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"Credit Reports: Consumers' Ability to Dispute and Change Information"

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Mr. Chairman, and Members of the Committee, thank you for the opportunity to testify before the Committee. My name is Evan Hendricks, Editor & Publisher of *Privacy Times*, a Washington newsletter since 1981. For the past 30 years, I have studied, reported on and published on a wide range of privacy issues, including credit, medical, employment, Internet, communications and government records. I have authored books about privacy and the Freedom of Information Act. I have served as an expert witness in litigation, and as an expert consultant for government agencies and corporations.

I am the author of the book, "Credit Scores and Credit Reports: How The System Really Works, What You Can Do." (2nd Edition, Privacy Times 2005) The Third Edition is due out later this year.

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The Credit Reporting System

Without question, the U.S. credit reporting system has played a central role in the expansion of consumer credit in this country. The largely digital credit reporting system, and the companion credit scoring system, have automated credit "decisioning," greatly reducing the time and cost of granting credit, to the benefit of millions upon millions of consumers, and thousands of businesses. It has improved the profit worthiness of the financial services industry in general. It has proven to be very profitable for the three major credit reporting agencies (CRAs).

While I readily willing to acknowledge the benefits of the credit reporting system, I am consistently disappointed by industry witnesses who decline to admit that the system remains plagued by serious problems relating to accuracy, fairness, responsiveness and privacy.

The lives of too many consumers are still tormented by chronic inaccuracy, inadequate reinvestigations of genuine disputes, non-responsiveness and gross invasions of privacy. Yes, these were the same problems that consumers faced in the late 1980s and early 1990s when the Federal Trade Commission and State Attorneys General conducted extensive investigations and reached consent agreements with each of the Big Three CRAs or their corporate predecessors. In those consent agreements, the CRAs vowed to significantly improve their practices, but in reality did not improve them, in my opinion.

And yes, these were the same problems that Congress heard about during the seven years leading up to the 1996 FCRA Amendments, as well as those Congress heard about in 2003 when it amended the FCRA by passing the FACT Act.

The same problems persist today. In my view, a major reason Congress has consistently strengthened the FCRA is so consumers *won't have to file a federal lawsuit* in order to get errors in their credit reports corrected. However, I have seen a steady rise in cases in which the only practical way the consumer could get errors corrected was by filing a federal lawsuit.

Why The Same Old Problems?

When taking up the FCRA, why does Congress continue to hear about the same problems of inaccuracy, inadequate reinvestigations of disputes, non-responsiveness and loss of privacy?

First, in a significant number of cases, there is systematic non-compliance with the *goals* of the FCRA. The CRAs, and even some creditors, behave like naughty children who simply refuse to do the right thing unless their parent is standing over them, making them do it. (A significant difference is that naughty children are not managing the sensitive personal credit report data of 220 million-plus Americans.)

Second, there is not systematic enforcement of the FCRA. The FTC's last large-scale enforcement action vs. the CRAs was in the early 1990s. The banking regulatory agencies, which were supposed to begin enforcing inaccurate reporting violations by creditors in 1997, to date have not brought a notable enforcement action. Currently, the only serious enforcement comes from private lawsuits. In recent years, some notable court opinions and jury verdicts have been issued. The good news is that the law is finally beginning to catch up to some of the industry's worst practices. The bad news is that this is a slow and uneven process, which at its current pace, will take years to accomplish the FCRA's goals on a national level.

Third, the financial services industry in general, and the three CRAs in particular, clearly appear to have made the calculation that it is more beneficial to them to continue the old ways than to change in a manner sufficiently robust to spare thousands of consumers of the same old problems that the FCRA was intended to prevent.

FCRA Compliance Is A 'Cost;' Industry's Goal Is To Reduce Cost (Automation)

Naturally, a central issue is the industry's goal of reducing the cost of FCRA compliance. The primary means of accomplishing this is through automation of the processes for "building" consumer files and for responding to consumer disputes. Yet the manner in the CRAs and major furnishers have set up their automated systems, and their resistance to making obviously necessary adjustments, are at the core of the kinds of maddening inaccuracy problems that consumers continue to experience. Another more recent method of reducing costs is to outsource dispute processing to low-wage countries like the Philippines, Jamaica and Costa Rica.

Partial Matching & Inaccuracy

A major cause of inaccuracy is the CRAs' use of "partial matching" for building consumer files. At the core of "partial matching" is the willingness of CRAs to allow two consumers to be considered the same consumer if 7-out-of-9 digits of the Social Security Number (SSN) match, and there is enough geographic similarity, as well as common letters in the consumer's *first name*. Thus, when the results of CRA Partial Matching are incorrect, the consumer becomes the victim of a "Mixed File," meaning that information on another consumer was mixed into the victim's file. Mixed Files were the leading cause of complaints to the FTC and some State AGs *in the early 1990s*. In separate consent agreements, each of the Big Three CRAs acknowledged the importance of using "Full Identifying Information," defined as "full last and first name; middle initial; full street address; zip code, year of birth; any generational designation; and social security number." Yet deposition testimony indicates that at least two CRAs did not make significant changes in their partial matching practices after the consent agreements. The underlying reason that CRAs cling to their old ways is that their fundamental goal is to provide the "maximum possible *amount of information*" to its paying subscribers. The problem is that the CRAs' goal often clashes with the FCRA's fundamental requirement that they have "reasonable procedures for maximum possible accuracy."

When partial matching goes awry, it systematically causes inaccuracy. Moreover, after the CRA sold an inaccurate, mixed-file credit report, and the consumer was declined credit, when the consumer requests his or her file from the CRA, there have been cases where the CRA only disclosed to the consumer a "thinner" file that doesn't include all of the derogatory data that might have disadvantaged the consumer in his or her credit application. Put simply, in these cases the CRA sells one set of data to the creditor but gives a less complete set to the consumer. This is because when the consumer requests his or her own file, the CRAs use an *exact match* of the SSN to determine what information goes into the consumer's file.

Partial Matching Helps Identity Thieves

Partial matching has significantly helped identity thieves, but for different reasons. The CRA algorithms assign great importance to an exact match of the SSN. As explained in my book, the exact match of the SSN will permit wrongful release of the victim's credit report, even if the thief uses a different address or city:

> In "true-name fraud," the key moment occurs when the CRA discloses the innocent victim's credit report to a subscriber holding the identity thief's application for credit. This disclosure enables the fraudster to obtain credit in the name of the innocent victim.
>
> Identity thieves often enter mistaken data when they fraudulently apply for credit. But if they have obtained the victim's SSN, it will help override other discrepancies in the application and convince the CRA algorithm to disclose the victim's credit report. Even if there are mistakes in the SSN, the "partial match" tolerance within the algorithm still gives the fraudster a chance of triggering release of the credit report.

CRAs continue to defend partial matching as necessary. However, there should be no dispute that CRAs should adjust towards more exact matching after victims of a mixed file or identity theft (or some other form of chronic inaccuracy) notifies the CRA of inaccuracies in their reports. Astonishingly, the CRAs don't this. Moreover, this crucial issue of post-notification partial matching was not even addressed in the FTC's report.

However, it was addressed in the 2006 case of Victoria Apodaca v. Equifax (417 F.Supp.2d.1220), by U.S. District Judge M. Christina Armijo, in New Mexico. Ms. Apodaca had very good credit until Equifax permitted the bankruptcy of another "Vickie Apodaca," with a similar SSN, to be included in Ms. Apodaca's report. Equifax failed to remove the highly damaging bankruptcy notation, despite Ms. Apodaca's repeated disputes. Judge Armijo observed:

> I agree with Equifax that if Plaintiff were relying solely on a general policy argument in favor of scrapping partial matching logic and the CDV process altogether, then such an argument would not suffice to prove willfulness in this case because there is nothing illegal *per se* about using partial matching logic and the CDV process as part of Equifax's credit reporting business. We do not live in a perfect world, and therefore any credit-reporting agency must choose between a system that defaults to a procedure that is under-inclusive or a system that defaults to a procedure that is over-inclusive," she continued.
>
> The real question Plaintiff is raising in this case, however, is … what additional steps, if any, are required to override or correct the standard procedures to which a credit-reporting agency defaults when those procedures are not functioning."

> "In other words, I do not understand Plaintiff to be claiming punitive damages merely because Equifax's credit-reporting system initially defaulted to an over-inclusive procedure that mistakenly included information belonging to another consumer on her credit report and relied on the furnisher of that information to determine its accuracy or applicability. Rather, I understand Plaintiff to be making the argument that punitive damages are warranted because Equifax consciously and recklessly decided not to make available any additional steps which would have overridden or supplemented the standard procedures to which it initially defaulted in Plaintiff's case, even though the company knew that those procedures were so over-inclusive they would result in violations of consumer rights without such additional steps," she wrote.
>
> There are circumstances in which the FCRA may require a credit-reporting agency to go beyond the initial CDV process and 'verify the accuracy of its initial source of information.' Courts determine the existence and extent of such a requirement by balancing 'the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer,' which in turn 'will depend, in part, on whether the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable.' 'Once a claimed inaccuracy is pinpointed, a consumer reporting agency conducting further investigation incurs only the cost of reinvestigating that one piece of disputed information.' In such instances, 'the likelihood that the cost-benefit analysis will shift in favor of the consumer increases markedly.'"[1]

Inadequate Reinvestigations: The 'ADCV Exchange'

Why are there times when CRAs and furnishers simply don't correct or delete erroneous data?

The fundamental problem is that CRAs, as a matter of policy, don't truly "investigate" serious consumer disputes. Instead, they exchange messages with creditors with the basic purpose of determining what information the creditor furnished before and whether the furnisher wants essentially the same information to continue to be included in the consumer's report.

The goes to the automated system set up by the industry to respond to consumer disputes, and to which Judge Armijo alluded. It is known as E-Oscar, or the "ACDV Exchange."[2]

ACDV stands for "Automated Consumer Dispute Verifications." When the consumer sends his dispute to the CRA, the CRA creates an ACDV with the consumer's identifying

[1] The Apodaca case was settled for confidential terms after Judge Armijo's opinion, just weeks before trial.
[2] In fact, Congress required such a system in the 1996 Amendments, but Judge Armijo indicated, Congress never even hinted that this system should be the exclusive means for responding to consumer disputes.

information (name, address, city-state-zip, SSN, sometimes previous address),[3] and then reduces the dispute to a two-or three-digit, or alpha-numeric code that cryptically describes the dispute (e.g., "not mine" or "fraud"). In a "not mine" dispute, the CDV instructs the furnisher to provide "complete ID."

Upon receipt of the CDV form, the creditor will advise the CRA if a sufficient number of identifiers (i.e., name, Social Security number) match up, and if the description of the account on the ACDV is the same as that in the creditor's database (i.e., "90-days late' or "charge-off"), and then "instruct" the CRA to either delete, modify, or "verify" the information so that it remains.

Thus, this process is better described as a ***comparison*** of each entity's existing data on the consumer, rather than an independent evaluation or investigation of the consumer's dispute.

As case after case illustrates, there can be several problems with the CDV-exchange serving as the principal means of responding to consumer disputes. First, a cursory exchange of messages does not amount to an investigation under any normal sense of the word. The Webster's New Collegiate Dictionary defines "investigate" as, "v. To observe or study by close examination and systematic inquiry. Systematic—adj. Marked by thoroughness and regularity." An exchange of messages is neither a "study by close examination" nor "marked by thoroughness and regularity," in my opinion.

Second, when the misapplication (mixed file) or misuse (identity theft) of the victim's identifiers *is the cause* of the inaccuracy in the victim's credit report, the CDV-exchange is not reasonably calculated to successfully determine whether a consumer's dispute should be honored.

Third, because the CRAs and creditors rely principally on the CDV-Exchange, they do *not even consider* taking other reasonable investigative steps that likely would be more effective in resolving a dispute over highly damaging errors caused by mixed files, identity theft, or mis-assignment of liability. Such alternative steps would include contacting the consumer directly by phone or email, or using readily available investigatory tools, like look-up services, to verify addresses.

Fourth, CRA dispute handling processes are biased in favor of the word of creditors over the word of consumers, which in my opinion, reflects disregard for the FCRA's goals of fairness and impartiality. There are times when the creditor is right and the consumer is wrong. However, there are times when the consumer is correct in pointing out that errors exist on her credit report and the credit grantor is incorrect in "verifying" errors. It is the CRAs' responsibility to analyze all available data -- that from the consumer, from the creditor, and that which is in its own files -- and then decide which disputed data should remain and which should be removed from the consumer's report.

The ACDV-exchange system is reasonably calculated to blunt credit repair-styled disputes that send in a barrage of disputes in the hope that CRAs-creditors won't comply with the 30-day time limit, and consequently, will have to remove the disputed information. However,

[3] The CRAs often refer to identifiers as "indicative data"

Trans Union's executive testified in 2003 that credit repair outfits were responsible for about 35 percent of dispute volume. This means that CRAs and creditors are exclusively relying on a system that might not be reasonably calculated to satisfactorily resolve millions of disputes.

It is important to note that this very problem was identified some 16 years ago by the FTC and State AGs. One of the provisions in the consent agreements – again, agreed to by each of the Big Three CRAs – related to the importance of having experienced CRA personnel oversee investigations of consumer disputes over the more complex Mixed Files cases.

For instance, in the 1992 agreement with the State Attorneys General, Trans Union agreed to adhere to the following practices:

> As to Consumer disputes concerning Mixed Files, assigning such disputes, for investigation and resolution, to Senior Investigators who are experienced in handling such disputes. In such cases the Investigator shall, as appropriate: 1) pull all files which may be involved in the dispute; 2) fully verify disputed tradelines to determine whether the tradeline is owned by the Consumer in whose file it resides; 3) make any changes, deletions, or additions to correct the Consumer's file and resolve the dispute; and 4) for files which are found to be mixed, prepare a summary and hard copies of the files involved to the systems support division of the Data Processing Department, for review and analysis by that Department as to the need for corrective action…

Instead of honoring the spirit of this agreement, CRAs have gone the other direction, outsourcing dispute processing to low-wage countries where personnel has less experience and less familiarity with our consumer credit system. This is not to say that the CRAs don't train low-wage, outsourced personnel on their priorities. Outsourced dispute processors from one low-wage country consistently testified that their CRA trained them to carefully look at the creditor's response on an ACDV form and then decide what goes into the consumer's file based on the creditor's instructions.

This goes to the heart of how CRAs view their role, and even how *they* define "accuracy." CRAs view their primary role as to faithfully include on a consumer's report those data that are furnished to it by its paying customers, the creditors. As long as the creditors furnish accurate information, this is fine. But it is problematic when the information is inaccurate and the CRAs' file-building and dispute resolution systems default toward the creditors' reporting, even when the consumer is right and the creditor is wrong.

Accordingly, CRAs essentially define "accuracy" as faithfully including on the consumer's report what is furnished to them by the creditor, rather than seeing accuracy as having a direct relationship with the underlying truth. The dictionary defines accuracy as, "1.the condition or quality of being true, correct, or exact; freedom from error or defect; precision or exactness; correctness."

I see the CRAs' pro-creditor bias conflicting with the FCRA's stated purpose that they "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."

Lack of Enforcement

The FCRA is a good statute, but systematic enforcement by the federal agencies that are charged with that duty is totally lacking. I look forward to hearing if the federal banking agencies can cite any significant enforcement actions on their part in regards to systemically inaccurate credit reporting by creditors.

Moreover, the federal agencies have dismally missed deadlines for promulgating several important rules under the FACT Act. Most of these failures can be attributed to the agencies' propensity to kowtow to industry pressure.

Private Enforcement

The most important enforcement of the FCRA comes in the form of private lawsuits.[4]

These cases have come to light since Congress finished work on the FACT Act Amendments in 2003.

In January 2000, Matthew S. Kirkpatrick, a Portland, Ore. carpenter and father of two young children, was surprised to learn that he had been denied a loan, since he always had top-of-the line credit. But he had become a victim of identity theft by an unknown perpetrator in Idaho, and his once-pristine credit report was mauled by 19 fraudulent accounts. The diligent Kirkpatrick sent Equifax a dispute package consisting of

- Coeur d'Alene and Portland police reports confirming that Kirkpatrick was not responsible for the fraud
- Letters from two defrauded creditors confirming that he was not at fault
- A copy of his Social Security card w/ signature
- A copy of his driver's license with his photo and current home address in Portland
- A cover letter explaining that he was a victim of identity theft.

A week or so later, Kirkpatrick called Equifax to ensure that it had received the package. An Equifax operator said it was never received. Kirkpatrick re-sent the package, placed a follow up call, and again was told by an Equifax operator that it was never received. He sent the same package a third time, but was later told on the phone that Equifax didn't have the package. The third operator told him to send it certified, return receipt requested. Kirkpatrick did, and promptly received the signed USPS green card, showing that Equifax received the package. But when he called, an Equifax operator told him it was no where to be found. The operator convinced Kirkpatrick to do a dispute over the phone. The story got worse from there. Equifax

[4] Many of the attorneys who specialize in FCRA are members of the National Association of Consumer Advocates (NACA, www.Naca.net and subscribe to the FCRA manual published by the National Consumer Law Center www.NCLC.org.)

consistently failed to delete the fraudulent data. Information that was patently false had been "verified" by its investigations, Equifax claimed. Some data that it deleted was later reinserted. Kirkpatrick missed a deadline for getting the financing he needed to complete a home renovation that he had started to add a bedroom, as his wife was pregnant with his third child. As the weeks and months went by, Kirkpatrick was trapped in credit report purgatory, and the constant stress made his life Hell.

Kirkpatrick was one of several consumers who was only able to effectuate correction of his credit report by filing a federal lawsuit.[5] The lawsuit is necessary because the defense attorneys have the authority to finally override the automated systems that are causing – or failing to fix – the problem in the first place. Unlike most such suits, Kirpatrick's actually went to trial.

In her pre-trial deposition, Alicia Fluellen, head of Equifax's dispute-handling department,[6] denied that Equifax had violated even one provision of the FCRA.[7] But at trial, five years after his ordeal began, Fluellen, who was speaking for the company, Equifax admitted it had failed Kirkpatrick, but couldn't explain the breakdowns.

"It appears to me to be the Murphy's law of all dispute handling. I have truly never seen that. Every last opportunity that we had to get it right, we just – it was missed or wasn't taken."

> Further, Kirkpatrick finally got an apology when the soft-spoken Fluellen, facing him from the witness stand, said, "I am completely and utterly embarrassed by the errors, very disappointed that we made so many errors on one particular consumer's credit file. This is my very first time coming into contact with Mr. Kirkpatrick. I really do believe he deserves an apology and I really would like to say that I am very, very sorry in the way we handled your disputes. I truly am."

Fluellen did not mention that prior to Kirkpatrick, John Harrison had a similar experience: he too was a victim of identity theft with 15 fraudulent accounts that Equifax failed to remove despite repeated disputes. Fluellen was personally involved in Harrison's case after he filed suit. Harrison testified before this Committee in May 2003

Nicole M. Robinson, an Alexandria, Virg. resident, who for the past five years served as the volunteer East Coast coordinator of the Identity Theft Resource Center, has spent some six years trying to get her Equifax report corrected – all to no avail. The fraudulent accounts caused by the perpetrator – Nicole A. Robinson, of San Antonio, Tex. – have marred victim Nicole's Equifax reports since 2000, and prevented her and her daughter from purchasing a home. She tried everything she could think of: she's testified before Congress and State Legislatures, she has appeared in the media, she was an invited guest at President Bush's 2006 White House meeting on identity theft. She also spoke directly with dispute department higher-ups at Equifax.

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[5] Mr. Kirkpatrick was represented by Michael Baxter and Robert Sola, Portland, Ore.
[6] Fluellen's title was director of consumer customer care.
[7] That portion of the deposition was read at trial.

None of this was enough to persuade Equifax to remove obviously fraudulent data in her file. Her case is pending in federal court in Alexandria, Virg.[8]

No Sign of Change

In 2002, a jury hit Trans Union with a $5 million punitive damages award because its routine procedures caused the chronic mixing of plaintiff Judy Thomas' file (of Klamath Falls, Ore.,) with the negative history of Judith Upton (Stevenson, Wash.) In January 2003, Magistrate Judge John Jelderks reduced the punitive award to $1.2 million, which Trans Union paid. Later in 2003, a federal jury in Fresno, Calif. awarded $939,900 -- $325,000 in punitive damages and $614,900 in compensatory damages -- to a husband and wife who sued Trans Union after the credit bureau continued reporting tax lien delinquencies well after the couple disputed their accuracy.[9] Yet despite these verdicts, it's not clear if Trans Union has made any significant changes to its procedures because of these verdicts, according to Oregon attorneys Michael and Justin Baxter. The Baxters continue representing plaintiffs against TU and other CRAs over inaccuracies stemming from mixed files and identity theft.

Sandra Cortez had a rude surprise when she went to a Denver-area auto dealer to buy a car: on the front page of her TransUnion report, there were multiple listings referencing "OFAC Alerts" for Sandra Cortes Quintero, a suspected narcotics associate from Cali, Colombia. The alerts caused the car dealer to call law enforcement authorities. Ms. Cortez was asked to wait in a room until local police could reach the FBI. Ms. Cortez later testified at trial that she was terrified that the FBI would burst into the room and begin interrogating her.

"OFAC" stands for the U.S. Treasury Department's Office of Foreign Assets Control, which maintains a list of over 6,000 names suspected terrorists, narcotics traffickers, and other "specially designated nationals."

Ms. Cortez could readily see that the Colombian narcotics suspect was a completely different person. Sandra Cortes Quintero had a Colombian passport number and a date-of-birth of "06/21/1971;" Ms. Cortez was born some 27 years earlier.

When Cortez repeatedly disputed the information with TransUnion, the credit bureau's dispute operators told her there was no such information about Quintero or OFAC in her file. This was in part true because TransUnion testified it did not integrate the OFAC alerts into its central credit reporting database. Instead, TransUnion has an arrangement with a vendor, Accuity, which obtains the information from OFAC and then transfers it to TransUnion. The credit bureau would include OFAC information on a consumer's report based solely on a "name match," even if the matching name was a middle name instead of a last name. TransUnion testified that it did nothing more to vet information, like comparing dates-of-birth, before putting OFAC data on a consumer's report. TransUnion argued that since it never put the OFAC data into its principle credit reporting database, but instead merely passed it on to users of its credit reports, the activity was not covered by the FCRA.

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[8] Ms. Robinson is represented by A. Hugo Blankingship III
[9] Soghomonian v. U.S.A., 278 F. Supp. 2d 1151 (E.D. Cal. 2003)

But Senior Judge John P. Fullum, of the Eastern District of Pennsylvania, rejected TransUnion's argument that it wasn't covered by the FCRA, and let the case go to the jury.

A federal jury in Philadelphia awarded Ms. Cortez $50,000 in actual damages and $750,000 in punitive damages. The jury foreperson apparently took it on her own to write the following at the end of the verdict form: "The Trans Union business process needs to be completely revamped with much more focus on customer service and the consumer." Trans Union said it will appeal.[10]

Ms. Cortez's experience was not an isolated one. A 2007 report by the Lawyers' Committee for Civil Rights of the San Francisco Bay area (LCCR) found that financial institutions, credit bureaus, charities, car dealerships, health insurers, landlords, and employers are now checking names against the list before they open an account, close a sale, rent an apartment, or offer a job. TransUnion, one of the three major credit bureaus, markets and sells an OFAC screening service as an add-on to credit reports.

"The OFAC list threatens to become an even wider problem than the no-fly lists: while the no-fly lists are screened at the airport by a limited number of private companies (commercial airlines), the OFAC list is potentially checked by hundreds of thousands of private businesses across many sectors of the economy, with no standards for training or for compliance with civil rights," the report said. "The government's indiscriminate OFAC policies end up drafting large swathes of American society into domestic surveillance."

Defending the Indefensible

It is most fortunate that Anne Fortney is appearing before the Committee, as her expert witness work provides a useful window into some of industry's anti-consumer policies and practices. Ms. Fortney's work also underscores industry's determination to defend and continue these practices.

The most important court opinion regarding furnishers' duties to reinvestigate consumer disputes is Johnson v. MBNA[11]. In that case, the U.S. Court of Appeals for the Fourth Circuit (Richmond) rejected MBNA's claim that all that was required of its investigation in response to a consumer's FCRA dispute was that it briefly review its own records to determine if the disputed information was what it previously reported.

Writing for the Fourth Circuit panel, in an opinion authored by Chief Judge William W. Wilkens made it clear that the standard industry automated "parroting" was not enough:

> Stated differently, MBNA contends that this provision does not contain any qualitative component that would allow courts or juries to assess whether the creditor's investigation was reasonable.

[10] Ms. Cortez was represented by John Soumalis and Jim Francis of Francis & Mailman in Philadelphia.
[11] Linda Johnson v. MBNA America Bank, 357 F.3d 426 (4th Cir. 2003)

> The key term at issue here, ‘investigation,’ is defined [by the dictionary] as ‘a detailed inquiry or systematic examination.’ Thus, the plain meaning of ‘investigation’ clearly requires some degree of careful inquiry by creditors,” he wrote.
>
> … [T]he statute uses the term “investigation” in the context of articulating a creditor’s duties in the consumer dispute process outlined by the FCRA. ***It would make little sense to conclude that, in creating a system intended to give consumers a means to dispute – and, ultimately, correct – inaccurate information on their credit reports, Congress used the term ‘investigation’ to include superficial, unreasonable inquiries by creditors***. We therefore hold that § 1681s-2(b)(1) requires creditors, after receiving notice of a consumer dispute from a credit reporting agency, to conduct a reasonable investigation of their records to determine whether the disputed information can be verified.”

Despite the Fourth’s Circuit’s unequivocal holding, however, she continued to express opinion that the FCRA did not require creditors’ FCRA investigations to be overly concerned with the accuracy of disputed information, but only to report accurate the results of their reinvestigations.

Ms. Fortney once wrote: “Lawsuits, like Gail Cope’s, confuse (1) the requirement that the furnisher ***report accurately the results*** of its investigation to the CRA with (2) the requirement that the furnisher ***report accurately the information*** investigated.” [Emphasis in original]

Under Ms. Fortney’s view then, a creditor would never be liable whenever it *accurately reported* that *the result* of its “investigation” was that it erroneously “verified” false information – regardless of the adequacy of the investigation. In my opinion, such a result does not square with the FCRA’s goals of accuracy and fairness.

Adverse Action Notices. Under the FCRA, when a consumer is denied credit or somehow disadvantaged in the insurance context because of any information in his or her credit report, the creditor or insurer must so inform the consumer in an adverse action notice. The notice must also inform the consumer which CRA was used and that the consumer has a right to obtain a free credit report from that CRA.

Ms. Fortney, however, has expressed the opinion that the required adverse action notices do not actually have to inform the consumer that an adverse action in fact has taken place. This sort of sophistry was rejected by the U.S. Supreme Court in its very recent Safeco opinion in which Justice David Souter wrote, “The notice must point out the adverse action, explain how to reach the agency that reported on the consumer’s credit, and tell the consumer that he can get a free copy of the report and dispute its accuracy with the agency.”

In a tenant-screening case, Ms. Fortney expressed the opinion that it was reasonable for a specialized tenant-screening CRA to compile a report showing that the consumer had been sued by a former landlord, but at the same time fail to mention that other court records, already in its possession**,** showed the landlord's suit against the consumer was dismissed.

Troubling Developments

Credit reporting and credit scoring are very dynamic fields. Some of recent developments of concern include:

Triggers: Endorsed By FTC. For the past year or so, the three major credit reporting agencies have been selling a service to mortgage brokers and lenders that reveals, sometimes within 24 hours, when a consumer has applied for a mortgage or refinance. The controversial program, first marketed as "Triggers" by Experian, has drawn sharp criticism from consumer advocates and the National Association of Mortgage Brokers (NAMB) as both an invasion of privacy and an unfair business practice. The practice is also the target of lawsuits charging that it violates the Fair Credit Reporting Act (FCRA). Despite the growing controversy, the Federal Trade Commission, which is responsible for consumer protection, deterring unfair trade practices and enforcing the FCRA, in February issued a statement endorsing Triggers because it meant that consumers would receive "more offers" when seeking a mortgage or refinance. But a growing list of anecdotes indicates that unscrupulous lenders and brokers are using the leads to make deceptive "bait-and-switch" proposals.

The FTC's FreeCreditReport.com Settlement. Although no one knows the total, FreeCreditReport.com probably made millions of dollars in profit inducing consumers with the misleading offer of "free (Experian) credit reports." Yet the FTC agreed to settle charges of deceptive practices for $1 million. The FTC[12] went after FreeCreditReport.com a second time, but this time only fined them $300,000. I agree with the dissenting opinion of FTC Commissioner Jon Liebowitz from a separate case, "I would rather go to trial and risk losing, than settle for a compromise that makes an FTC action just a cost of doing business."

Post-Bankruptcy Inaccuracies. There is a systematic problem with inaccuracies in post-bankruptcy credit reporting. After debts are discharged, they are supposed to be reported as "included in bankruptcy," with a zero balance, which mitigates the negative impact on a credit scores. But all too often, creditors continue to report discharged debts as still owed, which dramatically punishes a consumer's credit score. The CRAs have been too lenient in permitting this, and there has been little in the way of investigation or enforcement from U.S. banking agencies.

Credit Reporting As Debt Collection. Some creditors don't actively pursue debts, they just report them as unpaid to the CRAs. This is appropriate if the debt is actually owed, but this

[12] Many experts and consumer advocates believe that in recent years, the FTC has been "soft" on the credit reporting industry. Some believe that one reason for this is that Timothy Muris, the previous FTC Chairman, and his chief of consumer protection, Howard Beales, were once reported to be expert witnesses for TransUnion in a case brought against it by the FTC. Moreover, the current FTC Chairman, Deborah Platt Majoras, is from Jones Day, the law firm that represents Experian in FCRA cases. If this pattern continues, the next FTC Chairman will have ties to Equifax. In the future, Congress should conduct an "FCRA-impact analysis" when evaluating candidates for FTC Chairmen.

practice "crosses the line" when creditors and collectors threaten to report debts – or actually report debts – that they know or should know are not the responsibility of the consumer.

Authorized Users. For years, the FICO scoring model has "scored" authorized users, even though they are not responsible for the credit card's debt. However, now services are selling the right to become an authorized user on the card of a complete stranger for the purpose or boosting one's credit score. In response, Fair Isaac said its next version of the scoring model, due out later this year, will no longer score authorized users. Such a change is likely to bring even more inconsistency and confusion, as most lenders likely will not use the new version.

Pattern Recognition Software. Credit card companies often use "pattern recognition software" to detect changes in customer buying patterns that might indicate a lost card and fraudulent use. When identity theft occurs, it is typical that the victim's credit report file is rapidly hit by several fraudulent tradelines. However, to my knowledge, the CRAs do not use any sort of "pattern recognition software" to spot new signs of identity theft. Moreover, it does not appear the CRA dispute operators are trained to look for such patterns when receiving fraud disputes from victims of identity theft.

What To Do

This is not a hearing on proposed legislation, so this is not the time to present to the Committee detailed proposals for improving the FCRA. It is worth noting, however, that despite Congress's successful efforts to strengthen the statute on behalf of consumers in both 1996 and 2003, the miscreant behavior of major industry players continues.

I strongly endorse the calls for injunctive relief, as well as all other improvements recommended by my colleagues Chi Chi Wu, of the National Consumer Law Center, and Leonard Bennett, one of the nation's leading FCRA attorneys.

Adverse Action Notices. It would be extremely helpful to consumers and not burdensome to require that Adverse Action Notices be more specific, so that the consumer would have a better and more immediate idea as to what information in his or her credit report is causing disadvantage. In part, this could be achieved by passing through to the consumer the "reason codes" that accompany a credit score, as is done in the mortgage context.

Consumer Protection Statute. Frankly, I think the FCRA is quite clear that it is first and foremost a Consumer Protection Statute. But some industry officials continue to deny this is the case. A Congressional reaffirmation of this could prove beneficial to consumers.

Failed Regulatory Oversight. A clear goal of the FACT Act Amendments was to increase and improve federal agency oversight of the consumer reporting industry. Given their dismal performance in both enforcement (lack thereof) and missing rule-promulgation deadlines, it is important to recognize that this approach thus far has proven to be a failure, and that the federal agencies charged with FCRA oversight have failed American consumers.

Catalyst theory. For several years, the "Catalyst Theory" applied to Freedom of Information Act (FOIA) lawsuits. This meant that if a lawsuit prompted a federal agency to release records under the FOIA, the plaintiff's attorney was eligible for attorney's fees. Given that there is little in the way of enforcement of from federal overseers, and that in many important cases, the only way that consumers can get their credit reports corrected is by filing an FCRA suit, it is important that the Catalyst Theory become part of the FCRA.

Credit Monitoring. Prior to the free-credit report requirement of the 2003 FACT Act Amendments**, t**he FCRA capped the price of a credit report. However, the credit monitoring services offered by the three CRAs can range between $79 to $119 per year. These services represent an "end-run" around the Act's intent to encourage access by prohibiting excessive charges. The FCRA can encourage better consumer access to their own data by capping the price of monitoring services. In fact, this is one place where there could be a "win-win." Let's say a CRA is charging 1 million consumers $80 a year for annual revenue of $80 million. Wouldn't it be better if 30 million American were paying $10 per year for annual revenues of $300 million? Finally, I see plugging people into their own data as a model for facilitating consumer access to other types of personal data.

This is only a partial list of improvements many of us would like to see. At the appropriate time, we could provide a more detailed list.

Mr. Chairman, Members of the Committee, again, thank you for this opportunity. I'd be happy to answer any questions.