

2012

## Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act

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### Recommended Citation

Noam Weiss, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 Brook. L. Rev. (2012).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol78/iss1/7>

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# Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act

## INTRODUCTION

In today's workplace, employers are either highly incentivized or legally mandated to ensure that they have knowledge of an employee's criminal record. As a result, an overwhelming majority of employers now require criminal background checks as a condition of employment,<sup>1</sup> and millions of these checks are performed each year.<sup>2</sup> Such checks are especially prevalent in the midst of today's gripping recession,

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<sup>1</sup> A 2010 survey by the Society for Human Resource Management found that 73 percent of employers conduct criminal background checks on all job candidates, while an additional 19 percent conduct criminal background checks on select job candidates. SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS (Jan. 22, 2010), *available at* <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>. When asked for their primary reasons for conducting criminal background checks, respondents answered as follows: "to ensure a safe work environment for employees" (61 percent); "to reduce legal liability for negligent hiring" (55 percent); "to reduce/prevent theft and embezzlement, other criminal activity" (39 percent); "to comply with applicable state law requiring a background check (e.g. daycare teachers, licensed medical practitioners, etc.) for a particular position" (20 percent); "to assess the overall trustworthiness of the job candidate" (12 percent); "other" (4 percent). *Id.* (noting that "[p]ercentages do not total to 100% as respondents were allowed multiple choices").

<sup>2</sup> According to a 2008 ABC News investigation, "There has been a surge in interest in criminal background checks in the last 15 years. Private companies conduct millions of such checks a year." Scott Michels, *Advocates Complain of Background Check Errors*, ABC NEWS (Oct. 13, 2008), <http://abcnews.go.com/TheLaw/story?id=6017227&page=1>. "[E]mployers are relying increasingly on privately maintained criminal history records." Michael H. Jagunic, Comment, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 170 (2011). Although "comprehensive, industry-wide data are not available," one CRA alone, "ChoicePoint[,] reported that it conducted approximately 3.3 million background investigations during 2002, the vast majority of which included a criminal justice information component." SEARCH: NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE INFORMATION 7 (2005), *available at* <http://search.org/files/pdf/rntfscjri.pdf> [hereinafter SEARCH].

which has truly “transformed the employment application process into a survival of the fittest.”<sup>3</sup>

In general, information relating to arrests, convictions, and other court proceedings is a matter of public record.<sup>4</sup> Rather than search these records themselves, employers solicit consumer reporting agencies (CRAs)<sup>5</sup> to provide them with consumer reports about potential employees, containing, among other things, information about criminal records.<sup>6</sup> Employers ultimately base their hiring decisions in part on the information contained in these consumer reports.<sup>7</sup> Not

<sup>3</sup> Roberto Concepción, Jr., *Pre-Employment Credit Checks: Effectuating Disparate Impact on Racial Minorities Under the Guise of Job-Relatedness and Business Necessity*, 12 SCHOLAR 523, 524 (2010).

<sup>4</sup> In the seminal case on this matter, *Paul v. Davis*, the Supreme Court denied a claim alleging that publicizing an arrest record was a violation of constitutional privacy rights. 424 U.S. 693, 713 (1976). The Court definitively stated that the petitioner’s case was based “on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner,” thereby closing the door on any future proceedings attempting to extend constitutional privacy protection to criminal records. *Id.*; see generally Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79 (2009) (providing an overview and critique of the persistence of *Paul v. Davis* and its progeny).

<sup>5</sup> Under the FCRA,

[t]he term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f) (2006). In some of the cases discussed in this note, CRAs are referred to as credit reporting agencies. For all intents and purposes, these are the same as consumer reporting agencies. Credit reports and consumer reports are interchangeable terms as well.

<sup>6</sup> Under the FCRA,

[t]he term “consumer report” means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness [creditworthiness], credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . (B) employment purposes . . .

*Id.* § 1681a(d)(1) (footnote omitted). “[C]riminal histories fall under the purview of the FCRA . . . [b]ecause a criminal history touches on an applicant’s ‘character, general reputation, or personal characteristics’ . . .” Christopher M.A. Lujan, *Using Criminal Histories to Make Sound Hiring Decisions*, COLO. LAW., Nov. 2008, at 57, 58.

<sup>7</sup> However, in making such decisions, employers must be careful not to violate “Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits employment discrimination based on race, color, religion, sex, or national origin.” EQUAL EMP’T OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2006), available at <http://www.eeoc.gov/laws/>

surprisingly, “research unequivocally demonstrates that having a criminal record greatly reduces one’s employment opportunities.”<sup>8</sup>

For this system to have any value, consumer reports must be accurate and up to date; a flawed consumer report can have adverse consequences for both the job-seeking consumer<sup>9</sup>—who loses a conditional offer of employment—and the employer—who rescinds an offer from a potentially valuable and otherwise qualified employee.<sup>10</sup> In 1970, Congress recognized the “vital role”<sup>11</sup> that CRAs play in this system and enacted the Fair Credit Reporting Act (FCRA)<sup>12</sup> to regulate the production and use of consumer reports.<sup>13</sup> To accomplish this goal, the FCRA regulates the information that can be included

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guidance/arrest\_conviction.cfm [hereinafter EEOC GUIDANCE]; see Title VII, codified at 42 U.S.C. § 2000 *et seq.* (2006); see also Robb Mandelbaum, *U.S. Push on Illegal Bias Against Hiring Those with Criminal Records*, N.Y. TIMES, June 21, 2012, at B8. To avoid Title VII liability, an employer must be able to show that denial of employment based on a criminal record was consistent with business necessity; that it considered three factors: “the nature and gravity of the offense(s), . . . the time that has passed since the [conviction] and/or completion of the sentence; and [t]he nature of the job held or sought.” EEOC GUIDANCE, *supra*. According to the Equal Employment Opportunity Commission (EEOC), “[a] policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity [as required by statute] and therefore will violate Title VII, unless it is required by federal law.” EQUAL EMP’T OPPORTUNITY COMM’N, QUESTIONS AND ANSWERS ABOUT THE EEOC’S ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII (2006), available at [http://www.eeoc.gov/laws/guidance/qa\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm); see also 42 U.S.C. § 2000e-2(k)(1)(A)(i). Even where an employer develops a screening system that considers these three factors, the EEOC suggests that an individualized assessment of any excluded applicants will further insulate the employer from Title VII liability. EEOC GUIDANCE, *supra* (listing factors that should be considered in an individualized assessment). Further, the EEOC treats arrests and convictions differently, as “[a]rrests are not proof of criminal conduct.” *Id.* Therefore, “an arrest record standing alone may not be used to deny an employment opportunity, [but] an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question.” *Id.*

<sup>8</sup> Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC’Y 18, 21 (2005).

<sup>9</sup> In the context of this note, the consumer will almost always be a prospective employee. Therefore, this note will use the term employee and consumer interchangeably.

<sup>10</sup> See NAT’L CONSUMER LAW CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES 6 (Apr. 2012), available at <http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf> [hereinafter NAT’L CONSUMER LAW CTR.]. A consumer report can be flawed in two ways: it can attribute an erroneous criminal record to an individual or it can report an individual’s criminal record in a flawed manner. In the latter instance, the report may contain information relating to an expunged matter or it may fail to state an ultimate disposition of the matter that was favorable to the consumer.

<sup>11</sup> 15 U.S.C. § 1681(a)(3) (2006).

<sup>12</sup> *Id.* § 1681 *et seq.*

<sup>13</sup> *Id.* § 1681(b).

in consumer reports<sup>14</sup> and the users with whom that information can be shared.<sup>15</sup> In the employment context, before CRAs can prepare a report for an employer, the FCRA also requires disclosure to consumers and their written consent.<sup>16</sup>

The FCRA mandates that CRAs employ mechanisms to ensure compliance with its provisions. In § 1681e(b), the statute requires that CRAs use “reasonable procedures to assure maximum possible accuracy” when preparing any consumer report.<sup>17</sup> In the employment context, § 1681k places heightened compliance requirements on CRAs when consumer reports are created using public records. When such a report is “likely to have an adverse effect” on an employment decision, CRAs must either notify the consumer at the time they send the report to the employer or “maintain strict procedures designed to insure that [the information reported] is complete and up to date.”<sup>18</sup>

The FCRA creates a private right of action for injured consumers, intended in part as one means of enforcing the statute.<sup>19</sup> Yet, the FCRA is not a strict liability statute. Instead, it provides for liability only in cases of negligent or willful noncompliance.<sup>20</sup> Thus, an injured consumer’s only recourse against a CRA is to bring a cause of action and prove elements similar to those of a traditional tort claim: that the CRA engaged in a negligent or willful breach of a duty imposed by the FCRA, which proximately caused the consumer’s injury.<sup>21</sup>

However, due to the FCRA’s general lack of guidance with respect to its requirements, injured consumers and courts have struggled to impose liability on CRAs for violating the statute. Forty years of extensive litigation has produced little clarity as to the types of procedures required for CRA compliance.

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<sup>14</sup> *Id.* § 1681c.

<sup>15</sup> *Id.* § 1681b.

<sup>16</sup> *Id.* § 1681b(b)(2).

<sup>17</sup> *Id.* § 1681e(b).

<sup>18</sup> *Id.* § 1681k(a).

<sup>19</sup> *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991).

<sup>20</sup> 15 U.S.C. §§ 1681n-o. Negligent violation of the statute entitles plaintiffs to recover actual damages, while willful violation allows for recovery of both statutory and punitive damages. *Id.*; see *Williams v. LexisNexis Risk Mgmt.*, No. 3:06-cv-241, 2007 U.S. Dist. LEXIS 62193, at \*27-28 (E.D. Va. Aug. 23, 2007) (holding that class certification could be permissible in a case alleging willful violation, even absent any claim for actual damages). In *Safeco v. Burr*, the Supreme Court held that a CRA willfully violates the FCRA when it acts in reckless disregard of the statutory requirements. 551 U.S. 47, 52 (2007).

<sup>21</sup> *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1242 (E.D. Mich. 1980) (noting that “[t]he standard of conduct by which the agency’s action is to be judged is deeply rooted in the law of negligence”).

And although the FCRA, in § 1681k, purports to impose a heightened standard on CRAs when furnishing criminal background reports for employment purposes, these problems still persist. Further, § 1681k contains an enigmatic provision allowing CRAs to “opt-out” of its heightened standards (by sending contemporaneous notice to consumers), while providing no corresponding enhancement of consumer protection.<sup>22</sup> Therefore, while private litigation may have been intended as a way to enforce the FCRA’s goal of ensuring accuracy in the reporting industry, the reality of engaging in protracted litigation often presents an insurmountable hurdle for consumers seeking relief, and, even then, only after they have been injured by erroneous reports. By amending § 1681k to require that CRAs provide consumers with a copy of their purported criminal records before distributing the report to prospective employers, Congress could solve many of these problems and give meaning to the heightened requirements of § 1681k.

The rest of this note is divided into five parts. Part I explores some of the reasons why employers conduct criminal background checks and identifies some of the dangers that over-reliance on these reports poses to consumers, especially in light of documented inaccuracies.<sup>23</sup> Part II provides an introduction to the FCRA, its purpose, and some of its relevant provisions. Part III analyzes the requirements for proving a violation of the general compliance procedures contained in § 1681e(b), illustrating the current legal framework’s inadequacies in providing meaningful relief to injured consumers. Part IV explores the supposed heightened compliance requirements of § 1681k and shows how that section fails to meaningfully

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<sup>22</sup> See *infra* Part IV.C.

<sup>23</sup> In a report issued in April 2012, the National Consumer Law Center (NCLC) found that “evidence indicates that professional background screening companies routinely make mistakes with grave consequences for job seekers.” NAT’L CONSUMER LAW CTR., *supra* note 10, at 3. The report documented the many types of mistakes found in these reports and their causes, and also addressed some of the same legal issues raised in this note. See *generally id.* In response to the NCLC report, the National Association of Professional Background Screeners issued a press release denouncing the report’s findings and claiming that “[o]f the small number of reports that are disputed by a consumer, more than 95 percent are ultimately found to be accurate.” Press Release, Nat’l Ass’n of Prof’l Background Screeners, Background Screening Industry Denounces NCLC Report (June 19, 2012), *available at* <http://www.prweb.com/releases/2012/6/prweb9603002.htm>. It is not the intention of this note to join in this empirical debate concerning whether or not inaccuracies are rampant in the background screening industry. Instead, given that it is undisputed that *some* inaccurate criminal background reports are produced, this note focuses on improving the means of recourse available for consumers injured by such reports and offers a legislative suggestion to improve accuracy overall.

enhance consumer protection—in large part because the FCRA’s ex-post approach provides consumers an opportunity to identify mistakes in their reports only after the damage has been done. Finally, Part V suggests that amending § 1681k to require that reports be provided to consumers before being supplied to potential employers can ameliorate many of private litigation’s failures in FCRA enforcement.

I. CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT: THE GOOD, THE BAD, AND THE UNRELIABLE

A. *The Use of Criminal Background Checks Protects Society and Employers*

There are many reasons why employers conduct criminal background checks of prospective employees, but those reasons all share a central theme: the recognition that certain positions have the potential to be used as a means of inflicting harm—either against the employer or the public.<sup>24</sup> In some instances, employers are mandated to conduct these checks by a wide range of state and federal laws prohibiting the employment of people with criminal records in certain fields, such as the healthcare, financial services, trucking, and community care facility industries.<sup>25</sup>

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<sup>24</sup> Lujan, *supra* note 6, at 57 (“[I]f there is a high probability that an employee will interact frequently with the public or handle valuable property, a prudent employer will obtain a criminal history and analyze the relationship between the criminal conduct and the position sought before determining if hiring is appropriate.”); *see also supra* note 1. While this note focuses on CRA responsibilities and liabilities when providing criminal background in consumer reports, the FCRA also regulates the use of that information by user-employers. 15 U.S.C. § 1681m. For an in-depth discussion of employer responsibilities when soliciting criminal background checks from CRAs, see generally Susan Gardner et al., *Does Your Background Checker Put You in Jeopardy?: A Case for Best Practices and Due Diligence*, 11 J. LEGAL ETHICAL & REG. ISSUES 111 (2008).

<sup>25</sup> Aukerman, *supra* note 8, at 23; Gardner et al., *supra* note 24, at 118; James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 177-78 (2008). The requirement of a license for certain jobs poses problems as well. According to a 2006 report by the New York State Bar Association,

Over 100 occupations in New York State require some type of license, registration, or certification by a state agency. Although only a few statutes automatically bar people from licensure solely based on past convictions, New York places many statutory restrictions based on an individual’s criminal history through general “good moral character” requirements for almost all licenses. For example, an individual with a criminal conviction cannot obtain a license to work as a barber because “a criminal history indicates a lack of good moral character and trustworthiness required for licensure.”

Even where criminal background checks are not required by law, many employers will demand them as a condition of employment. Employers tend to view those with criminal records as untrustworthy or unreliable.<sup>26</sup> Additionally, the state law doctrine of negligent hiring liability provides a large incentive for employers to insist on conducting criminal background checks.<sup>27</sup> Under this doctrine, “[a]n employer may be liable for negligently hiring employees when such negligence results in harm to third parties, even when the harm inflicted by the employee occurs outside the scope of employment . . . .”<sup>28</sup> Thus, “a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as the result of the hiring” is imposed.<sup>29</sup> An employer can be liable if he “knew or should have known” of an employee’s propensities towards criminal acts.<sup>30</sup> To avoid potential liability, an employer’s “safest course of action sometimes appears to be automatically disqualifying applicants with criminal histories . . . .”<sup>31</sup> As one writer put it, “many companies [have]

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N.Y. STATE BAR ASS’N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS 60-61 (2006), available at [http://www.nysba.org/AM/Template.cfm?Section=Substantive\\_Reports&ContentID=11415&template=/CM/ContentDisplay.cfm](http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&ContentID=11415&template=/CM/ContentDisplay.cfm) [hereinafter STATE BAR REPORT] (quoting Clyde Haberman, *He Did Time, So He’s Unfit to Do Hair*, N.Y. TIMES, Mar. 4, 2005, at B1).

<sup>26</sup> See James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 390 (2006).

<sup>27</sup> Gardner et al., *supra* note 24, at 111 (“[W]ith the upsurge in negligent hiring and retention lawsuits, employers [have] continued their prevention efforts by checking the qualifications and backgrounds of prospective and current employees.”); Lujan, *supra* note 6, at 57 (“Having this information before a hiring decision is made can help in defending the employer against negligent hiring or supervision claims.”); STATE BAR REPORT, *supra* note 25, at 83. “Virtually all states have recognized a cause of action in tort for persons injured by an employer’s negligence in hiring, retaining or supervising a dangerous employee.” 1 LEX K. LARSON, EMPLOYMENT SCREENING § 10.01 (MB 2012); see also Katherine A. Peebles, Note, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. & MARY L. REV. 1397, 1404 (2012) (“Every state recognizes the tort of negligent hiring.”).

<sup>28</sup> Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. L.J. 365, 376 (1997). To be successful, “a plaintiff must establish that (1) the employer owed the third party a duty of reasonable care, (2) the employer breached the duty[,] and (3) the breach proximately caused the third party’s harm.” *Id.* (footnotes omitted).

<sup>29</sup> *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 n.5 (Minn. 1983).

<sup>30</sup> Jennifer Leavitt, Note, *Walking A Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1301 (2002) (emphasis added).

<sup>31</sup> *Id.* at 1302.



adopted Ben Franklin's adage, 'an ounce of prevention is worth a pound of cure.'<sup>32</sup>

*B. Over-Reliance on Criminal Background Checks Hurts Offenders and Society*

While criminal background checks can help employers avoid liability, overzealous reliance on this information leads to an unfounded bias against individuals with criminal records. In theory, "[t]he law conducts a balancing test between the employer's right to maintain an environment free from criminal behavior and providing individuals with a criminal history the opportunity to work."<sup>33</sup> However, critics of mandated proscription from certain jobs<sup>34</sup> and proponents of limiting negligent hiring liability feel that these practices create an insurmountable obstacle for people who have criminal records.<sup>35</sup> As a result, while "background screening can be helpful in identifying applicants whose records makes [sic] them unsuitable for a particular position . . . , such screening also discloses records which should not be disqualifying, but which, in practice, are treated as disqualifying by employers."<sup>36</sup> High recidivism rates have been attributed in part to the difficulty of obtaining meaningful employment with a criminal record,<sup>37</sup> and it has been suggested that "[r]ehabilitation through employment opportunities is one clear way to stem the tide of ex-offenders leaving and re-entering society through the jailhouse doors."<sup>38</sup>

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<sup>32</sup> Gardner et al., *supra* note 24, at 111 (quoting Benjamin Franklin, c. 1736).

<sup>33</sup> Lujan, *supra* note 6, at 60.

<sup>34</sup> One such critique of "[r]ecord based employment disqualifications [is that they] are imposed by operation of law, without any consideration of their appropriateness for the individual involved." Aukerman, *supra* note 8, at 25.

<sup>35</sup> "Despite the protections afforded by federal and state law, a demonstrated preference for hiring people without criminal records still exists." STATE BAR REPORT, *supra* note 25, at 80; Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 45-46 (2008) (stating that a criminal record can carry with it "a stigma so indelible as to subject even non-violent offenders to lifelong sentences"). "The more accessible these records, the more likely the stigma of a criminal conviction, or even an arrest, will endure." Jacobs & Crepet, *supra* note 25, at 211.

<sup>36</sup> Aukerman, *supra* note 8, at 23.

<sup>37</sup> "Research from both academics and practitioners suggest that the chief factor which influences the reduction of recidivism is an individual's ability to gain 'quality employment.'" STATE BAR REPORT, *supra* note 25, at 50 (citing, e.g., MEASURING RECIDIVISM: CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES, A COMPONENT OF THE FIFTEEN YEAR REPORT ON THE U.S. SENTENCING COMMISSION'S LEGISLATIVE MANDATE, at 12 (May 2004), available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf)).

<sup>38</sup> Leavitt, *supra* note 30, at 1282.

C. *Accuracy Is Paramount, but Elusive*

Whether one agrees with the logic behind them or not, the reality is that criminal background checks are regularly performed. Assuming that these checks are important for employment decisions, it is clear that such reports should contain accurate and complete information. Unfortunately, “[n]o single source exists that provides complete and up-to-date information about a person’s criminal history.”<sup>39</sup> Many employers, therefore, rely on information from “commercial databases[, which] are frequently inaccurate . . . .”<sup>40</sup> Even information taken directly from courthouse computer systems can be unreliable, as “human errors, court delays, processing lags, and staffing shortages impair the quality of data.”<sup>41</sup> “Misspelled words, erroneous birthdates, and transposed address numbers can cause mis- or no information for the report.”<sup>42</sup> As a result, courthouse “repositories are notorious for being ‘outdated, inaccurate and incomplete.’”<sup>43</sup>

Yet, according to Craig Kessler, president of the CRA Backgroundchecks.com, “We’re not in the business of authenticating the identity of individuals. All we do is report the data that’s supplied to us from the courts.”<sup>44</sup> This attitude has a direct effect on the accuracy of consumer reports, as illustrated by the experience of Ron Peterson. Peterson, a California resident, was denied employment based on an erroneous criminal report compiled by Backgroundchecks.com.<sup>45</sup> According to Peterson, “In Florida I’m a female prostitute (named Ronnie); in Texas I’m currently incarcerated for manslaughter . . . . In New Mexico I’m a dealer of stolen goods.

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<sup>39</sup> U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 6 (2006), available at [http://www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf) [hereinafter ATTORNEY GENERAL’S REPORT]; see also Gardner et al., *supra* note 24, at 119.

<sup>40</sup> Gardner et al., *supra* note 24, at 119.

<sup>41</sup> *Id.* at 120 (internal quotation marks omitted).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 118 (quoting Jason B. Morris, *Criminal Background Checks: You Get What You Pay For*, VERIFIER (Background Info. Servs., Cleveland, Ohio) June/July 2004, at 4, available at [http://www.employeescreen.com/web/pdfs/verifier\\_issue3.pdf](http://www.employeescreen.com/web/pdfs/verifier_issue3.pdf)). “Misinformation can occur for a number of reasons—clerks mis-key information, criminal charges get dropped but not updated in files, or arrested suspects provide authorities with the name and Social Security number of someone else.” Kim Zetter, *Bad Data Fouls Background Checks*, WIRED (Mar. 11, 2005), <http://www.wired.com/politics/security/news/2005/03/66856?currentPage=all>.

<sup>44</sup> Zetter, *supra* note 43.

<sup>45</sup> *Id.*

Oregon has me as a witness tamperer. And in Nevada—this is my favorite—I’m a registered sex offender.”<sup>46</sup>

Peterson represents one type of consumer that can be hurt by an inaccurate or incomplete criminal background check: those who have never been arrested yet have a criminal history mistakenly ascribed to them. Inaccurate or incomplete reports can also harm individuals who were previously arrested or convicted of crimes because, while their charges might have been dropped or their records expunged, those records might still show up in a criminal background check.<sup>47</sup>

There is currently no industry-wide data dealing directly with the accuracy of criminal record reports.<sup>48</sup> However, a 2004 study by the National Association of State Public Interest Research Groups surveyed credit reports of adults in 30 states.<sup>49</sup> The study found that “[f]ifty-four percent (54%) of the credit reports contained personal demographic information that was misspelled, long-outdated, belonged to a stranger, or was otherwise incorrect[.]”<sup>50</sup> The study also found that “[a]ltogether, 79% of the credit reports surveyed contained either serious errors or other mistakes of some kind.”<sup>51</sup> At least one writer has opined that, “[g]iven that many of the same organizations conduct background and credit checks, errors in conducting one kind of check (credit) should make [us] similarly suspect of the accuracy of the other (background).”<sup>52</sup>

Given how frequently criminal background checks are performed for employment purposes,<sup>53</sup> the pervasiveness of such deficiencies poses a grave problem.<sup>54</sup> In a recent class

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<sup>46</sup> *Id.*

<sup>47</sup> “[C]ommercial databases may also be missing important disposition information that is relevant to a conviction record’s use for employment suitability purposes, such as sealing and expungement orders or entry into a pre-trial or post-trial diversion program.” ATTORNEY GENERAL’S REPORT, *supra* note 39, at 2.

<sup>48</sup> See NAT’L CONSUMER LAW CTR, *supra* note 10, at 7; SEARCH, *supra* note 2, at 7.

<sup>49</sup> NAT’L ASS’N OF STATE PIRGS, MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS 4 (June 2004), available at <http://cdn.publicinterestnetwork.org/assets/BEevuv19a3KzsATRbZMZlw/MistakesDoHappen2004.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Gardner et al., *supra* note 24, at 118; see also Zetter, *supra* note 43 (stating that “[t]here’s no reason to believe that criminal records are any more accurate” than credit reports).

<sup>53</sup> See *supra* note 1.

<sup>54</sup> According to a recent study, the current recession has not lead to a significant increase in the percentage of employers that conduct criminal background checks. SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: GENERAL BACKGROUND CHECKS 8 (Jan. 22, 2010), available at [http://www.shrm.org/Research/SurveyFindings/Articles/Documents/Background%20Check\\_General.pptx](http://www.shrm.org/Research/SurveyFindings/Articles/Documents/Background%20Check_General.pptx). Still, it is safe to assume that with a constant rate of background checking, the increase in job

action lawsuit, 665,391 consumers brought a claim against the CRA HireRight, alleging that between 2004 and 2010 HireRight failed to comply with the FCRA in the preparation of consumer reports, all of which contained adverse information about the consumers.<sup>55</sup> And that is just a *single* case against a *single* agency. In fact, litigation for this issue continues.<sup>56</sup> For these injured consumers, winning lawsuits depends on proving that the CRA violated the FCRA—the statute that was implemented to regulate this industry.

## II. FCRA—PURPOSE AND BACKGROUND

In the latter half of the twentieth century, Congress recognized that “[c]onsumer reporting agencies [had] assumed a vital role in assembling and evaluating consumer credit and other information on consumers.”<sup>57</sup> Even forty years ago, House Representative and FCRA sponsor Leonor Sullivan remarked:

[W]ith the trend towards computerizations and billings and the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal “blips” and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable . . . .<sup>58</sup>

Therefore, in 1970, Congress enacted the FCRA to address what it perceived as the “need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”<sup>59</sup> To that end, the FCRA’s stated purpose is “to require that consumer reporting agencies adopt reasonable procedures

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applicants in the past several years has led to a higher incidence of criminal background checks overall. See AP, *Employers Post Fewest Job Ads in Five Months*, USA TODAY (Nov. 6, 2012, 2:33 PM), <http://www.usatoday.com/story/money/business/2012/11/06/job-ads-september/1685879/> (“With 12.1 million people unemployed in September [2012], there were 3.4 unemployed people, on average, competing for each open job. In a healthy economy, that ratio is roughly 2-to-1.”).

<sup>55</sup> Order of Preliminary Approval of Class Action Settlement at 3, ¶ 3, *Ryals v. HireRight Solutions, Inc.*, No.3:09cv625, (E.D. Va. July 7, 2011).

<sup>56</sup> See, e.g., *King v. Gen. Info. Servs., Inc.*, 2012 U.S. Dist. LEXIS 159380 (E.D. Pa. Nov. 6, 2012) (class action suit upholding constitutionality of FCRA); *Moore v. First Advantage Enter. Screening Corp.*, 2012 U.S. Dist. LEXIS 136721 (N.D. Ohio Sept. 24, 2012) (dismissing class allegations and allowing individual claims); *Farmer v. Phillips Agency, Inc.*, 2012 U.S. Dist. LEXIS 146144 (N.D. Ga. Sept. 20, 2012) (denying class certification).

<sup>57</sup> 15 U.S.C. § 1681(a)(3) (2006).

<sup>58</sup> 116 CONG. REC. 36570 (1970) (statement of Rep. Sullivan), *quoted in* *Bryant v. TRW, Inc.*, 689 F.2d 72, 79 (6th Cir. 1982).

<sup>59</sup> 15 U.S.C. § 1681(a)(4).

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.”<sup>60</sup> In effect, the FCRA “governs the collection, assembly, and use of consumer report information and provides the framework for the credit reporting system in the United States.”<sup>61</sup> Enforcement of the FCRA occurs “at the federal and state levels, as well as through private litigation.”<sup>62</sup>

To accomplish its goal, the FCRA regulates how CRAs compile and distribute consumer reports. Section 1681b lists the “[p]ermissible purposes of consumer reports”<sup>63</sup> for which a CRA “may furnish a consumer report.”<sup>64</sup> Use of information contained in a consumer report by an employer—the user—to make an employment decision about a prospective employee—the consumer—is one such “[p]ermissible purpose” under the FCRA.<sup>65</sup>

To comply with § 1681b, CRAs must have procedures requiring “prospective users of the information [to] identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.”<sup>66</sup> When the purpose of a consumer report is to make an employment decision, the user is required to provide additional certifications before a CRA may furnish a report. The employer-user must also certify that a written disclosure was made to the consumer,<sup>67</sup> that the consumer provided written authorization for the procurement of the report,<sup>68</sup> and that “information from the consumer report will not be used in

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<sup>60</sup> *Id.* § 1681(b).

<sup>61</sup> FED. TRADE COMM’N, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING, AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS 1 (2011), available at <http://ftc.gov/os/2011/07/110720fcrareport.pdf> [hereinafter FTC STAFF REPORT].

<sup>62</sup> *Id.* at 3.

<sup>63</sup> 15 U.S.C. § 1681b.

<sup>64</sup> *Id.* § 1681b(a).

<sup>65</sup> *Id.* § 1681b(a)(3)(B).

<sup>66</sup> *Id.* § 1681e(a). CRAs must also “make a reasonable effort” to independently verify such certifications from new users. *Id.* “What constitutes adequate verification will vary with the circumstances.” FTC STAFF REPORT, *supra* note 61, at 65. Interestingly, according to one FTC Staff opinion letter, the requirements for such verification are more lax when a CRA only provides consumer reports that contain public records, such as criminal background checks. The staff opinion did not consider such information “sensitive personal information, as in a traditional credit report,” and therefore advised that simply relying on the client’s certification would satisfy the statute. FTC Informal Staff Opinion Letter of William Haynes (June 9, 1998), available at <http://www.ftc.gov/os/statutes/fcra/leblanc.shtml>.

<sup>67</sup> 15 U.S.C. § 1681b(b)(2)(A)(i).

<sup>68</sup> *Id.* § 1681b(b)(2)(A)(ii).

violation of any applicable Federal or State equal employment opportunity law or regulation . . . .”<sup>69</sup> Additionally, the employer-user must certify that “before taking any adverse action based in whole or in part on the report, [it will provide the consumer with] a copy of the report; and a description in writing of the rights of the consumer . . . .”<sup>70</sup>

Section 1681c contains the “[r]equirements relating to information contained in consumer reports.”<sup>71</sup> Because criminal records are public information,<sup>72</sup> there is no specific federal law that prohibits CRAs from providing criminal background checks in consumer reports. However, the FCRA does temporally restrict CRAs’ ability to include information pertaining to criminal records other than criminal convictions—e.g., arrests that did not lead to convictions. With a few exceptions not relevant to this note, CRAs cannot report any arrests that “antedate the report by more than seven years . . . .”<sup>73</sup> There is, however, no time limit on reporting information pertaining to criminal convictions.<sup>74</sup>

The general procedures for CRA compliance with the FCRA, applicable in all situations, are laid out in § 1681e.<sup>75</sup> Section 1681e(b) states that “[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report

<sup>69</sup> *Id.* § 1681b(b)(1)(A)(ii).

<sup>70</sup> *Id.* § 1681b(b)(3)(A). “There is no specific period of time an employer must wait after providing a pre-adverse action notice and before taking adverse action against the consumer. Some reasonable period of time must elapse, but the minimum length will vary depending on the particular circumstances involved.” FTC STAFF REPORT, *supra* note 61, at 52. The problems inherent in this lack of specificity will be discussed in detail, *infra* Part IV.C.

<sup>71</sup> 15 U.S.C. § 1681c.

<sup>72</sup> *See supra* note 4.

<sup>73</sup> 15 U.S.C. § 1681c(a)(2). Some states place further limits on the reporting of criminal records. In New York, for example, in most instances, a consumer report may contain information about an arrest only if it resulted in a criminal conviction or if the charges are still pending. N.Y. GEN. BUS. LAW § 380-j(a)(1) (McKinney 2012).

<sup>74</sup> 15 U.S.C. § 1681c(a)(5).

<sup>75</sup> Prior to enactment of the FCRA, a House amendment was accepted that extended the requirement to follow reasonable procedures to apply to all CRAs—an extension from the original Senate bill that applied this requirement only to CRAs that prepared investigative consumer reports. 116 CONG. REC. 35940 (1970) (remarks of Sen. Proxmire introducing the conference report), *quoted in* Bryant v. TRW, Inc., 689 F.2d 72, 77-78 (6th Cir. 1982). Additionally, even when subject to the “heightened” requirements of § 1681k, a CRA will have to follow § 1681e(b), and the analysis of a court will often rest on an interpretation of § 1681e(b). *See infra* notes 157-61 and accompanying text.

relates.”<sup>76</sup> When CRAs produce consumer reports for employment purposes based on public records, they are subject to ostensibly heightened compliance requirements under § 1681k. If the report is likely to have an adverse effect on an employment decision, CRAs must either notify the consumer at the time they send the report to the employer or use “strict procedures designed to insure that [the report] is complete and up to date.”<sup>77</sup> The next two parts of this note will explore how courts analyze private causes of action alleging violations of these two provisions.

### III. PRIVATE LITIGATION UNDER SECTION 1681E(B)

Section 1681e(b) is the general compliance provision in the FCRA and mandates that “[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”<sup>78</sup> The FCRA, however, does not impose strict liability on CRAs for providing erroneous reports.<sup>79</sup> Instead, liability can be found if the CRA committed negligent or willful violations of this provision.<sup>80</sup> Yet litigation of this provision is no easy task, because the legislative history of § 1681e(b) is, as one Sixth Circuit case called it, “sketchy,”<sup>81</sup> and the exact standards required by the provision have remained elusive.

The elements required for proving a negligent violation of § 1681e(b) appear simple enough, mirroring the requirements for proving a general tort action:

To succeed on a claim under this section, a plaintiff must establish that: (1) the consumer reporting agency was negligent in that it failed to follow reasonable procedures to assure the accuracy of its credit report; (2) the consumer reporting agency reported inaccurate information about the plaintiff; (3) the plaintiff was injured; and (4) the consumer reporting agency’s negligence proximately caused the plaintiff’s injury.<sup>82</sup>

Basing their analyses on these elements, courts recognize that “[t]he threshold question in a [§] 1681e(b) action

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<sup>76</sup> 15 U.S.C. § 1681e(b).

<sup>77</sup> *Id.* § 1681k(a).

<sup>78</sup> *Id.* § 1681e(b).

<sup>79</sup> *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991) (stating that the FCRA “does not make reporting agencies strictly liable for all inaccuracies”).

<sup>80</sup> 15 U.S.C. §§ 1681n-o.

<sup>81</sup> *Bryant v. TRW, Inc.*, 689 F.2d 72, 77 (6th Cir. 1982).

<sup>82</sup> *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp. 824, 829 (E.D.N.Y. 1994).

is whether the challenged credit information is inaccurate. If the information is accurate no further inquiry into the reasonableness of the consumer reporting agency's procedures is necessary."<sup>83</sup> On the other hand, "Whether the credit reporting agency followed reasonable procedures 'will be a jury question in the overwhelming majority of cases.'"<sup>84</sup> In that way, reasonableness, "like other questions concerning the application of a legal standard to given facts . . . , is treated as a factual question even when the underlying facts are undisputed. It therefore cannot be resolved on summary judgment unless the reasonableness or unreasonableness of the procedures is beyond question . . . ."<sup>85</sup> Proving causation and injury are also questions for the jury.<sup>86</sup> Thus, a CRA may succeed on a motion for summary judgment "only if a court finds, as a matter of law, that a credit report was accurate,"<sup>87</sup> thereby employing the "accuracy defense."<sup>88</sup> But, because the definitions of these elements remain unclear, injured consumers struggle to prove their cases.

#### A. *Accuracy Is Not Defined by the Statute*

The inaccuracy of a consumer report is the threshold question in a § 1681e(b) claim, yet the statute provides no definition of the term *accuracy*, and the circuit courts are split between two different views on the type of accuracy required by the statute.<sup>89</sup> This disagreement exists because "[a]ccuracy is quite clearly not a self-defining concept, and [the] FCRA's fragmentary legislative history provides little, if any, guidance as to how Congress intended this standard to be applied."<sup>90</sup>

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<sup>83</sup> *Houston v. TRW Info. Servs.*, 707 F. Supp. 689, 691 (S.D.N.Y. 1989) (citing *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013, 1015 (N.D. Ga. 1976) (stating that a "court need not reach the issue of 'reasonableness' if it finds initially that the report furnished was accurate")); *see also* *Williams v. LexisNexis Risk Mgmt.*, No. 3:06cv241, 2007 U.S. Dist. LEXIS 62193, at \*18 (E.D. Va. Aug. 23, 2007) (stating that "when a report is in fact accurate, the procedure is per se reasonable").

<sup>84</sup> *Adams v. Nat'l Eng'g Serv. Corp.*, 620 F. Supp. 2d 319, 330 (D. Conn. 2009) (quoting *Cahlin*, 936 F.2d at 1156); *see also* *Guimond v. Transunion Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) ("The reasonableness of the procedures and whether the agency followed them will be jury questions in the overwhelming majority of cases.").

<sup>85</sup> *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001).

<sup>86</sup> *Adams*, 620 F. Supp. 2d at 330.

<sup>87</sup> *Cahlin*, 936 F.2d at 1156 (internal quotation marks omitted).

<sup>88</sup> *Id.* "This term of art is actually a misnomer because the burden of proving that a particular report is inaccurate is part of the plaintiff's case and not an affirmative defense for a defendant credit reporting agency." *Id.* at 1156 n.9.

<sup>89</sup> *Id.* at 1157.

<sup>90</sup> *Id.*



One approach to the definition of accuracy—the “business friendly interpretation”<sup>91</sup>—is known as the “technical accuracy standard.”<sup>92</sup> Under this interpretation, “a credit reporting agency satisfies its duty under [§ 1681e(b)] if it produces a report that contains factually correct information about a consumer that might nonetheless be misleading or incomplete in some respect.”<sup>93</sup> Courts that adopt the technical accuracy standard fear that requiring more would place too heavy a burden on CRAs.<sup>94</sup>

By contrast, under the “maximum possible accuracy approach,”<sup>95</sup> also known as the “consumer-friendly interpretation,”<sup>96</sup> an “entry may be inaccurate within the meaning of [§ 1681e(b)] either because it is patently incorrect, or because it is misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions.”<sup>97</sup> The rationale for this approach is based on statutory interpretation and a basic recognition of the FCRA’s purpose. Looking at the statute’s language, “[§ 1681e(b)] does not require that a consumer reporting agency follow reasonable procedures to assure simply that the consumer report be

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<sup>91</sup> Neil Vanderwoude, Comment, *The Fair Credit Reporting Act: Fair for Consumers, Fair for Credit Reporting Agencies*, 39 SW. U. L. REV. 395, 400 (2009) (internal quotation marks omitted).

<sup>92</sup> *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 433 n.5 (E.D. Pa. 2010) (citing *Holmes v. TeleCheck Int’l*, 556 F. Supp. 2d 819, 833 (M.D. Tenn. 2008)).

<sup>93</sup> *Cahlin*, 936 F.2d at 1157.

<sup>94</sup> See, e.g., *Heupel v. Trans Union LLC*, 193 F. Supp. 2d 1234, 1240 (N.D. Ala. 2002) (reluctant to place “too great a burden on credit reporting agencies” and holding that “[r]equiring ‘technical accuracy’ in credit reports best captures the balance Congress struck between consumers’ concern for fair and equitable treatment and reporting agencies’ goal of maintaining accurate and cost-effective credit reporting”); *Grant v. TRW, Inc.*, 789 F. Supp. 690, 692 (D. Md. 1992) (“‘Accuracy’ can be tested by verification whereas a determination of ‘completeness’ requires the exercise of judgment on potentially difficult questions concerning the meaning and effect of contextual information.”). In *Alexander v. Moore & Associates*, the court criticized the technical accuracy standard as leading to the result “that a consumer reporting agency could report that a person was ‘involved’ in a credit card scam, and without regard to [§ 1681e(b)] fail to report that he was in fact one of the victims of the scam.” 553 F. Supp. 948, 952 (D. Haw. 1982). However, the *Grant* court rejected the example given by the *Alexander* court, characterizing it as an “extreme instance[] in which a technically accurate statement is so inherently misleading that it would run afoul of the ‘maximum possible accuracy’ requirement of § 1681e(b).” *Grant*, 789 F. Supp. at 692. The *Grant* court felt that “the possibility that such extreme cases might be presented does not justify rewriting the FCRA to render actionable the initial reporting of information which although accurate is deemed to be misleading because it is incomplete.” *Id.*

<sup>95</sup> *Smith*, 711 F. Supp. 2d at 433.

<sup>96</sup> Vanderwoude, *supra* note 91, at 400.

<sup>97</sup> *Sepulvado v. CSC Credit Servs.*, 158 F.3d 890, 895 (5th Cir. 1998) (internal quotation marks omitted).

accurate, but to assure *maximum possible accuracy*.<sup>98</sup> Because fairness in consumer reporting is one of the stated purposes of the FCRA,<sup>99</sup> courts have held that § 1681e(b), “fairly read, would apply to consumer reports even though they may be technically accurate, if it is shown that such reports are not accurate to the maximum possible extent.”<sup>100</sup>

Whether a court adopts the “technical accuracy standard” or the “maximum possible accuracy approach” can impact the court’s disposition as to a CRA’s successful use of the accuracy defense, and therefore is fundamental to determining whether a violation of § 1681e(b) occurred.<sup>101</sup> A recent case helps to illustrate this point. In *Smith v. HireRight*, the Eastern District court in Pennsylvania denied the defendant CRA’s motion to dismiss a claim under § 1681e(b).<sup>102</sup> Smith, the named plaintiff in this class-action suit, had applied for several truck-driving positions, and each of his prospective employers solicited the defendant, CRA HireRight, to provide them with his consumer report.<sup>103</sup> Smith had been arrested once, a few years earlier, but the consumer report prepared by HireRight listed this single incident multiple times.<sup>104</sup> In its motion to dismiss, HireRight cited a Sixth Circuit case using the “technical accuracy standard” to argue that “no claim can be stated based on the publication of factually accurate information, even if the information was presented in a format that created some risk it could be misconstrued by a third party.”<sup>105</sup> Under this argument, since Smith had been arrested on the date reported, the report contained factually correct, albeit repeated, information.<sup>106</sup> But the court rejected this argument and chose to “adopt the maximum accuracy approach over the technical accuracy approach.”<sup>107</sup> Having adopted this

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<sup>98</sup> *Alexander*, 553 F. Supp. at 952 (internal quotation marks omitted).

<sup>99</sup> 15 U.S.C. § 1681(a)(4) (2006).

<sup>100</sup> *Alexander*, 553 F. Supp. at 952.

<sup>101</sup> “Although courts have assumed that the so-called ‘accuracy defense’ is a question fit for disposition on motion for summary judgment, they have widely diverged in their interpretations of what constitutes an ‘accurate’ credit report.” Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1156-57 (11th Cir. 1991).

<sup>102</sup> *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 439 (E.D. Pa. 2010).

<sup>103</sup> *Id.* at 430.

<sup>104</sup> *Id.*

<sup>105</sup> Reply Memorandum of Law in Further Support of Motion to Dismiss Plaintiff’s Complaint at 3-4, *Smith*, 711 F. Supp. 2d 426 (No. 09-06007) (citing *Holmes v. Telecheck Int’l*, 556 F. Supp. 2d 819, 833 (M.D. Tenn. 2008)).

<sup>106</sup> *Id.* (claiming that “no court has ever held that the mere repetition of factually accurate information within a background report renders that report legally inaccurate for the purposes of Section 1681e(b)”).

<sup>107</sup> *Smith*, 711 F. Supp. 2d at 433 n.5.

standard, the court held that Smith had pleaded sufficient facts to state a viable cause of action under § 1681e(b) and denied the defendant's motion to dismiss.<sup>108</sup> Had the case been brought in a circuit employing the "technical accuracy standard," the result would likely have been different.

*B. The Statute Provides No Guidance on the Reasonable Procedures Required*

While proving that a CRA supplied inaccurate information is the threshold question often resolved during the summary judgment stage, a plaintiff must still prove the other three elements of a § 1681e(b) claim at trial, beginning with showing that the CRA was negligent or willful when it failed to use reasonable procedures to ensure accuracy. Indeed, as the D.C. Circuit stated, "The reasonableness requirement thus severely limits an agency's duty to maximally assure precise and complete reporting."<sup>109</sup> The duty imposed by the statute is much like that of the standard tort test: it requires the CRA to do "what a reasonably prudent person would do under the circumstances."<sup>110</sup>

Whether a CRA has satisfied this burden will almost always be left up to a jury,<sup>111</sup> yet juries are given little guidance by the statute or the courts for determining the reasonableness of such procedures. As was the case with accuracy, the FCRA does not explicitly explain what types of mechanisms would constitute reasonable procedures. Some courts explain that

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<sup>108</sup> *Id.* at 438. The court acknowledged that plaintiff's claim "would not necessarily withstand summary judgment scrutiny." *Id.* The burden of proving the inaccuracy of a report has had the effect of deterring at least some class actions from being brought for § 1681e(b) claims. *See, e.g., Williams v. LexisNexis Risk Mgmt.*, No. 3:06cv241, 2007 U.S. Dist. LEXIS 62193, at \*13 (E.D. Va. Aug. 23, 2007) ("Asserting a § 1681e(b) claim for the entire class would render the class-action device useless, note Plaintiffs, because it would require an assessment of whether or not each class member's report was, in fact, inaccurate.").

<sup>109</sup> *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 45 (D.C. Cir. 1984). This is not to imply that CRAs have no duty above merely reporting information that is provided to them. *See Bryant v. TRW, Inc.*, 689 F.2d 72, 77 (6th Cir. 1982) (holding that the requirement to follow reasonable procedures "requires a consumer reporting agency to do more than correctly report the information supplied to it by creditors"). Still, a CRA will not be strictly liable for errors contained in a report, assuming it did employ reasonable procedures.

<sup>110</sup> *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1242 (E.D. Mich. 1980) (noting that "[t]he standard of conduct by which the agency's action is to be judged is deeply rooted in the law of negligence"). Before enacting the FCRA, a House amendment was accepted that changed the standard for liability from gross negligence to ordinary negligence. H.R. REP. NO. 91-1587 (1970) (Conf. Rep.), *reprinted in* 1970 U.S.C.A.N. 4411, 4416, *quoted in Bryant*, 689 F.2d at 79.

<sup>111</sup> *See supra* notes 84-85 and accompanying text.

“[j]udging the reasonableness of an agency’s procedures involves weighing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.”<sup>112</sup> But this balancing act does little to inform or exemplify.

Little direction comes from the Federal Trade Commission (FTC). Although tasked with enforcement of the FCRA,<sup>113</sup> the FTC lacks the authority to establish firm interpretations of its rules.<sup>114</sup> Guidance from an Unofficial FTC Staff Interpretation provides scant illumination: “The exact nature of a ‘reasonable procedure’ is determined by the circumstances surrounding the operation of credit bureau [sic] and may vary from credit bureau to credit

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<sup>112</sup> *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984).

<sup>113</sup> FTC STAFF REPORT, *supra* note 61, at 3. Under the Consumer Financial Protection Act of 2010, the FTC now shares its enforcement role with the newly created Consumer Financial Protection Bureau (CFPB). *Id.* at 1. In August 2012, the FTC brought its first enforcement action against a CRA for violations of the FCRA in connection with employment background screening. Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, *United States v. HireRight Solutions, Inc.*, 12-cv-01313 (D.D.C. Aug. 8, 2012), available at <http://ftc.gov/os/caselist/1023130/120808hirerightempt.pdf>; see also Press Release, Fed. Trade Comm’n, Employment Background Screening Company to Pay \$2.6 Million Penalty for Multiple Violations of the Fair Credit Reporting Act (Aug. 8, 2012), available at <http://www.ftc.gov/opa/2012/08/hireright.shtm>; Editorial, *Accuracy in Criminal Background Checks*, N.Y. TIMES, Aug. 10, 2012, at A18, available at [http://www.nytimes.com/2012/08/10/opinion/accuracy-in-criminal-background-checks.html?\\_r=1&hp](http://www.nytimes.com/2012/08/10/opinion/accuracy-in-criminal-background-checks.html?_r=1&hp). The case, brought against CRA HireRight, addressed FCRA violations that may have come to the attention of the FTC after a class action suit against the company settled last year. See *id.*; *supra* notes 55, 102-08. The complaint alleged that HireRight violated several provisions of the FCRA, including §§ 1681e(b) and 1681k. See *HireRight*, 12-cv-01313, ¶¶ 21-38. A settlement with HireRight, announced the same day the complaint was brought, imposed a \$2.6 million penalty on the company and permanently enjoined it from further violations of the FCRA. Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction, and Other Equitable Relief at 3-5, *HireRight*, 12-cv-01313, available at <http://ftc.gov/os/caselist/1023130/120808hirerightstip.pdf>.

<sup>114</sup> “[T]he Commission was specifically denied the power to issue substantive rules and regulations under the Fair Credit Reporting Act and, therefore, may not specify the precise procedures which credit bureaus must follow on an industry-wide basis . . . .” *Bryant*, 487 F. Supp. at 1241-42 (quoting FED. TRADE COMM’N, UNOFFICIAL STAFF INTERPRETATION NO. 162). Regardless, it is not clear how much weight would be given to FTC interpretations of the FCRA. The issue of how much deference the courts should give to FTC interpretations brings up administrative law issues that are outside the scope of this note. For a discussion of those issues, see Amanda L. Fuchs, Comment, *The Absurdity of the FTC’s Interpretation of the Fair Credit Reporting Act’s Application to Workplace Investigations: Why Courts Should Look Instead to the Legislative History*, 96 NW. U. L. REV. 339, 347-58 (2001). Unlike the FTC, the CFPB was granted rule-making authority over the FCRA, but has yet to use this power in the context of employment screening and criminal background checks. See NAT’L CONSUMER LAW CTR., *supra* note 10, at 35.

bureau.”<sup>115</sup> Therefore, the FTC is relegated to “litigate the question on a case by case basis.”<sup>116</sup>

Litigating reasonableness on such a case-by-case basis often reduces the issue to a “battle of . . . witnesses,”<sup>117</sup> even where the underlying facts of the case are undisputed, causing jury confusion and making the outcome of a case unpredictable. To illustrate this point, consider the recent case of *Adams v. National Engineering Service Corp.*<sup>118</sup> Deborah Adams brought an action against CRA National Engineering Services Corporation (NESC) after she was denied employment based on a consumer report “which inaccurately attributed to [her] felony and misdemeanor convictions belonging to a person with a different first name . . . [and which] emanated from Virginia, a state to which . . . [she] had no connection.”<sup>119</sup> The court denied NESC’s motion for summary judgment, finding that the CRA had clearly reported inaccurate information as “it [was] uncontested that the convictions which NESC reported to Guidant did not belong to Adams,”<sup>120</sup> and that, as to the other three elements of a § 1681e(b) claim, a reasonable jury could find in Adams’s favor.<sup>121</sup>

At trial, the jury found for NESC, and Adams subsequently moved for a new trial.<sup>122</sup> The court denied her motion because, although “the facts of this case were generally

<sup>115</sup> *Bryant*, 487 F. Supp. at 1241 (quoting FED. TRADE COMM’N, UNOFFICIAL STAFF INTERPRETATION NO. 162).

<sup>116</sup> *Id.* at 1242 (quoting UNOFFICIAL STAFF INTERPRETATION NO. 162, *supra* note 115). In the decade following the passage of the FCRA, even the consumer reporting industry was unsure of their responsibilities under this provision. An industry publication from 1977 stated:

[Y]ou have some flexibility and the law does not spell out what reasonable procedures you must follow. Congress believed that you and the credit granter and the consumer would best determine that, and if there was a conflict, the courts could decide if the procedure was reasonable. This does not give you the license to do anything you please but it recognizes that a procedure may differ between credit bureaus, and both procedures may be perfectly acceptable.

RALPH C. CLONTZ, JR., FAIR CREDIT REPORTING MANUAL App. H-113 (rev. ed. 1977), quoted in *Bryant*, 487 F. Supp. at 1242.

<sup>117</sup> *Adams v. Nat’l Eng’g Serv. Corp.*, No. 3:07cv1035, 2010 U.S. Dist. LEXIS 35489, at \*6 (D. Conn. Apr. 12, 2010).

<sup>118</sup> *Adams v. Nat’l Eng’g Serv. Corp.*, 620 F. Supp. 2d 319 (D. Conn. 2009).

<sup>119</sup> *Id.* at 333.

<sup>120</sup> *Id.* at 330.

<sup>121</sup> *Id.* (explaining that “a reasonable jury could find that NESC failed to follow reasonable procedures,” “that Adams was injured when [her potential employer] revoked its contingent offer of employment,” and “that [it] would not have revoked its contingent offer but for NESC’s inaccurate attribution of various felony and misdemeanor convictions to Adams”).

<sup>122</sup> *Adams*, 2010 U.S. Dist. LEXIS 35489, at \*3.

undisputed . . . , the crux of the jury’s role in this case was to determine whether the undisputed actions of [the] defendants constituted negligent and/or willful violations of the law.”<sup>123</sup> The court pointed out that “the distinction between a failure to comply with the FCRA and a negligent or willful failure . . . was crucial to the case and the presumptive basis for the jury’s decision.”<sup>124</sup> As the court stated, “The trial constituted a battle of the parties’ expert witnesses who attempted to define what the parties’ responsibilities were under the law.”<sup>125</sup> In the absence of guidance as to what constitute reasonable procedures under the statute, litigation under the FCRA remains unpredictable and difficult for consumers to win.

### C. *Proving Causation Can Be Very Problematic*

Even if a plaintiff is able to prove to a jury that a CRA was negligent or willful in failing to follow reasonable procedures under § 1681e(b), she still has to prove the other elements in a § 1681e(b) claim—notably that the CRA’s negligence proximately caused her injury. To exemplify the challenge that this requirement can present, consider the case of *Obabueki v. Choicepoint*.<sup>126</sup> Abel Obabueki had been arrested for a misdemeanor, and two years after pleading “nolo contendere,” his conviction had been “set aside and dismissed.”<sup>127</sup> When applying for a job at IBM, Obabueki did not disclose the conviction on his application, believing that it had been expunged from his record and that it could therefore be omitted under the directions on the application.<sup>128</sup> IBM subsequently obtained a consumer report on Obabueki from CRA Choicepoint, which “contained information about [Obabueki’s] 1995 conviction but did not mention the 1997 dismissal order.”<sup>129</sup> IBM questioned Obabueki about this

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<sup>123</sup> *Id.* at \*5-6.

<sup>124</sup> *Id.* at \*7.

<sup>125</sup> *Id.*

<sup>126</sup> *Obabueki v. Choicepoint*, 236 F. Supp. 2d 278 (S.D.N.Y. 2002), *aff’d sub nom.* *Obabueki v. Int’l Bus. Mach. Corp.*, 319 F.3d 87 (2d Cir. 2003).

<sup>127</sup> *Id.* at 280. Obabueki’s arrest had taken place in California, and the “conviction was set aside and dismissed by an order pursuant to California Penal Code § 1204.3.” *Id.*

<sup>128</sup> *Id.* at 280-81. The form directed that “‘arrests without convictions, [and] convictions or incarcerations for which a record has been sealed or expunged’ need not be included . . . .” *Id.* at 280 (alteration in original).

<sup>129</sup> *Id.* at 281.

incident, at which point he provided them with a copy of the 1997 dismissal order.<sup>130</sup> Even after reviewing the dismissal order, however, IBM determined that Obabueki had lied on his application, and rescinded its offer of employment.<sup>131</sup> After Obabueki showed the 1997 dismissal order to Choicepoint, Choicepoint sent a revised report to IBM which “stated that [Obabueki’s] criminal record was ‘clear,’ and made no mention of either the 1995 conviction or the 1997 dismissal order.”<sup>132</sup> However, IBM did not reinstate its offer of employment.<sup>133</sup>

Obabueki brought an action against Choicepoint, and the jury found that Choicepoint had “negligently fail[ed] to maintain required procedures designed to ensure the completeness and accuracy of its reports.”<sup>134</sup> Choicepoint moved for judgment as a matter of law, and the court granted its motion,<sup>135</sup> holding that “the evidence produced at trial . . . did not provide a legally sufficient basis for the jury to find as a factual matter that [Obabueki’s] injury was proximately caused by Choicepoint’s negligence.”<sup>136</sup> According to the court, “the inaccuracy of the initial report lay in its failure to include the 1997 dismissal order, not in its failure to report that plaintiff had no convictions whatsoever.”<sup>137</sup> The court went on to say that “although this inaccuracy may have been caused by Choicepoint’s negligent failure to maintain procedures designed to ensure the accuracy of its reports, the inaccuracy was effectively neutralized . . . when plaintiff faxed a copy of the 1997 dismissal order to . . . IBM.”<sup>138</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* Later, when ruling on Choicepoint’s motion for judgment as a matter of law, the court held that Obabueki had no right to a “clean” report. *Id.* at 283 (accepting Choicepoint’s assertion that “the initial report would have been correct if it had listed the 1997 dismissal order along with the 1995 conviction”).

<sup>133</sup> *Id.* at 282.

<sup>134</sup> *Id.* at 280.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 284.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* The court further stated:

[A]fter evaluating both the initial Choicepoint report and the 1997 order, IBM concluded that [Obabueki] had lied on the [form]. The fact that this conclusion was based on IBM’s possibly erroneous interpretation of the legal effect of the 1997 order is of no consequence to the issue of whether Choicepoint caused [Obabueki’s] injury. While Choicepoint may have provided IBM with incomplete information regarding [Obabueki], the uncontested evidence offered at trial showed that IBM based its decision on information that was complete and accurate. Thus, Choicepoint’s negligence—which may have caused the

In the court's eyes, Obabueki lost the job offer because, basing its decision on a full and complete record, IBM decided that Obabueki had lied. And, as the court pointed out, "the FCRA is not a strict liability statute; Choicepoint's violation of the statute does not relieve plaintiff of his burden to establish that those violations were the proximate cause of plaintiff's injury."<sup>139</sup> The fact that Choicepoint later determined that Obabueki's record had been expunged, and left it off the report, was of no consequence to the court.<sup>140</sup> IBM was free to make whatever assumptions it wanted about whether his record was expunged, even if those assumptions were erroneous.

#### IV. HEIGHTENED STANDARDS UNDER § 1681K? DEBUNKING THE MYTH

The preceding part of this note dealt with problems associated with litigating a claim under § 1681e(b), which is applicable to CRAs in all cases. Recognizing the importance of employment decisions and the decisive effect that a misreported criminal offense can have on such decisions, § 1681k of the FCRA "deals specifically with consumer reports in the employment context and 'creates heightened standards for procedures used to collect information for employment purposes.'"<sup>141</sup> Under this portion of the FCRA,

[w]hen a consumer reporting agency furnishes a report that contains matters of public record likely to have an adverse effect upon the consumer's ability to obtain employment, it is obligated to do one of two things: (1) notify the consumer contemporaneously with the transmission of the report to the user *or* (2) "maintain strict procedures" designed to ensure the information is "complete and up to date."<sup>142</sup>

Focusing first on the second prong of this test, the standard for CRA compliance in the employment context differs in two ways from the general requirement found in § 1681e(b): (1) the CRA must maintain strict, rather than reasonable, procedures, and (2) these procedures must be meant to ensure

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production of the initial report—cannot be said to have been the proximate cause of IBM's decision.

*Id.* at 285.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 285 n.4.

<sup>141</sup> *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 438 (E.D. Pa. 2010) (quoting *Dalton v. Capital Assoc. Indus.*, 257 F.3d 409, 417 (4th Cir. 2001)).

<sup>142</sup> *Id.* (emphasis added) (quoting *Dalton*, 257 F.3d at 417).



that information is complete and up to date, and not just to ensure maximum possible accuracy.

However, these changes may be misleading because, in practice, they do not result in any heightened standards at all. Section 1681k does not alter the fact that the FCRA is not a strict liability statute, and the important “distinction between a failure to comply with the FCRA and a negligent or willful failure”<sup>143</sup> remains. Therefore, to succeed on a § 1681k claim at trial, a plaintiff still must prove the same general elements as in a § 1681e(b) claim, except that “strict procedures” and “complete and up to date” replace “reasonable procedures” and “maximum possible accuracy.” Although the standard for accuracy presents unique problems in this context,<sup>144</sup> courts tend to encounter many of the same problems with the “strict procedure” standard as they did when defining “reasonable procedures.”<sup>145</sup> Courts often conflate the two, using reasonable procedures as a way to qualify strict procedures.<sup>146</sup> When a plaintiff loses on reasonable procedures, he will likely lose on strict procedures as well.<sup>147</sup> And, since a plaintiff must also prove that the CRA’s negligence proximately caused his injury, many of the problems that were present in § 1681e(b) persist in § 1681k(a)(1), making it hard to see how this provision imposes “heightened” requirements at all.

Turning to the first prong of the test laid out above, § 1681k(a)(1) explicitly offers CRAs a way to “opt-out” of the so-called “heightened” procedures by providing notice to the consumer at the same time as providing a report to an employer.<sup>148</sup> If the agency contemporaneously provides notice, its responsibilities revert back to those under the regular § 1681e(b) requirements.<sup>149</sup> Since the notice provides no benefit to the consumer,<sup>150</sup> § 1681k, as written and as applied, fails to create a meaningful form of heightened protection in the employment context.

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<sup>143</sup> Adams v. Nat’l Eng’g Serv. Corp., No. 3:07cv1035, 2010 U.S. Dist. LEXIS 35489, at \*7 (D. Conn. Apr. 12, 2010).

<sup>144</sup> See *infra* Part IV.A.

<sup>145</sup> See *infra* Part IV.B.

<sup>146</sup> See *infra* note 157 and accompanying text.

<sup>147</sup> See *infra* notes 158-61 and accompanying text.

<sup>148</sup> See 15 U.S.C. § 1681k(a) (2006).

<sup>149</sup> See *infra* note 167.

<sup>150</sup> See *infra* notes 168-73 and accompanying text.

A. *The Accuracy Requirement Is Ineffective*

As for the threshold question of accuracy in the context of employment, it would seem that § 1681k(a)(2) eliminates the effect of the circuit split as to the definition of accuracy under § 1681e(b).<sup>151</sup> Because § 1681k(a)(2) requires that reports be complete and up to date, a CRA that reported a criminal record but left out a subsequent expungement would be foreclosed from using the technical accuracy approach as a defense. The language of the statute, however, does not address the fact that many court records are inaccurate, and that CRAs may be reporting inaccurate information from them.

According to the statute, reports of public records are “considered up to date if the current public record status of the item at the time of the report is reported.”<sup>152</sup> In *Henson v. CSC Credit Services*,<sup>153</sup> the court held that court records are “a presumptively reliable source.”<sup>154</sup> Therefore, the court held that “as a matter of law, a credit reporting agency is not liable under the FCRA for reporting inaccurate information obtained from a court’s Judgment Docket, absent prior notice from the consumer that the information may be inaccurate.”<sup>155</sup> The court felt that to hold otherwise “would be unduly burdensome and inefficient” for CRAs.<sup>156</sup> Therefore, although agencies are subject to heightened standards in the sense that they must ensure that the report reflects the current public records, those standards do not actually produce reports with greater accuracy overall.

B. *“Strict Procedures” Is Not Defined by the Statute*

Additionally, in § 1681k, the statute changes the standard from one requiring reasonable procedures to one requiring strict procedures. While the reasonableness of procedures follows the standard torts definition, “strict procedures” is harder to define, and just like with reasonableness, the statute offers no guidance. Because the FCRA does not provide a definition, the courts are left to decide

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<sup>151</sup> See *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 433 n.5 (E.D. Pa. 2010); see also *supra* Part III.A.

<sup>152</sup> 15 U.S.C. § 1681k(a)(2).

<sup>153</sup> 29 F.3d 280 (7th Cir. 1994).

<sup>154</sup> *Id.* at 285.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 285-86.

what Congress intended. The result is that courts punt the question to the jury with very little guidance, using “reasonable procedures” as a qualifier, thereby conflating the two standards. In *Smith*, the court simply stated that “[w]ithout an extensive analysis of what constitutes ‘strict’ as opposed to ‘reasonable’ procedures, it stands to reason that ‘strict’ is necessarily a more stringent standard.”<sup>157</sup>

At the summary judgment stage, when a plaintiff brings claims under both § 1681e(b) and § 1681k, courts will usually just evaluate the two claims together.<sup>158</sup> After finding that a report was inaccurate under § 1681e(b), there will almost always be a question of fact as to the reasonableness of the procedures,<sup>159</sup> and courts will, therefore, assume that one exists as to the “strictness” of the procedures, as well.<sup>160</sup> Ultimately, this comes down to the same “battle of the witnesses” that was present in § 1681e(b),<sup>161</sup> and the result is often the same in both cases: if consumers fail to show that the CRA used reasonable procedures, they will lose on a claim of strict procedures, as well. In this way, the strict procedures required by the statute remain unclear and undefined, and the supposed heightened requirement that it imposes remains largely unenforced.

### C. *Making Matters Worse—Offering CRAs a Way Out*

To top off the frustrations consumers face in § 1681e(b) and § 1681k(a)(2), the notice provision of § 1681k(a)(1) explicitly offers CRAs a way to “opt-out” of the provisions of § 1681k(a)(2), allowing CRAs to exclusively follow § 1681e(b)

<sup>157</sup> *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 439 (E.D. Pa. 2010).

<sup>158</sup> *See, e.g., Williams v. LexisNexis Risk Mgmt.*, No. 3:06cv241, 2007 U.S. Dist. LEXIS 62193, at \*18-19 (E.D. Va. Aug. 23, 2007) (explaining that because the *Obabueki* court was analyzing the adequacy of procedures under the FCRA, the court analyzed the § 1681k claims under § 1681e(b)).

<sup>159</sup> *See supra* notes 84-85 and accompanying text.

<sup>160</sup> *See, e.g., Adams v. Nat’l Eng’g Serv. Corp.*, 620 F. Supp. 2d 319, 332 (D. Conn. 2009) (Because it had “already found that there exist[ed] a factual dispute over whether NESC followed reasonable procedures, the court necessarily [held] that there exist[ed] a genuine issue of material fact as to whether it followed strict procedures.”); *Poore v. Sterling Testing Sys., Inc.*, 410 F. Supp. 2d 557, 572 (E.D. Ky. 2006) (“Just as there is an issue of fact as to whether such reliance and procedures were ‘reasonable’ under § 1681e(b), there is an issue of fact as to whether these actions constitute ‘strict’ procedures under § 1681k.”); *Obabueki v. Int’l Bus. Mach. Corp.*, 145 F. Supp. 2d 371, 399 (S.D.N.Y. 2001) (The court approvingly cited *Equifax v. Federal Trade Commission*, 678 F.2d 1047, 1049 & n.4 (11th Cir. 1982), for its recognizing that the distinction between reasonable procedures and strict procedures “is clearly not without significance,” yet holding that “the disposition of plaintiff’s respective claims under these sections are parallel in this case.”).

<sup>161</sup> *See supra* note 125 and accompanying text.

without providing anything to consumers in return. Therefore, rather than imposing heightened standards, this notice requirement actually harms consumers without helping to ease their burden in litigation. Given that Congress intended to create heightened standards in the employment context through § 1681k, the inclusion of § 1681k(a)(1) is an enigma.

Section 1681k applies when a CRA uses public records to create a consumer report for employment purposes and the information contained therein is likely to have an adverse effect.<sup>162</sup> The provision mandates that the CRA do one of two things: either follow strict procedures to ensure a complete and up-to-date report under § 1681k(a)(2), or,

at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported.<sup>163</sup>

Central to understanding this provision is recognizing the problem the statute creates by permitting the CRA to follow either subsection (a)(1) or (a)(2). Because of that choice, stating a valid cause of action for violation of § 1681k “requires Plaintiff to plead facts to establish *both* that: (1) Defendant failed to timely notify Plaintiff of the report; and (2) Defendant failed to ‘maintain strict procedures designed to insure’ that the potentially adverse report is ‘complete and up to date.’”<sup>164</sup> Therefore, failing to comply with the notice provision does not create strict liability for the CRA; if a CRA fails to send timely notice to the consumer, the consumer still must prove that it negligently or willfully violated § 1681k(a)(2).<sup>165</sup> Yet a CRA can evade the supposedly heightened requirements under § 1681k(a)(2) by providing contemporaneous notice to both the consumer and the employer.<sup>166</sup> Much like the threshold question of accuracy in § 1681e(b) claims, if the CRA provides this notice to the consumer, then that ends the § 1681k inquiry; the CRA does not have to prove that it followed strict procedures.

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<sup>162</sup> 15 U.S.C. § 1681k(a) (2006).

<sup>163</sup> *Id.* § 1681k(a)(1).

<sup>164</sup> *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 439 (E.D. Pa. 2010) (quoting 15 U.S.C. § 1681k(a)).

<sup>165</sup> *See, e.g., Adams v. Nat'l Eng'g Serv. Corp.*, No. 3:07cv1035, 2010 U.S. Dist. LEXIS 35489, at \*7 (D. Conn. Apr. 12, 2010) (stating that “Even if [the CRA’s] notice to plaintiff was ‘clearly inadequate,’ as the Court found on summary judgment, it does not necessarily follow that [the CRA] was negligent under the law.”).

<sup>166</sup> *Smith*, 711 F. Supp. 2d at 438.

Instead, its responsibility reverts back to the general compliance requirements of § 1681e(b).<sup>167</sup>

What makes this so troubling is that the contemporaneous notice requirement does not provide any meaningful additional protection to the consumer to warrant exemption from the heightened standards of § 1681k(a)(2).<sup>168</sup> Contemporaneous notice does not give the consumer an opportunity to dispute the contents of the report before the potential employer receives it.<sup>169</sup> Therefore, “By delaying its meaningful accuracy test, the Act allows agencies and furnishers a free pass that can be painfully costly to the defamed consumer.”<sup>170</sup> Thus, the smart CRA would always send notice, and thereby avoid having to litigate whether it followed strict procedures or not.

The problems that arise when an employer is the first to receive the report demonstrate how this notice mechanism fails to provide any benefit to the consumer. As discussed earlier, the FCRA places a notice requirement on employers who wish to “tak[e] any adverse action based in whole or in part” on information contained in consumer reports—the employer must “provide . . . the consumer . . . with a copy of the report” before taking such adverse action.<sup>171</sup> In theory, “The purpose of the notification requirement is to allow individuals to contact the consumer reporting agency and correct any inaccuracies contained in a report, such as incorrect information regarding an individual’s arrest or conviction.”<sup>172</sup> In light of the way the statute is worded, however, this requirement fails to provide the consumer any meaningful chance of disputing the record in time to remain a realistic candidate for the position.<sup>173</sup>

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<sup>167</sup> See EEOC, Statement of Maneesha Mithal, Meeting of Oct. 20, 2010, available at <http://www.eeoc.gov/eeoc/meetings/10-20-10/mithal.cfm#fn12> (“Regardless of whether a CRA chooses to provide the notice or adopt strict procedures, section 1681e(b) of the FCRA still requires CRAs to have reasonable procedures to assure maximum possible accuracy.”).

<sup>168</sup> It is a well-documented problem with the FCRA that it does not provide any form of relief until it is too late. See, e.g., ATTORNEY GENERAL’S REPORT, *supra* note 39, at 100-01; Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 VAL. U. L. REV. 1061, 1107 (2007).

<sup>169</sup> See De Armond, *supra* note 168, at 1107.

<sup>170</sup> *Id.*

<sup>171</sup> 15 U.S.C. § 1681b(b)(3)(A) (2006).

<sup>172</sup> Lujan, *supra* note 6, at 59; see also SEARCH, *supra* note 2, at 60 (“[P]readverse action’ notice is intended to give the consumer the opportunity to review the report for accuracy and completeness before the employer makes a final decision.”).

<sup>173</sup> This appears to be a fundamental flaw in the statute from its very inception, related to the remedial nature of the statute. In explaining the requirement that an employer provide notice to an employee before taking adverse action—a

In *Johnson v. ADP*,<sup>174</sup> plaintiff Eric Johnson ran into this very problem. Johnson was denied employment by defendant staffing agency RHI based on an erroneous criminal record in a consumer report compiled by defendant CRA ADP.<sup>175</sup> Initially, RHI provided Johnson with a copy of the report and informed him that his employment application was being placed on hold.<sup>176</sup> Fourteen days later, RHI informed Johnson that he was no longer being considered as a candidate.<sup>177</sup> Johnson sued RHI claiming that it violated the FCRA by disqualifying him so soon after sending the statutorily required notice, effectively denying him an opportunity to dispute the contents of the report.<sup>178</sup> The FCRA allows CRAs thirty days to investigate disputes by consumers.<sup>179</sup> Johnson argued that since ADP had thirty days to review his report, RHI should have to wait at least thirty days before taking adverse action against him.<sup>180</sup>

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requirement that was added by the House conferees prior to the FCRA's enactment—then House Representative Sullivan explained,

The House conferees succeeded in assuring immediate notification to any individual, who is rejected for . . . employment because of information in a credit report, of the name and address of the agency which made the report on him. Thus, his right to access to his file is made more meaningful—he will automatically be told where to look for information which may be causing him needless harm. The Senate bill would have required the consumer who had been rejected for . . . employment because of adverse information in a credit file to request, in writing, the name and address of the credit reporting bureau in order to check further into the information which may have caused his rejection.

116 CONG. REC. 36571 (1970) (statement of Rep. Sullivan), *quoted in* *Drury v. TNT Holland Motor Express*, 885 F. Supp. 161, 165 (W.D. Mich. 1994). This focus on allowing consumers to fix their report ex post exemplifies how the consumer cannot realistically expect to keep the job offer. And, given the aforementioned inadequacies, the FCRA's protections seem almost meaningless—if a consumer loses one job, then he might have a chance for another, but he will almost never know that he does not have a clean report until he loses that first job. *See* De Armond, *supra* note 168, at 1106. This ex-post approach to correcting inaccuracies presents another problem: since “[t]he process of evaluating and choosing employees is a subjective, hidden process with no oversight[,] . . . the notice requirement is in reality no more than a request that employers act in good faith.” Ruth Desmond, Comment, *Consumer Credit Reports and Privacy in the Employment Context: The Fair Credit Reporting Act and the Equal Employment for All Act*, 44 U.S.F. L. REV. 907, 919 (2010). Additionally, “there is the risk that the employer will still be influenced by the record in his employment decision and find another ostensible reason not to hire the individual, even if a mistake in the record is corrected before the adverse action is taken.” ATTORNEY GENERAL'S REPORT, *supra* note 39, at 101.

<sup>174</sup> 768 F. Supp. 2d 979 (D. Minn. 2011).

<sup>175</sup> *Id.* at 981. “[T]he criminal records incorrectly list[ed] his race as ‘black.’” *Id.* at 984.

<sup>176</sup> *Id.* at 981.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 981, 983.

<sup>179</sup> 15 U.S.C. § 1681m (2006).

<sup>180</sup> *Johnson*, 768 F. Supp. 2d at 983.

The court disagreed. Looking to the language of the FCRA, the court stated that there is no statutorily “mandate[d] . . . waiting period between the notice and the adverse action.”<sup>181</sup> Still, the court recognized that “Congress’s use of the word ‘before’ shows that there must be some time between notice and action.”<sup>182</sup> However, in what is now a familiar problem, the court was left looking at a statute that provided a dearth of guidance into exactly *how much* time “before” would satisfy the statutory requirement. Ultimately, the court felt that the two weeks that RHI waited between notice and taking adverse action satisfied the requirement of the statute.<sup>183</sup>

The holding in *Johnson* shows how consumers are hurt when their employer receives a copy of their consumer report before they have a chance to review it. In fact, just one week after RHI denied Johnson employment, ADP concluded that his criminal record had been inaccurate.<sup>184</sup> This conclusion was reached within the thirty-day window provided to CRAs, but it was still too late—RHI had already made its decision. And yet RHI had acted, according to the court, completely within its mandated requirements. Further, the court stated in its holding that “[n]othing in the FCRA requires an employer to consider any correction that a reporting agency might make.”<sup>185</sup> Therefore, similar to the problems already shown, once the damage had been done by the inaccurate report, nothing could be done to fix it. But, if the FCRA is a “remedial statute[],”<sup>186</sup> as the *Johnson* court called it, then the statute should actually provide some meaningful remedial relief for injured consumers. Further, if providing a private right of action under the FCRA was intended to be a “part of its enforcement mechanism,”<sup>187</sup> then bringing a private action should induce CRAs to employ better practices, something which clearly has not happened.

## V. THE SOLUTION: AMENDING § 1681K

In light of Congress’s intention for § 1681k to impose heightened responsibilities on CRAs, the standards in § 1681k(a)(2) must be enhanced by giving meaning to the

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 984.

<sup>184</sup> *Id.* at 981.

<sup>185</sup> *Id.* at 984.

<sup>186</sup> *Id.* at 983.

<sup>187</sup> *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991).

requirement of strict procedures and by providing for greater accuracy in background checks. Further, the statute should not provide CRAs an opportunity to “opt-out” of § 1681k(a)(2) through use of the notice provision of § 1681k(a)(1). Modifying this notice requirement and incorporating it into § 1681k(a)(2) may provide a solution to many of the problems outlined in this note.

The fact that Congress thought to include a notice provision in § 1681k shows that the lawmakers at least recognized that the consumer is in the best position to identify and fix a mistake in his consumer report. Courts also recognize that “[t]he consumer is in a better position than the credit reporting agency to detect errors appearing in court documents dealing with the consumer’s own prior litigation history.”<sup>188</sup> However, although the right intention exists, the methodology is flawed in at least two important ways. First, notifying a consumer that a report of his criminal history is being prepared will not necessarily move that consumer to request a copy of the report. As happens in many cases, information in a criminal history report may be completely erroneous, and the consumer may not realize that he has any reason to suspect errors.<sup>189</sup> The consumer may also be motivated by the fear that if he delays production of the report to the employer, he will be viewed as having something to hide. Second, and most important, for such a method to have any meaningful effect on employment decisions, the consumer must have the ability to inspect and correct the report *before* a potential employer has the opportunity to see it. Providing notice of the report to the consumer at the same time the report is supplied to the employer fails to provide that protection.

Therefore, the first step to amending § 1681k is to require the CRA to provide the consumer with a copy of the report before providing it to the employer.<sup>190</sup> A simple way to enforce this would

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<sup>188</sup> Henson v. CSC Credit Servs., 29 F.3d 280, 286 (7th Cir. 1994).

<sup>189</sup> ATTORNEY GENERAL’S REPORT, *supra* note 39, at 100.

<sup>190</sup> Noting the problems inherent in the failure of the FCRA to provide a consumer with the opportunity to review his criminal record ahead of a prospective employer is not a novel observation. *See, e.g.*, De Armond, *supra* note 168, at 1107. It has also been suggested that as a means of consumer protection, “Congress may want to consider imposing the requirement of giving consumers the pre-reporting opportunity to see the information in all reports of criminal records by consumer reporting agencies.” ATTORNEY GENERAL’S REPORT, *supra* note 39, at 134. More recently, one student writer, aiming to bolster the efficacy of Ohio’s record-sealing statute, proposed that Ohio adopt a credit reporting law that would give consumers access to their criminal record reports prior to their being provided to prospective employers. Jagunic, *supra* note 2, at 185 (proposing that Ohio “enact credit reporting legislation that allows a consumer to dispute inaccurate and out-of-date information



be to impose strict liability on CRAs who fail to do so. Congress, however, clearly did not intend for the FCRA to create strict liability. Instead, the amended § 1681k(a)(1) should be combined with § 1681k(a)(2), and prior notice to the consumer should be considered a “strict procedure” for ensuring that the report is complete and up to date. In this way, the “strict procedures” required in § 1681k would have a definition more rigorous than, and separate from, the “reasonable procedures” required in § 1681e(b), thereby ameliorating many of the problems found in litigation under § 1681k.

The D.C. Circuit Court of Appeals suggested that CRAs could provide reports to satisfy the reasonable procedure requirement of § 1681e(b) in *Koropoulos v. Credit Bureau*.<sup>191</sup> There, in the context of a credit report that was incomplete, yet not erroneous or misleading, the court stated that “the likelihood that consumers will be harmed by incomplete reports that are neither misleading nor erroneous is less, and in many cases it may well be a ‘reasonable procedure’ to let the potential creditor supplement the missing information himself.”<sup>192</sup> For reasons already discussed,<sup>193</sup> leaving the responsibility of fixing a consumer report in the hands of the employer would not work because the consumer is already harmed if the employer views an erroneous report. But, using the framework suggested by the *Koropoulos* court, CRAs could satisfy “strict procedures” by providing a report to the consumer before showing it to the employer. The analogy works as follows: if allowing a potential creditor to supplement missing information in a credit report could be considered a reasonable procedure for assuring maximum possible accuracy under § 1681e(b), then perhaps

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before it is provided to a prospective employer”). And, earlier this year, a report by the NCLC stated that CRAs should “send the consumer a notice that they intend to report the negative information *before* they send the information to the prospective employer, so that incomplete information can be addressed prior to dissemination,” thereby “ensuring that records are complete and up-to-date, and no sealed or expunged information is provided.” NAT’L CONSUMER LAW CTR., *supra* note 10, at 34.

<sup>191</sup> 734 F.2d 37 (D.C. Cir. 1984).

<sup>192</sup> *Id.* at 45. The court reasoned that:

Imprecise or incomplete reports that are not misleading, although undesirable, are not as noxious as erroneous and misleading ones. The potential creditor is not misled; he is merely missing information which might be relevant to his decision whether to grant credit. Unlike the case of erroneous or misleading reports, the potential creditor can often correct inaccuracies himself by asking the credit applicants or the source to supply the missing information.

*Id.*

<sup>193</sup> See *supra* notes 168-73 and accompanying text.

providing a copy of a criminal report to the consumer to verify its accuracy could be considered a strict procedure for ensuring the report is complete and up to date under § 1681k.

This approach would benefit both the consumer and the CRA. Consumers would have the chance to review their purported criminal records before they are given to potential employers. CRAs would have a clear example of a compliance mechanism that satisfies the strict procedure requirement.

Employers would most likely oppose this proposition, claiming that they will be forced to delay hiring schedules and bear added costs. In *Johnson*, however, the court rejected a similar argument by the CRA that a waiting period between providing consumers with their reports and taking adverse action “would create untenable constraints on employers” by pausing their hiring process pending resolution of any dispute.<sup>194</sup> The court held that the language of the FCRA required some waiting period and that the CRA’s position would “lead to absurd results.”<sup>195</sup> Given that the FCRA was enacted to ensure accuracy in the credit reporting industry, it would seem that a short delay in the process would not be beyond the reach of the statute. Most disputes could be cleared up rather quickly, and, at that point, the employer could make a well-informed decision based on accurate data. Additionally, since the report would have already been created, the cost of sending a copy to the consumer first would be minimal.

## CONCLUSION

Criminal background checks can provide important information to potential employers about their prospective employees. At the same time, these consumers must be protected by ensuring that what their potential employers find out about them is accurate and up to date. The FCRA aims to regulate the production of consumer reports and places requirements on the CRAs that compile information pertaining to criminal records. When a consumer is injured because of a flawed report, however, the FCRA provides little meaningful relief. Having lost an opportunity for employment, the injured consumer must then engage in protracted litigation with a low chance for success. Additionally, § 1681k of the FCRA—which

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<sup>194</sup> *Johnson v. ADP Screening & Selection Servs.*, 768 F. Supp. 2d 979, 983-84 (D. Minn. 2011).

<sup>195</sup> *Id.*

purportedly places heightened standards on CRAs in the context of employment—actually only harms consumers, while helping the CRAs. Because the requirements under that section are inadequately defined, the standard of care required is much the same as the general standard of care required under other sections of the FCRA. Additionally, CRAs can “opt-out” of the so-called “heightened” requirements, without giving the consumer anything in return. Amending the FCRA by combining the two choices in § 1681k can provide a solution to these problems. It would give some guidance to courts and juries on the required heightened standard of care in the employment context, and it would eliminate the ability of CRAs to “opt-out” from compliance. Most importantly, it would give the consumer a meaningful chance of avoiding injury in the first place.

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