and the recipients to which the reports have been sent.

4. If the consumer objects to the information as false and misleading, he may request a reinvestigation, and may have a brief statement inserted in the report for future investigations.

5. The consumer may also cause the brief statement to be sent to those who received the original report.\textsuperscript{41}

Moreover, the FCRA also attempts to protect consumers by requiring reform in the operating procedures of both the CRAs and their users. For example, CRAs are required to have procedures to avoid the reporting of outdated information,\textsuperscript{42} avoid furnishing reports to unauthorized users,\textsuperscript{43} and ensure the maximum level of accuracy in reporting consumer-credit information.\textsuperscript{44} While the FCRA was the first step in providing the consumer some redress from the damage resulting from obsolete, inaccurate, and misleading information in their credit reports, it was also criticized as “awkward, uncertain and owing to industry influence” and as not enough help to the consumer.\textsuperscript{45}

Since its inception, the FCRA provided the ground rules for resolving consumer disputes about errors in their credit scores. The CCRA later amended FCRA in several ways beneficial to consumers.\textsuperscript{46} Statutory damages became available for consumers

\textsuperscript{41} Id. at 467.
\textsuperscript{42} 15 U.S.C. § 1681e(b).
\textsuperscript{43} Id. § 1681e(a).
\textsuperscript{44} Id. § 1681e(b).
\textsuperscript{45} Van Fleet, supra note 8, at 507.
\textsuperscript{46} Gardner, supra note 7, at 298–301.
against “any person who willfully fails to comply with any requirements . . . with respect to any consumer.” 47 Actual damages, which might be greater, are also recoverable, 48 as are punitive damages, 49 costs, and attorneys’ fees. 50 With these statutory damages and the availability of costs and attorneys’ fees, an individual consumer could privately enforce the law and define specific obligations of the CRAs. 51

The CCRA also extended civil liability to any entity or person which willfully violates FCRA, including creditors. 52 Creditors can be found to be in violation of FCRA after failing to properly conduct or cooperate with a reinvestigation. 53 Once the creditor has been advised that the account was either improperly established or contains erroneous information, the creditor may be held liable for failing to document or support a published report. 54

The 1996 amendments also address the reinsertion of previously deleted information. 55 Before the amendments, the consumer may have worked her way through the dispute process, have erroneous material removed from her file, only to have the creditor report the same information again, 30, 60 or 90 days later to the CRA. 56 Unless the consumer continually reviewed the reports, there would be no suspicion that the erroneous information had been re-reported. 57

The CCRA, therefore, imposed affirmative duties on CRAs to notify the consumer if previously deleted information reappeared in a consumer’s credit file and to maintain a system to prevent the reappearance of information and data that had been previously deleted. 58 If any information was deleted because of a dispute, inaccuracy, incompleteness, or lack of verification, the consumer must be notified in writing if the information is later reinserted into his or her portfolio. 59 Before such information could be reinserted, it

48 Id. § 1681n(a)(1)(A).
49 Id. § 1681n(a)(2).
50 Id. § 1681n(a)(3).
51 Gardner, supra note 7, at 299.
53 Id. § 1681i(a); see also Gardner, supra note 7, at 300.
54 Gardner, supra note 7, at 300.
56 Gardner, supra note 7, at 300.
57 Id.
59 Id. § 1681i(a)(5)(B).
must have been verified by the furnisher as “complete and accurate.”

One other feature of the CCRA bears mention. Recognizing that a substantial part of the consumer-reporting process crosses state lines and is national in scope, Congress included provisions in the amendments that explicitly preempt state laws in certain critical areas, including: prescreening, the process whereby the creditor provides credit requirements to a CRA and requests a list of consumers who meet them; reinvestigation time frames; and information contained in consumer reports. As part of the political compromise to pass the bill, these preemption provisions were scheduled to sunset January 1, 2004. Preventing these sunset provisions became a key motivation to amend the FCRA again.

In December 2003, President George W. Bush signed into law the Fair and Accurate Credit Transactions Act, the FACT Act. In addition to keeping the preemption provisions of the CCRA permanent and expanding preemption requirements to other areas, the FACT Act imposed new obligations on CRAs, in addition to banks, retailers, insurance companies and others. It became the latest in the legislative enactments which attempted to protect consumers and increase their access to credit. The following is a brief overview of the changes Congress made to the FCRA in 2003.

The FACT Act includes a number of sections which attempt to prevent identity theft. When a consumer believes that he has been or is about to be a victim of identity theft, he may request a CRA to place in his portfolio an initial fraud alert. This alert must remain in the consumer’s file for at least 90 days, and anyone requesting the consumer’s report is required to receive the alert as well. Moreover if the consumer has already been a victim of identity theft, he may include in his file an extended fraud alert after taking certain steps, including filing an identity-theft report with a law-enforcement agency and providing it to the CRA. This extended alert must remain in the consumer’s file for seven years and must be included in

---

60 Id. § 1681i(a)(5)(B)(i).
62 Id. § 1681i(b).
65 Id. § 1681c-1(a)(1).
66 Id. § 1681c-1(b)(1).
the consumer’s credit report.\textsuperscript{67}

In addition to its preventative measures, the FACT Act provides the consumer with tools to correct the identity-theft problems by allowing the consumer to halt a CRA from including in her file information that resulted in the identity breach.\textsuperscript{68} Under the tradeline-blocking provision\textsuperscript{69} the consumer may prevent certain information from being included in their file by providing certain documents to the CRA, including the identity-theft report and the information to be blocked.\textsuperscript{70} The CRA, thereupon, is required to block the publication of this information within four business days and to give notice of the block to the data furnisher,\textsuperscript{71} and the data furnisher is required to maintain procedures to prevent the further publication of that information to other CRAs.\textsuperscript{72} These measures greatly enhanced the consumer’s ability to police the contents of their credit reports and have meaningful methods of protecting the integrity of their files.\textsuperscript{73}

The FACT Act also increases the responsibilities of data furnishers with regard to the accuracy of information provided to CRAs.\textsuperscript{74} Accordingly, it directs the federal banking agencies, the Federal Trade Commission ("FTC"), and others to establish guidelines for data furnishers to ensure the integrity of the documentation provided to the CRAs.\textsuperscript{75} Also, a data furnisher may not publish information to a CRA if it knows or reasonably believes the information to be inaccurate.\textsuperscript{76} This addresses the accuracy of the credit report on the front-end of the process, at the time the data is reported and complements the tools provided to the consumer to police and correct information on the back-end.

Another major tenet of the FACT Act is to provide the

\textsuperscript{67} Id. § 1681c-1(b)(1)(A).
\textsuperscript{68} Id. § 1681c-2(a).
\textsuperscript{69} See 2003 Changes to the Fair Credit Reporting Act: Important Steps Forward at a High Cost, CONSUMERSUNION.ORG (2009), http://www.consumersunion.org/pub/core_financial_services/000745.html (discussing specific provisions of the Fair and Accurate Credit Reporting Act of 2003, including the tradeline blocking provision).
\textsuperscript{71} Id. § 1681c-2(a)–(b).
\textsuperscript{73} See generally Michael F. McEneney & Karl F. Kaufmann, Implementing the FACT Act: Self-Executing Provisions, 60 BUS. LAW. 737 (Feb. 2005).
\textsuperscript{74} See id. § 1681s-2(e)(1)(A) (requiring guidelines to be established and maintained for persons furnishing information to credit reporting agencies).
\textsuperscript{75} Id.
\textsuperscript{76} Id. § 1681s-2(a)(1)(A).
consumer easier access to his credit history. To accomplish this goal, national and other CRAs must provide to each consumer, upon request, disclosure of his credit history at least once per year for free.\footnote{id § 1681j(a)(1)(A).} Also, the consumer must be notified if a consumer report is used to make a credit decision “on material terms that are materially less favorable than the most favorable terms available to a substantial portion of consumers.”\footnote{id § 1681m(h)(1).} The notice must advise the consumer that the terms of credit offered are set based on data from a consumer report, identify the CRA that provided the report, include a statement that the consumer may secure a copy of the report from the CRA without paying a fee.\footnote{id § 1681m(h)(5).}

Finally, the FACT Act provides for disclosures to consumers in connection with the use of their credit scores.\footnote{id § 1681g.} In essence, certain CRAs are required to disclose, upon request, either the score that is derived from a credit scoring model in connection with residential real property loans or a more generic score designed to assist the consumer in better understanding the assessment of his credit behavior.\footnote{id § 1681g(f)(7)(A).} Additionally, those who make or arrange home loans based on credit scores are also required to furnish the consumer’s credit score to him.\footnote{id § 1681g(g)(1)(A)(i).}

As discussed above, the FCRA, and the amendments thereto, have expanded the protections beyond the common law to consumers who desire to ensure their credit is in good standing and available to them when they want to purchase a home or other large item. In the wake of the financial crisis, beginning in late 2008 the value of an accurate and authentic credit report has increased. Banks are making fewer loans, usually to consumers with clean credit histories. Related to this consequence is the consumer’s ability to regularly have access to his credit report and require that the mandates of the FCRA be followed. Of course the ultimate consequence of the FCRA and its amendments depends on how the courts have interpreted and enforced the Act.

\begin{footnotes}
\item[77] Id. § 1681j(a)(1)(A).
\item[78] Id. § 1681m(h)(1).
\item[79] Id. § 1681m(h)(5).
\item[80] Id. § 1681g.
\item[81] Id. § 1681g(f)(7)(A).
\item[82] Id. § 1681g(g)(1)(A)(i).
\end{footnotes}
III. CREDIT BUREAU LITIGATION

A. General Overview

The advent of information sharing over the internet, the recent lending and mortgage crisis, and the rise in popularity and proliferation of advertisements from independent credit bureaus such as Consumerinfo.com, which promotes Freecreditscore.com and Freecreditreport.com, has led to a sharp rise in CRA litigation. The case In re FCRA Litigation seeks class action status for consumers in several states who have claimed that credit bureaus are intentionally confusing customers, engaging in false advertising, and not giving consumers what they pay for when they sign up for services. For example, Consumerinfo.com, the subject of the suit in U.S. District Court in California, is alleged to have advertised and sold credit scores that were represented to be the credit scores used by lenders, but was actually a score they created. The voluminous nature of the class action, as well as the underlying theory of liability, portend a growing tide of litigation for CRAs.

While the recent Consumerinfo.com suit and others show the relationship between credit bureau publicity and the increase in litigation over false or irresponsible reporting, litigation and the general principles behind FCRA suits have been well established in prior years. Though as the following survey reveals, the courts in many federal circuits take distinct approaches to FCRA cases.

First Circuit

In DeAndrade v. Trans Union LLC et al., the First Circuit held that a CRA could not be held liable—either under the FCRA or any other theory—for its alleged failure to reinvestigate properly and delete the disputed debt from the plaintiff’s credit history. In that case, the lending bank that reported the repayment controversy to the
CRAs, Trans Union and Equifax, caused the CRAs to update the plaintiff’s credit report with negative information. 87 When the plaintiff wrote a letter to the CRAs explaining the misinformation sent to them by the lending bank, both of the defendants failed to update his credit report accordingly. 88 The plaintiff argued that the failure to update and correct the credit report constituted a substantial injury to him and caused him to be unable to refinance his home. 89

The court determined that the information given to the CRAs by the bank was not the cause of the plaintiff’s injury. The court held that for the reinvestigation requirement of section 1681i to be triggered: “[t]he decisive inquiry is whether the defendant credit bureau could have uncovered the inaccuracy” if it had reasonably reinvestigated the matter. 90 Because the plaintiff’s dispute in DeAndrade was actually a dispute with the bank over the validity of the mortgage, the CRAs could not have uncovered the truth behind the dispute through reasonable investigation. Therefore, the lack of investigation or any breach of a duty imposed by FCRA was not the cause of the harm. 91 This case demonstrates the First Circuit’s reluctance to impose liability on CRAs for unresolved disputes between creditors and borrowers.

The First Circuit also refused to impose liability in Chiang v. MBNA. 92 The court found that that case turned on the following pertinent section of section 1681:

The Fair Credit Reporting Act imposes certain obligations on entities that furnish credit information to consumer credit reporting agencies (CRAs). One such obligation is to investigate any disputes over the completeness or accuracy of the information furnished and then notify the CRA of any corrections—but only if the CRA, acting as a gatekeeper, has previously notified the furnisher of the consumer’s dispute. By contrast, “[a] notice of disputed information provided directly by the consumer to a

87 Id. at 64.
88 Id. at 64-65.
89 Id. at 65.
90 Id. at 68 (citing Cushman v. Trans Union Corp., 115 F.3d 220, 226 (3d Cir. 1997)) (holding sections 1681n and 1681o of Title 15 respectively provide private rights of action for willful and negligent noncompliance with any duty imposed by the FCRA and allows recovery for actual damages and attorneys’ fees and costs, as well as punitive damages in the case of willful noncompliance).
91 DeAndrade, 523 F.3d at 69.
92 Chiang v. MBNA, 620 F.3d 30 (1st Cir. 2010).
furnisher does not trigger a furnisher’s duties under § 1681s-2(b).”

The plaintiff in the Chiang case disputed the alleged delinquency report on payments on his credit card and claimed that the CRA failed to follow up on that dispute with a further investigation. The district court granted summary judgment to the defendant after finding no evidence that a CRA, rather than just the plaintiff himself, had ever contacted the defendant concerning the plaintiff’s objections. The court in this case affirmed the rule set in DeAndrade, and refused to impose liability for failure to investigate when information given to the CRA comes from the subject of the report and not a third party furnisher of credit information.

Second Circuit

In the Second Circuit, a mortgage lending company, Premium Mortgage Corporation, brought suit against Equifax and the other two major credit reporting agencies, TransUnion LLC and Experian Information Solutions Inc, as well as a myriad of intermediary resellers of consumer credit information, asserting nine state law claims. The suit stemmed from the defendants’ purchasing of aggregate credit reports of potential mortgagors from intermediate resellers of consumer credit information, such as Credit Plus. The reseller, in turn, purchased individual credit reports from each of the CRA defendants and bundled the information for use by lenders like the plaintiff. In this case, the plaintiff asserted state law claims based upon defendants’ practice of permitting other lenders to purchase prescreened consumer reports that contain trigger leads, which are disclosures of information from the CRAs to the reseller of credit information such as defendant Credit Plus. According to the plaintiff in that case, these trigger leads constituted its “proprietary customer information” because “such information is not readily known in the industry and it cannot be obtained except through extraordinary effort.” The focus of this case in the Second Circuit was the FCRA preemption on issues relating to state common law

93 Id. at 35 n.8 (citations omitted).
94 Id. at 31.
95 Id.
97 Id.
98 See id.
99 Id.
Holding Credit Reporting Agencies Accountable

2012] Hiding Credit Reporting Agencies Accountable

In the key element of its opinion, the Second Circuit stated:

The operative provision of the FCRA for the purpose of this analysis is 15 U.S.C. § 1681t(b)(1)(A), which states: “[N]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports . . . .”

The case stands for the proposition that FCRA preempts state law causes of action with respect to reporting and prescreening of credit reports. Though many of the circuits are silent as to whether state law can control the issues in question, the limited case law available relies on the operative language in FCRA to preempt state law claims such as the ones in Premium.

Third Circuit

The Third Circuit views the sections of FCRA that impose liability on CRAs in favor of plaintiffs much more leniently than the First and Second Circuits. The Third Circuit has stated, “§§ 1681n - 1681o of Title 15 respectively provide private rights of action for willful and negligent noncompliance with any duty imposed by the FCRA and allows recovery for actual damages and attorneys’ fees and costs, as well as punitive damages in the case of willful noncompliance.”

In Cortez v. Trans Union LLC, the Third Circuit held that section 1681i imposes a duty to reinvestigate any information in a consumer’s file that is disputed by a consumer and either record the current status of the information in dispute or delete it. The Third Circuit will impose liability should the CRAs have notice of a dispute in the report, and that such duty will give rise to a duty to reasonably investigate. If the agency determines that the information is inaccurate, incomplete, or cannot be verified, it must delete or modify the information and notify the provider of the information that the

---

100 Id.
102 Cushman v. Trans Union, Corp., 115 F.3d 220, 224 (3d Cir. 1997) (citing Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996)).
103 Cortez v. Trans Union, LLC, 617 F.3d 688 (3d Cir. 2010).
104 Id. at 713.
105 Id. at 713-14.
Fourth Circuit

In the conservative Fourth Circuit, FCRA litigation is highlighted by the decision in Robinson v. Equifax Information Services, LLC.\(^\text{107}\) In that matter, the plaintiff hired Equifax to help her identify and correct errors in her credit report that resulted from a stolen identity.\(^\text{108}\) However, the plaintiff brought suit several years after the initial reporting, due to errors and damages resulting from Equifax’s mishandling of the information.\(^\text{109}\) Equifax mistakenly placed Robinson’s address and social security number on three credit files established by the identity thief, each of which contained derogatory credit accounts (the “identity thief’s files”).\(^\text{110}\) Consequently, Equifax sent various creditors requesting Robinson’s credit report her actual credit file along with one of the identity thief’s files.\(^\text{111}\) As a result of these errors, Robinson’s credit problems persisted and she experienced difficulties obtaining any type of consumer credit from 2003 until 2006.\(^\text{112}\) For example, she had a credit card application denied in part based on derogatory information contained in one of the identity thief’s files that Equifax sent the credit card company.\(^\text{113}\)

In the Robinson case, the Fourth Circuit upheld the trial court’s finding that Equifax negligently reported Robinson’s credit.\(^\text{114}\) It also upheld the jury award of actual damages in the amount of $200,000 for (1) loss of opportunity in the home mortgage market, (2) emotional distress, and (3) loss of income from missing approximately 300 hours of work addressing Equifax’s mistakes.\(^\text{115}\)

Fifth Circuit

The Fifth Circuit has stated, “Congress enacted the FCRA ‘to require that consumer reporting agencies adopt reasonable procedures

\(^{107}\) 560 F.3d 235 (4th Cir. 2009).
\(^{108}\) Id. at 237.
\(^{109}\) Id.
\(^{110}\) Id. at 238.
\(^{111}\) Id.
\(^{112}\) Id.
\(^{113}\) Id.
\(^{114}\) Id. at 246.
\(^{115}\) Id. at 240.
2012]  Holding Credit Reporting Agencies Accountable  

for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . .’ 15 U.S.C. § 1681(b).”

In following this view of fairness and equity, the Fifth Circuit stated, “Congress further required that consumer reporting agencies ‘follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom a credit report relates. 15 U.S.C. § 1681e(b).’”

In Stevenson, the court went into a lengthy analysis as to what would constitute negligence or willfulness in failing to correct or accurately report credit information. The court held that allowing previously deleted inaccurate information to be re-reported on a credit report is negligent. The court held that TRW was negligent in not making calls to verify the information or check its accuracy. The court reached this decision with knowledge of the Sixth Circuit’s decision in Bryant v. TRW, in which the same credit reporting firm was held liable for negligence in only making two follow-up calls to check the accuracy of information. It is clear that the Fifth Circuit imposes a high level of liability for failure to verify information and this level of negligence justifies damages.

In Young v. Equifax the plaintiff, Young, alleged that the CRA injured him by publishing defamatory information about him in violation of the FCRA. Young claimed that an ex-girlfriend opened a joint charge account in Young’s name without his permission, the CRA failed to acknowledge this information and Young disputed these discrepancies with the CRA. Though the case turned on whether Young had waived his rights under the FCRA through previous settlements, the Fifth Circuit held that any private right of action Young may have had under the FCRA would require proof that a CRA had given the prospective lenders false information.

---

117 Id.
118 See id. at 294.
120 Id. at 295.
121 Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982).
123 Id.; see also 15 U.S.C. § 1681s-2(b) (cross-referencing §1681i(a)(2) and establishing duties of furnishers of information arising upon notice of a dispute).
Young pointed to no evidence tending to prove that notice of a
dispute from a CRA was given as required to trigger duties under
section 1681s-2(b). Thus, Young’s FCRA claims failed as a matter of
law.124

Sixth Circuit

The Sixth Circuit goes a step further than any case reviewed
from other Circuits and imposes liability on a CRA for the willful
actions of an employee under a theory of apparent authority. In Jones
v. Federated Financial Reserve Corp., a friend of a jilted ex-spouse
of the plaintiff was employed at the defendant credit reporting
company and obtained a credit report on the plaintiff at the behest of
the ex-spouse.125 Obtaining a credit report from a CRA for a non-
approved, non-business purpose is in direct violation of the FCRA.126
According to the Sixth Circuit, these actions violate section 1681b’s
extensive list of the limited circumstances under which a CRA or a
user of credit reports may furnish or utilize a consumer report. The
CRA, Federated, was required by the statute to comply with section
1681b’s permissible uses and purposes when providing and using
consumer credit reports.127 The court found that the scope of the
friend’s employment was to obtain credit reports, and doing so, even
wrongfully, was well within that scope of employment. As such, the
defendant, through apparent authority over its employee, willfully
violated FCRA.128

Jones v. Federated Financial Reserve Corp., demonstrates an
extension of the doctrine articulated in the Fifth Circuit. Again, it
extends a heavy curtain of liability over CRAs that fail to either
follow up on reports or monitor the reasons it justifies accessing
information. This ruling can be viewed as an extension of Bryant v.
TRW into the realm of vicarious liability for the intentional and
illegal acts of its employees.129 Both the Fifth and Sixth Circuits have
held CRAs to a high standard of accuracy and diligence.

124 Young, 294 F.3d at 540-41.
125 Jones v. Federated Financial Reserve Corp., 144 F.3d 961, 962-63 (6th Cir.
1998).
126 See id.; see also 15 U.S.C. § 1681 et seq.
127 Jones, 144 F.3d at 964.
128 Id.
129 Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982).
Seventh Circuit

The Seventh Circuit faced a factually analogous case in Washington v. Equifax Information Services, LLC as the Fourth Circuit faced in the Robinson case. In Washington, the plaintiff’s identity was also stolen, causing him to solicit the services of Equifax to rectify the resultant errors and report his credit information as it existed prior to the theft. In 2008, he applied for a loan, but was denied because of uncorrected inaccuracies in his credit report resulting from the theft. The plaintiff sued Equifax, claiming that the company violated the FCRA by disseminating false information about his credit history and by failing to employ reasonable procedures to investigate the accuracy of its information after he reported the identity theft. He also claimed that his credit problems caused his marriage to fail and left him suicidal and unable to work.

Unlike the Fourth Circuit, the Seventh Circuit held that the plaintiff had not proven that the negligent or intentional acts of Equifax had caused the damages that he claimed. Additionally, he failed to adduce evidence showing that his Equifax report was inaccurate, that they had notice of the inaccuracies, or that they failed to correct such inaccuracies, all of which a cause of action under FCRA requires.

Eighth Circuit

The Eighth Circuit does not typically extend liability as far as the Fifth or Sixth Circuits for wrongful access to credit information under the FCRA, aligning itself more with the Seventh Circuit in refusal to find CRA liability.

131 Id. at 633.
132 Id.
133 Id.
134 Washington, 373 F. App’x at 633.
135 Id. at 634.
136 Id.; 15 U.S.C. § 1681e(b); see also Wantz v. Experian Info. Solutions, 386 F.3d 829, 834 (7th Cir. 2004), abrogated on other grounds by Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007); Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994).
137 See Poehl v. Countrywide Loans, Inc., 528 F.3d 1093 (8th Cir. 2008); c.f. Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004) (finding release of consumer information in connection with an offer for credit on the purchase of a
In Poehl, the Eighth Circuit was called upon to define what types of agencies and lenders could be allowed access to obtain and disseminate credit information. Specifically, the court analyzed the provision that permits creditors to purchase prescreened lists of consumers who meet the creditor’s specific criteria without the consumers’ consent as long as the purchaser intends to give the consumer a “firm offer of credit.”\(^{138}\) In this case, the defendants mailed flyers, which stated that the plaintiffs had been pre-approved for various home and car loans. The court held that the mailers fell within the statutory definition of firm offers of credit, and that the CRAs did not violate FCRA by accessing the plaintiff’s credit information to extend firm offers of credit to them.\(^{139}\)

In Gohman v. Equifax Information Services, Inc.,\(^{140}\) a district court in Minnesota addressed the question of whether Equifax violated FCRA negligently when it (1) delegated to CSC (an affiliate CRA which owned and maintained the plaintiff’s credit file) its duty to update and review credit file changes; (2) failed to ensure that changes were made to the credit file; and (3) failed to detect “gross inconsistencies” in plaintiff’s credit file.\(^{141}\) The court held that delegation of duties is not unreasonable and does not violate either the CRA industry standard of care to credit furnishers or the guidelines of FCRA.\(^{142}\) Additionally, the court held that Equifax might not face liability if the plaintiff never filed a dispute with Equifax. However, the court acknowledged evidence that the plaintiff contacted Equifax concerning the erroneous information and was referred to Wells Fargo. Plaintiff also presented evidence showing that Wells Fargo sent Equifax a written notice that the deceased status in her file needed to be changed. Plaintiff therefore demonstrated that Equifax was on notice that her file contained a significant inaccuracy, and that Equifax could be held liable for its

---


\(^{139}\) Poehl, 528 F.3d at 1099.


\(^{141}\) Id. at 827.

\(^{142}\) Id.
failure to correct it.  

Ninth Circuit

In a suit naming numerous CRAs for alleged wrongful and erroneous reporting of information on a credit report, *Nelson v. Equifax Information Services, Inc.*)⁴⁴ the District Court for the Central District of California held that CRAs violated the FCRA with respect to the information released by the CRAs. In *Nelson*, the plaintiff, Nelson, sued for alleged re-reporting of information that was unverified and undisputedly false.⁴⁵ The court held that the CRAs failed to exercise the requisite care and their acts constituted negligence or even willful knowledge of an FCRA violation.⁴⁶ In order to sustain her claims against defendant Arrow, Nelson had to prove, both that she had notified Equifax of the disputed account, and that Equifax had notified Arrow of the disputed account. According to the evidence, Nelson notified Equifax of the disputed Account in September 2005, but Equifax failed to send notice to Arrow of the dispute. Therefore her claims were sustained against Equifax, but not in respect to Arrow, the furnisher of the information.⁴⁷

*Nelson*, in its differing outcomes for Equifax and Arrow, shows the willingness of the Ninth Circuit to extend liability to parties for their negligence or willfulness, but not when a plaintiff fails to show that the party knew, or should have known, of the false information. In *Nelson*, Arrow was not held to the duty of investigation suggested by both the Fifth and Sixth Circuits. Were the *Nelson* facts presented in either the Fifth or Sixth Circuits, Arrow could likely have been held liable for failure to undertake an investigation into the accuracy of information received from the furnisher.⁴⁸ However, in this instance, even amidst evidence that Arrow should have been aware of a dispute, the Ninth Circuit did not extend liability.⁴⁹

Tenth Circuit

The Tenth Circuit has squarely focused the burden of proof on

---

⁴³ *Id.*
⁴⁵ *Id.* at 1233.
⁴⁶ *Id.* at 1232.
⁴⁷ *Id.* at 1231.
⁴⁸ See Fifth Circuit and Sixth Circuit *supra*.
⁴⁹ See *Nelson*, 522 F. Supp. 2d at 1233.
the plaintiff in an action against a CRA. In *Birmingham v. Experian Info. Solutions, Inc.* Birmingham sued Experian and Verizon alleging, *inter alia*, incorrect reporting and violations of FCRA. The allegations stemmed from an incident with Verizon where Birmingham disputed activity on both his actual accounts and on two accounts fraudulently opened in his name. The issue concerning Experian was whether it “intentionally or recklessly failed to investigate adequately his dispute with Verizon.” In discovery, Experian produced a letter sent to Birmingham requesting appropriate proof of his identity and a copy of the report he filed regarding the fraudulent activity. Birmingham never adequately followed up on this request. Two Experian employees swore in affidavits that this identity information is required before Experian will further investigate the accuracy of the information. As a result, the court found that Experian’s “standard procedures appear reasonable.” The court concluded that a reasonable person evaluating the evidence “could not find Experian to have committed a willful violation of the FCRA.”

**Eleventh Circuit**

In *Cahlin v. General Motors Acceptance Corp.*, the plaintiff alleged negligent and willful noncompliance with various provisions of FCRA. The 11th Circuit affirmed the District Court’s grant of summary judgment in favor of TRW, Inc. and CBI. The claim stemmed from Cahlin’s involvement in a dispute with General Motors over his liability for lease payments after he returned the vehicle prior to the end of the lease term. He had the vehicle for less than 90 days in 1985. He contended that the salesperson at the dealership said he could return the vehicle without penalty if he did...

---

150 Birmingham v. Experian Info. Solutions, Inc., 633 F.3d 1006 (10th Cir. 2011).
151 *Id.*
152 *Id.* at 1008.
153 *Id.*
154 *Id.* at 1011.
155 *Id.*
156 *Id.* at 1012.
157 *Id.*
158 *Id.*
159 Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151 (11th Cir. 1991).
160 *Id.*
161 *Id.* at 1154.
so within 90 days. General Motors charged him with an early lease termination penalty, and when he failed to pay that amount, it was reported as a bad debt. After a period of negotiations, he agreed to a partial payment of the amount demanded by General Motors. He completed the payment of the negotiated amount to General Motors by May 1986. Cahlin alleged he was damaged because he was denied credit on many occasions between October 9, 1986, and November 3, 1987, namely the denial of a residential mortgage loan. However, Cahlin produced no documentation that the denial was the result of the TRW report. The court emphasized that it was Cahlin’s burden to prove that the credit report was the causal factor in his credit denial. The Eleventh Circuit reviewed two interpretations of what it means for a credit report to be accurate. The first view is called technically correct where the CRA satisfies its duty if the report is factually correct, even if misleading or incomplete. The second view is the maximum possible accuracy where if the report is factually correct but possibly misleading, the CRA cannot win on summary judgment. While the district court ruled using the technically accurate approach, the Eleventh Circuit panel stated that it has yet to adopt either test and did not need to reach that issue in this case because of the evidentiary failures of the plaintiff. Furthermore, the court found that the reports contained information believed to be factual by the credit reporting agency, and that any derogatory remarks were an accurate reflection of how General Motors initially characterized the account. The court stated that “a consumer... cannot bring a section 611(a) claim against a credit agency when it exercises its independent professional judgment, based on full information, as to how a particular account should be reported on a credit report.” The court editorialized that consumers do not get to dictate to CRAs what information shall be reported, as long as that information is accurate.

---

162 Id.
163 Id. at 1154-55.
164 Id.
165 Id. at 1155.
166 Id.
167 Id. at 1161.
168 Id.
169 Id. at 1157.
170 Id.
171 Id.
172 Id. at 1160.
173 Id.
Fifteen years later, the 11th Circuit decided *Enwonwu v. Trans Union, LLC, et al.* Enwonwu alleged that Trans Union and numerous other defendants violated the FCRA. He claimed that Trans Union did so by failing to take reasonable steps in confirming the accuracy of information it published in his credit report and by maintaining the entry after it was disputed, a violation of section 1681e(b) of the FCRA. Specifically, he claimed Equifax violated the FCRA by publishing inaccurate information about a 2002 garnishment. The district court dismissed claims against all defendants except Trans Union. The district court granted summary judgment in favor of Trans Union on his 1618e(b) claim because although the report contained an error, Enwonwu failed to produce evidence that the Trans Union report caused him harm. The only evidence he offered, besides his own allegations, was a general letter from Trans Union stating that creditors use credit reports to evaluate creditworthiness and that his report had been requested. The district court stated that Enwonwu was entitled to an inference that the credit report was examined by a potential creditor, but that the proffered evidence did not support an inference that the credit report was the cause of the credit denial. Additionally, he failed to present evidence that the other negative entries were inaccurate or that his lending result would have been different without the Trans Union error. The 11th Circuit affirmed the summary judgment for Trans Union and the dismissal of the claims against the other defendants. While both the district and appeals courts were clear on their interpretation of CRA obligations under FCRA, this case is a questionable precedent due to what appears to have been Enwonwu’s pro se pursuit of the case. The report is replete with problems that typically haunt pro se claimants, especially in cases at this level of complexity.


175 *Id.* at 916.

176 *Id.* at 917.

177 *Id.* at 916.

178 *Id.* at 917.

179 *Id.* at 918.

180 *Id.*

181 *Id.*

182 *Id.*


184 *Id.* at 147.
proceeding pro se, claimed denial of credit due to inaccurate information in his credit report. Jackson attempted to offer a credit report compiled by Equifax and two credit denials from Impac Lending as evidence to the appeals court. However, the denial letters had not been introduced in the district court, so they could not be considered by the Eleventh Circuit panel. From the evidence on the record, which was a copy of the credit report, a copy of a merge credit report, and interrogatories, the Eleventh Circuit ruled that the district court did not commit an error in granting Equifax’s motion for summary judgment. This followed the previous Eleventh Circuit decisions by holding that Jackson had not produced evidence that he was damaged by the inaccurate report. The appeals court also stated, as it has in previous cases, that credit report inaccuracies are not a case for “strict liability” and that the CRA can escape liability if it shows that the inaccurate report was generated through reasonable procedures.

In Green v. RBS Nat. Bank, Green brought action against multiple banks alleging that they provided false information to Trans Union and Experian. The appeals court stated that the district court was correct in finding the FRCA did not provide for private right of action to redress misstatements by creditors. However, there is a private right of action for a violation of section 1681s-2(b), but only if the furnisher received a notice of the consumer’s dispute from a CRA. Furthermore, the court concluded that even under that claim, Green would have lost, because the banks investigated the disputes with both Experian and Trans Union in a timely manner.

More recently, the Eleventh Circuit decided Ray v. Equifax Info Servs., LLC. Ray, yet another pro se plaintiff, alleged, inter alia, violations of the FCRA by Equifax. In this case, the district court granted summary judgment to Equifax because Ray failed to produce the credit report relied on in denying him credit, and he also

185 Id. at 145.
186 Id.
187 Id.
188 Id. at 146.
189 Id.
190 Id.
192 Id. at 642.
193 Id.
194 Id.
195 Id. at 643.
failed to show that the report was the cause of his failure to obtain credit. The appeals court upheld the summary judgment ruling.197 In reaching its decision on the FCRA claims, the Eleventh Circuit referenced in a footnote its technically-correct vs. maximum-possible-accuracy analysis in Cahlin.198 Parallel to Cahlin, the district court in Ray granted summary judgment using the technically correct approach, but the appeals court noted that it has not adopted either analysis and did not need to reach that issue in this case, again due to the failure of the plaintiff to meet its burden of proof.199

Continuing to follow the precedent in this circuit in another 2009 ruling against a pro se plaintiff, Peart v. Shippie,200 the appeals court affirmed dismissal of Peart’s claim of FCRA violations by Wells Fargo, Equifax, Experian, and Trans Union on the grounds that he failed to state a claim.201 The district court found that Peart did not allege that Wells Fargo failed to investigate the dispute or that Equifax, Experian, and Trans Union failed to reinvestigate his credit history or to generally follow reasonable credit reporting procedures.202 Therefore, the Eleventh Circuit yet again found that the claims presented by the pro se plaintiff did not raise sufficient issues to avoid summary judgment.203

A question that arises at this juncture is whether the Eleventh Circuit strongly leans toward the CRAs, or if they have simply been confronted with a series of poorly presented cases brought by pro se plaintiffs? A possible explanation is that the Eleventh Circuit has historically been hostile to such plaintiff claims and therefore, the plaintiff bar members are unwilling to pursue these cases on a contingency basis in this circuit. Thus, pushing the aggrieved individuals into pursuing cases pro se.

IV. CONCLUSION

This article began with an examination of the development of the statutory framework for legal liability for credit reporting agencies. Traced back to English common law theories, the statutes in the United States, as interpreted by the Federal Courts, make it the

197 Id. at 826.
199 Ray, 327 Fed. App’x at 826.
200 Peart v. Shippie, 345 Fed. App’x 384 (11th Cir. 2009).
201 Id. at 386.
202 Id.
203 Id.
responsibility of CRAs to report accurate financial consumer data in credit reporting practices and provide the basis for holding them accountable should they fail to do so. In the age of identity theft and advancing technologies giving rise to increasing methods for “hacking” into databases, these statutes are important for consumers. Recent amendments to FCRA and the passage of FACT Act have provided stronger statutory protections for ensuring the accuracy and security of consumers’ credit reports. These include: providing the consumer easier access to and more control over the data within their credit reports and the ability to monitor them for accuracy, requiring disclosure to the consumer when their credit reports are being requested, and mandating more frequent disclosure to the consumer of their credit scores. These statutory requirements have provided the basis for judicial decisions from the courts as the result of consumer challenges to the accuracy and security of their financial data, and when and to whom it is disclosed.

The Federal court decisions, examining them by their respective Circuit Court of Appeals, have generally trended in the direction of more consumer protection. This is not universally true and practitioners need to be diligent in understanding the requirements for finding liability in each Circuit where a case may be brought.

The analysis produced some surprises in that the traditionally “conservative” Fourth and Fifth Circuits have delivered decisions that are more “pro-consumer” than Circuits like the First and Second, which are not viewed by legal observers as being as conservative. The Eleventh Circuit, formerly part of the Fifth Circuit, might be viewed as predictably ruling in the “conservative” or pro-business vein. As noted above, this is open to debate since numerous rulings against plaintiffs are against pro se plaintiffs and not leading plaintiff law firms.

Regardless of whether plaintiff consumers or defendant CRAs prevail, the next decade portends an expansion of CRA litigation in the Federal courts in light of the continued troubled economic climate and the shifting view of liability by the courts. This suggests that the parameters of consumer rights and protection and CRA liability will continue to unfold in the coming years. This review is but a signpost along the way.