


12-30-2020

## DOOR SHUT AND EARS PLUGGED: HOW CONSUMER REPORTING CASTS IDENTITY THEFT VICTIMS OUT OF FINANCIAL SOCIETY AND HOW THE LAW CAN BE HARMONIZED TO BRING THEM BACK IN

Ryan Bolger

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjcfcl>

 Part of the [Administrative Law Commons](#), [Bankruptcy Law Commons](#), [Business Organizations Law Commons](#), [Commercial Law Commons](#), [Consumer Protection Law Commons](#), [Internet Law Commons](#), and the [Tax Law Commons](#)

---

### Recommended Citation

Ryan Bolger, *DOOR SHUT AND EARS PLUGGED: HOW CONSUMER REPORTING CASTS IDENTITY THEFT VICTIMS OUT OF FINANCIAL SOCIETY AND HOW THE LAW CAN BE HARMONIZED TO BRING THEM BACK IN*, 15 Brook. J. Corp. Fin. & Com. L. 155 (2021).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol15/iss1/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of Corporate, Financial & Commercial Law by an authorized editor of BrooklynWorks.

# DOOR SHUT AND EARS PLUGGED: HOW CONSUMER REPORTING CASTS IDENTITY THEFT VICTIMS OUT OF FINANCIAL SOCIETY AND HOW THE LAW CAN BE HARMONIZED TO BRING THEM BACK

## ABSTRACT

*Consumer Reporting Agencies (CRAs) are the gatekeepers to the American economy. As the chief informants for prospective lenders, landlords, and employers, they exert immense power over the day-to-day decisions of who gets what. Despite these high stakes, the CRAs run consumer reporting as an automated electronic process that causes a lot of reporting errors, disqualifying consumers from essential goods, services, and opportunities. This is painfully true in the context of identity theft, where perverse incentives pollute the integrity of consumer reporting, piling undue harm onto identity theft victims. The law provides a remedy for this problem, but circuit courts are split on whether to allow it for identity theft victims, adopting different approaches. This Note proposes a solution that seeks to harmonize the caselaw in the Third and Seventh Circuits with a fair and practical rule. In doing so, it will dismiss a rule from the First and Ninth Circuits.*

## INTRODUCTION

We begin our inquiry into the problem of identity theft in consumer reports with a tale of international financial fraud and its fallout in consumer reporting. In August 2013, a man named Marlen Manukyan opened several bank accounts around Miami, Florida for himself and his online car sales business.<sup>1</sup> Shortly thereafter, he made his first sale, when a couple in Texas paid him \$39,960 for an RV listed on his craigslist page.<sup>2</sup> The couple wired the payment from their bank in Sugarland, Texas to a purported third-party escrow agent in Florida, believing the escrow agent would protect their money until they received the RV.<sup>3</sup> However, there was no RV, and the escrow agent was nothing more than a shell company created by Marlen under a stolen identity.<sup>4</sup> The entire transaction was a fabrication.

---

1. Indictment at 3–5, U.S. v. Manukyan, No. 16-cr-20263 (S.D. Fla. 2016).

2. Indictment at 5, U.S. v. Manukyan, No. 16-cr-20263 (S.D. Fla. 2016). *See also* Drew Armstrong, *I Lost my Identity to a Fraudster, and It Took Six Years to Clean up the Mess*, BLOOMBERG BUSINESSWEEK (Aug. 12, 2019), <https://www.bloomberg.com/news/articles/2019-08-12/i-lost-my-identity-to-a-fraudster-and-it-took-six-years-to-clean-up-the-mess>.

3. Indictment at 5, U.S. v. Manukyan, No. 16-cr-20263 (S.D. Fla. 2016). *See also* Armstrong, *supra* note 2.

4. *See* Indictment at 3-5, U.S. v. Manukyan, No. 16-cr-20263 (S.D. Fla. 2016). *See also* Armstrong, *supra* note 2.

Upon receiving the Texas couples' payment, Marlen wired it from a fake business account at Wells Fargo Bank to an overseas account at Alpha-Bank in Moscow, Russia.<sup>5</sup> Local police were on Marlen's trail with the Federal Bureau of Investigation not far behind.<sup>6</sup> Eventually, Marlen was indicted and sent to prison on a plea deal, serving two years for money laundering before being deported back to Russia: a decisive resolution to a complex crime.<sup>7</sup> Things were far messier for the individuals whose identities he stole to set up the fraudulent enterprise, however.<sup>8</sup>

One of those identity theft victims was Andrew Armstrong.<sup>9</sup> Using Andrew's identity, Marlen registered his fake business, "ZRF International Services LLC," with the Florida Secretary of State,<sup>10</sup> and set up bank accounts in Andrew's name at TD Bank, Bank of America, Popular Bank, and Wells Fargo.<sup>11</sup> Everything Marlen did using Andrew's identity showed up on Andrew's credit reports,<sup>12</sup> destroying Andrew's credit and, casting him out of financial society.<sup>13</sup> It was impossible for him to get a new credit card or apply for a mortgage,<sup>14</sup> and for several years, whenever he traveled internationally, he was stopped by security agents for extra screening.<sup>15</sup> His attempts to fix his credit reports were a seemingly endless waste of time, as he was pushed through a "byzantine maze of customer service representatives."<sup>16</sup> As Andrew described, "After I explained my story over the phone to a woman at Bank of America Corp., she thanked me for being a customer, which I'd never been."<sup>17</sup> He fruitlessly mailed packets of evidence—including copies of his passport, driver's license, and utility bills—to prove the transactions were not his.<sup>18</sup> Finally, six years after his identity was stolen and two years after Marlen pleaded guilty, Andrew's credit reports were corrected.<sup>19</sup> His takeaway from the six-year long debacle:

---

5. Indictment at 5–6, U.S. v. Manukyan, No. 16-cr-20263 (S.D. Fla. 2016).

6. Armstrong, *supra* note 2.

7. *Id.*

8. Indictment at 4–5, U.S. v. Manukyan, No. 16-cr-20263 (S.D. Fla. 2016). *See also* Armstrong, *supra* note 2.

9. Armstrong, *supra* note 2.

10. Fla. Sec. Of State, Electronic Articles of Organization for Florida Limited Liability Company, ZRF International Services LLC (Aug. 7, 2013) (filed under the name Andrew Armstrong).

11. Indictment at 4–5, U.S. v. Manukyan, No. 16-cr-20263 (S.D. Fla. 2016).

12. Armstrong, *supra* note 2.

13. *Id.* ("Identity theft isn't just an inconvenience; it shut me out of the most basic parts of the consumer-financial system.")

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

Our financial identity is a spool of fishing line left carelessly in a drawer. You pull it back out one day, and it's become knotted into a mess. You can try to untangle the line, but you can't just cut or throw it away. Our system ties you to the mess forever.<sup>20</sup>

If consumer reporting agencies (CRAs) were doing a better job, the fraudulent transactions would have been corrected sooner and much of the harm avoided.<sup>21</sup>

CRAs are the gatekeepers to the U.S. financial system.<sup>22</sup> Lenders use the CRAs' consumer reports to decide whether to lend and, if so, at what interest rates.<sup>23</sup> Landlords use them to screen tenants.<sup>24</sup> Employers use them to inform hiring decisions.<sup>25</sup> And yet, despite their powerful influence over the decisions of who gets what, the consumer reports for forty-two million Americans are riddled with errors.<sup>26</sup> Many of the errors are inconsequential, but for ten million of these consumers, they "can be life altering."<sup>27</sup> The harm that follows represents a failure in both law and in economics,<sup>28</sup> for those who look to the latter for guidance on the reasonability of parties' conduct.

While the law provides a solution under the Fair Credit Reporting Act (FCRA) for this situation, some courts have blocked it and instead require identity theft victims to prove that their consumer reports are inaccurate before holding CRAs to account for the inaccuracies.<sup>29</sup> Those courts misread the statute.<sup>30</sup> The FCRA is clear that CRAs, as the producers of consumer reports—and not consumers, as the involuntary subjects of

---

20. *Id.*

21. See 15 U.S.C. § 1681e(b) (requiring consumer reporting agencies to report consumer information at its "maximum possible accuracy").

22. See CONG. RSCH. SERV., R44125, CONSUMER CREDIT REPORTING, CREDIT BUREAUS, CREDIT SCORING, AND RELATED POLICY ISSUES 2 (2020), <https://fas.org/sgp/crs/misc/R44125.pdf>; See also CHI CHI WU, ET. AL, AUTOMATED INJUSTICE REDUX: TEN YEARS AFTER A KEY REPORT, CONSUMERS ARE STILL FRUSTRATED TRYING TO FIX CREDIT REPORTING ERRORS 4 (2019).

23. Wu, et. al, *supra* note 22, at 4; David D. Schein & James D. Phillips, *Holding Credit Ratings Agencies Accountable: How the Financial Crisis May Be Contributing to Improving Accuracy in Credit Reporting*, 24 LOY. CONSUMER L. REV. 329, 329 (2012).

24. Wu, et. al, *supra* note 22, at 4.

25. Wu, et. al, *supra* note 22, at 4; CONG. RSCH. SERV., *supra* note 22, at 1.

26. Wu, et. al, *supra* note 22, at 4 (citing *Consumer Response Annual Report January 1–December 31, 2017*, CONSUMER FIN. PRO. BUREAU 13 (Mar. 2018), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_consumer-response-annual-report\\_2017.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf)).

27. Wu, et. al, *supra* note 22, at 4 (citing *Consumer Response Annual Report January 1–December 31, 2017*, CONSUMER FIN. PRO. BUREAU 13 (Mar. 2018), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_consumer-response-annual-report\\_2017.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf)).

28. See Part II (Section D) (explaining how the consumer reporting system leads to inaccurate consumer reports in the context of identity theft).

29. See Part III (explaining how the Seventh Circuit Court of Appeals, and some lower courts, misread the FCRA by requiring consumers to prove consumer report inaccuracies before requiring CRAs to fix consumer reports).

30. See Part III.

them—must bear the costs of accurate consumer reporting.<sup>31</sup> In other words, under the FCRA, the burden of proof as to the accuracy of consumer reports lies with the CRA. Thus, this Note will argue that courts should read the FCRA to leave the costs of accurate consumer reporting with CRAs when a consumer alerts the CRA to the fact that his identity was stolen.

Part I will explain how credit reporting works and how it fails to detect identity theft. Part II will describe the FCRA and how it can encourage CRAs to fix credit reporting errors arising from identity theft. It will also show that the common law fails to provide an adequate remedy for consumers when a CRA negligently reports erroneous consumer information. Part III will set out the caselaw on CRAs' statutory duties to investigate and correct errors on credit reports. It will also focus on a split in holdings between the Third and Seventh Circuits. A bewildering pleading standard borrowed from the First and Ninth Circuits (by the lower court in the Seventh Circuit) will also be discussed, and then dismissed as offensive to the law as it is written and to financial justice as a practical matter. Part IV will explain how the statute should be read. Then, it will propose a solution that could serve to harmonize the Seventh Circuit's apparent concerns with the better rule in the Third Circuit.

## I. BACKGROUND

### A. HOW CREDIT REPORTING WORKS

Credit reports, and consumer reports more generally,<sup>32</sup> are populated based on computerized communications between the CRAs and the furnishers of consumer information, usually lenders, debt collectors, insurers, or landlords.<sup>33</sup> The CRAs, most prominently “the big three”—Experian, TransUnion, and Equifax—then publish that information in consumer reports.<sup>34</sup> Furnishers report information such as payment histories, delinquencies, and defaults to the CRAs who compile the information into consumer reports through an automated computer process.<sup>35</sup> Then, the CRAs sell the reports to the furnishers and potential lenders, employers, landlords or other parties who use them to screen

---

31. See *infra* notes 195–196 and accompanying text (quoting 15 U.S.C. § 1681i).

32. Credit reports are one type of consumer report; other types of consumer reports are used for tenant screening and employee background checks, for example. CONG. RSCH. SERV., *supra* note 22, at 3.

33. Michael Epshteyn, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers*, 93 GEO. L.J. 1143, 1147 (2005).

34. *Consumer Response Annual Report January 1–December 31, 2017*, CONSUMER FIN. PRO. BUREAU 13 (Mar. 2018), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_consumer-response-annual-report\\_2017.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf).

35. *About Us*, E-OSCAR, <https://www.e-oscar.org/implementation/about-us>. (last visited Oct. 27, 2019).

consumers for some sort of transaction.<sup>36</sup> The information is reported in separate “tradelines” with each tradeline representing the transactions for consumer accounts related to credit cards, lease agreements, or loans, for example.<sup>37</sup> If the consumer report does not include damaging tradelines (e.g. those reporting defaults and delinquencies) then the party using the report to screen the consumer will tend to welcome him or her into a transaction such as a loan, an employment agreement, or a residential lease.<sup>38</sup>

While the furnishers must provide information and pay membership fees to the CRAs<sup>39</sup>, they receive some benefits for contributing to the consumer reporting system.<sup>40</sup> Namely, a furnisher can protect its own position as creditor by furnishing the consumer’s debt to CRAs for publication as tradelines in consumer reports, thus discouraging third-party creditors from overwhelming a consumer with too much debt.<sup>41</sup> In turn, the CRA receives the benefit of a more comprehensive product with more tradelines to sell to furnishers and other customers who rely on the consumer reports.<sup>42</sup>

Consumers, however, are often harmed by consumer reporting.<sup>43</sup> The problem is that the industry standard reporting process necessarily creates a lot of errors.<sup>44</sup> Those errors tend to result from one or more of the following: (1) “mixed files” (when the CRA’s automated reporting logic mixes up consumer histories),<sup>45</sup> (2) furnishers sending bad information to CRAs,<sup>46</sup> (3) glitches in a CRA’s automated reporting process that cause the erroneous tradeline to re-appear despite the CRA having deleted it,<sup>47</sup> and (4)

---

36. Chi Chi Wu, *Automated Injustice: How A Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports*, 14 N.C. Banking Inst. 139, 180 (2010) (explaining that CRAs make most of their money from furnishers).

37. CONG. RSCH. SERV., *supra* note 22, at 4.

38. *See* CONG. RSCH. SERV., *supra* note 22, at 3.

39. *Experian Membership Application*, EXPERIAN, <https://www.experian.com/content/dam/marketing/na/assets/im/consumer-information/general/Reporting-Data-Contractual-Documents.pdf> (last visited Sept. 6, 2020).

40. *Credit Data Reporting Services*, EXPERIAN, <https://www.experian.com/consumer-information/reporting-to-credit-agencies> (last visited Sept. 6, 2020).

41. *Id.*

42. *Data Reporting*, TRANSUNION, <https://www.transunion.com/data-reporting/data-reporting> (last visited Sept. 6, 2020).

43. *See supra* notes 22–27 and accompanying text (explaining how inaccurate consumer reports can result in loss of access to credit, housing, and employment).

44. CONG. RSCH. SERV., *supra* note 22, at 9 (describing matching errors and errors due to fraud); Wu, et. al, *supra* note 22, at 5–6 (Feb. 2019); CONSUMER FIN. PROT. BUREAU, *KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM* (2012), [https://files.consumerfinance.gov/f/201212\\_cfpb\\_credit-reporting-white-paper.pdf](https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf).

45. Mixed files can happen due to automated matching of similar names, social security numbers, and other identifiers. Wu, *supra* note 36, at 146.

46. CONSUMER FIN. PROT. BUREAU, *supra* note 44, at 25. Wu, et. al, *supra* note 22, at 5–6.

47. CONSUMER FIN. PROT. BUREAU, *supra* note 44, at 24; Wu, et. al, *supra* note 22, at 5–6.

fraud, like identity theft.<sup>48</sup> This Note focuses on problems inherent in the correction of errors resulting from identity theft.

Unlike the other common types of consumer reporting inaccuracies, errors resulting from identity theft can hardly be corrected without a furnisher acting against its own interest or a CRA actually engaging in some investigating as the FCRA requires.<sup>49</sup> For one, furnishers of credit report information can collect from identity theft victims on a disputed account and not want to admit that their records fail to prove they are entitled to such payment.<sup>50</sup> Indeed, debt collectors can use consumer reports to collect false debts.<sup>51</sup> Where identity theft is alleged, CRAs should know furnishers are conflicted sources of information but they defer to them nonetheless.<sup>52</sup> On other occasions, the furnisher's conflict of interest is irrelevant, because the CRA omits the fact that a fraud has occurred in its request for furnisher verification.<sup>53</sup> Naturally, a furnisher cannot verify a tradeline as accurate when it has not been alerted to the possibility of identity theft. If a furnisher does not know the information in its records is fraudulent, then it cannot know that its normal verification process—matching its information on the consumer with what the CRA sends it—will as a matter of fact fail, because an identity thief used that same information to open the fraudulent account in question.<sup>54</sup>

Here is how the process tends to work: a consumer sends a “dispute letter” asking the CRA to delete one or more erroneous tradelines from the consumer report, triggering a statutory duty for the CRA to either verify the disputed tradeline as accurate, modify it to make it accurate, or delete it.<sup>55</sup>

---

48. CONSUMER FIN. PROT. BUREAU, *supra* note 44, at 24; Wu, et. al, *supra* note 22, at 5–6.

49. To be clear, correcting the other types of credit report errors can be excruciatingly painful for consumers even though those errors lack the inherent conflict of interest in identity theft cases. *See* Wu, *supra* note 36, at 139 (describing how consumer Kenneth Baker's credit history was mixed with another consumer's, resulting in delinquencies, charge-offs, collections, and judgments appearing on his consumer reports, leading to Baker developing severe depression as he tried unsuccessfully to take out a mortgage for his family, and finally leading to Baker's suicide).

50. *See* Wu, et. al, *supra* note 22, at 19 (explaining that debt collectors have no incentive to verify disputed accounts truthfully in light of the fact that they are primarily interested in being paid on the disputed account).

51. *See* Wu, *supra* note 36, at 178 (“For debt collectors, the credit reporting system alleviates them from the need to prove in a court of law by a ‘preponderance of the evidence’ that a consumer is liable for a debt, and that the amount of the debt is correct. Instead, the debt collector simply places the black mark on the consumer's credit report, and waits until the consumer needs to buy a car or home or insurance coverage. The consumer is either forced to pay off the amount to improve her credit report or forced to pay higher prices (if he or she can get the credit or insurance at all).”).

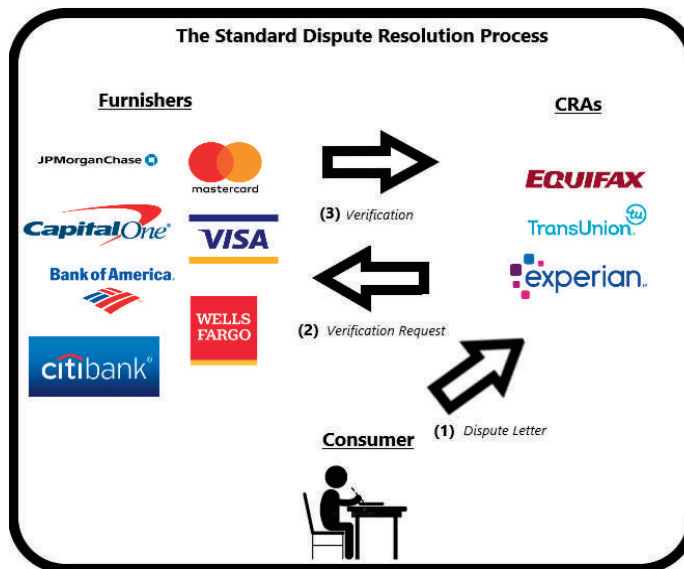
52. Wu, et. al, *supra* note 22, at 6–7 (explaining that CRAs are “universally biased in favor of furnishers and against consumers in disputes.”)

53. *See* Wu, *supra* note 36, at 177.

54. *See infra* notes 100-101 and accompanying text (describing the situation where a CRA fails to put a furnisher on notice of a purported fraud).

55. 15 U.S.C. § 1681i(a)(5)(A).

The CRAs look into potential errors on consumer reports by sending consumer disputes to the relevant furnisher for verification, through a web-based computer system called e-OSCAR.<sup>56</sup> Only limited information is communicated over the e-OSCAR system, so a furnisher does not necessarily learn everything that the consumer tells the CRA in her dispute letter.<sup>57</sup> Furnishers respond to the CRA's verification request by cross-checking the customer's information (e.g., name and social security number) against the information in their records.<sup>58</sup> Where an identity thief has opened an account with a victim's personal information, cross-checking of the consumer's personal information against the furnisher's information on the consumer verifies a tradeline as accurate despite the fact that it was incurred fraudulently by an imposter.<sup>59</sup> Upon verification by the furnisher, the CRA continues to publish the disputed tradeline without examining any documents, interviewing consumers, or exercising "any form of human discretion in resolving the dispute."<sup>60</sup> A visual simplification of the process, with examples of some furnishers and CRAs, follows immediately below.



56. E-OSCAR is the computer system where CRAs and Furnishers communicate with each other to resolve disputed tradelines through the sending of Automated Dispute Verification Codes (ACDVs). *About Us*, *supra* note 35.

57. Wu, et. al, *supra* note 22, at 6. However, there has been some progress on this front, as the CFPB began to enforce the requirement that CRAs send all relevant information from a consumer's dispute to the furnisher. Wu, et. al, *supra* note 22, at 14.

58. *Id.* at 6.

59. Christopher E. Kittell, *What You Need to Know About the Fair Credit Reporting Act*, MISS. LAWYER, Spring 2012, at 48.

60. Wu, et. al, *supra* note 22, at 6.



The key takeaway is that the standard dispute resolution process for fixing consumer reports can be completely useless in the identity theft context.

Consider, for example, the story of Adrienne Escobar whose mother, Julie Escobar, forged her signature on a student loan application.<sup>61</sup> After Julie defaulted on the loan, the default showed up as a tradeline on Adrienne's consumer reports.<sup>62</sup> Julie admitted to stealing Adrienne's identity in a letter to the lender, Pennsylvania Higher Education Assistance Agency Services (PHEAA), and she offered to cooperate to help PHEAA fix the account in May 2008.<sup>63</sup> But PHEAA continued to report the loan as belonging to Adrienne, so the CRAs continued to include it on Adrienne's consumer reports.<sup>64</sup> In August 2015, with the lender-furnisher ignoring Julie's admission, Adrienne filed a police report and attached it to dispute letters she sent to Equifax, Experian, and TransUnion.<sup>65</sup> In accordance with the standard dispute resolution process, the CRAs investigated Adrienne's dispute by asking PHEAA whether or not Adrienne owed the money, and PHEAA continued to say that Adrienne did.<sup>66</sup> Finally, eight years after Julie admitted to PHEAA that she forged Adrienne's signature, the CRAs stopped reporting the default on Adrienne's consumer reports.<sup>67</sup> Adrienne had to send four sets of dispute letters to the CRAs before they finally fixed the consumer reports.<sup>68</sup> The FCRA is clear: one dispute letter should be enough.<sup>69</sup>

## B. THE SCOPE OF IDENTITY THEFT AND HOW CRAS MAGNIFY ITS HARM

Identity theft is widespread, with just under 445,000 identity theft reports filed with the Federal Trade Commission (FTC) in 2018.<sup>70</sup> However, not all identity thefts are reported to the FTC, as 14.4 million consumers are thought to have had their identities stolen that year.<sup>71</sup> CRAs are largely to blame for the pervasiveness of the problem and for amplifying its harm when identities are stolen.<sup>72</sup> The CRAs increase the prevalence of

---

61. Wu, et. al, *supra* note 22, at 18 (citing *Escobar v. Pa. Higher Educ. Assistance Agency Serv.'s*, No. 17-4212, 2018 WL 1740364 (E.D. Pa. Apr. 11 2018).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 15 U.S.C. § 1681i(a)(5)(A).

70. Fed. Trade Comm'n, CONSUMER SENTINEL NETWORK DATA BOOK 6 (2018).

71. *Overview of 2019 Identity Fraud Study: Fraudsters Seek New Targets and Victims Bear the Brunt*, (JAVELIN Mar. 6, 2019), <https://www.javelinstrategy.com/coverage-area/2019-identity-fraud-report-fraudsters-seek-new-targets-and-victims-bear-brunt>.

72. Wu, et. al, *supra* note 22, at 18.

identity theft by failing to protect private consumer information from hackers, thus enabling criminals to use the stolen private information in fraudulent transactions.<sup>73</sup> As for amplifying identity theft's harm, CRAs tend to report fraudulent tradelines in spite of evidence consumers produce to show their identities were stolen.<sup>74</sup> As a result, victims have to spend incalculable hours and thousands of dollars to correct their consumer reports.<sup>75</sup>

Two of the big three CRAs, Experian and Equifax, have already failed to protect consumers' private information from hackers. First, in 2013, an identity thief tricked an Experian subsidiary, US Info Search, into granting him access to the personal information and financial data of more than 200 million consumers.<sup>76</sup> The identity thief in that case pleaded guilty to running an identity theft service with the consumer information he stole from the Experian subsidiary.<sup>77</sup> Just two years later, Experian dropped the ball again, as hackers stole fifteen million social security numbers of people who applied for wireless phone financing with T-Mobile.<sup>78</sup> Notably, Equifax failed to learn from Experian's mistakes, exposing the personal information of 147 million consumers during a May 2017 data breach.<sup>79</sup> As Equifax disclosed in September of that year, hackers stole the personal information of 147 million consumers from its data systems.<sup>80</sup> The stolen personal information included: first and last names, home and other physical addresses, email addresses, telephone numbers, dates of birth, social security numbers, driver's license numbers, military identification card numbers, passport numbers, banking account numbers, credit card and debit card information, and various usernames and passwords.<sup>81</sup> Months

---

73. Stipulated Order for Permanent Injunction and Monetary Judgment at 2, 10, F.T.C. v. Equifax Inc., No. 1:19-cv-03297-TWT (N.D. Ga. Jul. 23, 2019); MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 115<sup>TH</sup> CONG., THE EQUIFAX DATA BREACH 18 (Comm. Print 2018).

74. Wu, et. al, *supra* note 22, at 18.

75. Christopher P. Couch, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 ALA. L. REV. 583, 583 (2002).

76. MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 115<sup>TH</sup> CONG., THE EQUIFAX DATA BREACH 18 (Comm. Print 2018) (citing Brian Krebs, *Experian Breach Affects 15 Million Customers*, KREBS ON SEC. (Oct. 15, 2015), <https://krebsonsecurity.com/2015/10/experian-breach-affects-15-million-consumers/>).

77. Brian Krebs, *Experian Breach Affects 15 Million Customers*, KREBS ON SEC. (Oct. 3, 2020), <https://krebsonsecurity.com/2015/10/experian-breach-affects-15-million-consumers/>.

78. MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 115<sup>TH</sup> CONG., THE EQUIFAX DATA BREACH 18 (Comm. Print 2018).

79. *2017 Cybersecurity Incident & Important Consumer Information*, EQUIFAX, <https://www.equifaxsecurity2017.com/consumer-notice/> (last visited Sept. 27, 2020); Stipulated Order for Permanent Injunction and Monetary Judgment at 2, F.T.C. v. Equifax Inc., No. 1:19-cv-03297-TWT (N.D. Ga. July 23, 2019).

80. Stipulated Order for Permanent Injunction and Monetary Judgment at 2, F.T.C. v. Equifax Inc., No. 1:19-cv-03297-TWT (N.D. Ga. July 23, 2019).

81. *Id.* at 10.

before the breach, Equifax earned a data security rating of zero out of ten from financial index provider MSCI Inc.<sup>82</sup>

Hacks like those lead to identity theft as thieves sell or use the stolen information to open fraudulent lines of credit and make purchases in victims' names.<sup>83</sup> Then, once the identity thief fails to make payments on the fraudulently opened account, the counterparty to the account (e.g., a lender or debt collector) reports it as a delinquent tradeline to CRAs who then publish the information on the identity theft victim's consumer reports.<sup>84</sup> Consumers' lives are harmed when the tradeline shows up on pre-employment screenings, background checks, and traditional credit reports.<sup>85</sup> The causal chain concludes with consumers—who never volunteered to take part in the consumer reporting industry—being denied a place to live, a source of income, and affordable credit if they qualify to borrow at all.<sup>86</sup>

## II. STATUTORY HISTORY OF THE FCRA AND THE SETTLED LAW ON ITS APPLICATION

### A. THE FCRA PROMOTES ACCURACY AND FAIRNESS IN CREDIT REPORTING THROUGH A REMEDIAL APPROACH

Congress enacted the FCRA in 1970 to promote accuracy and fairness in credit reporting with an emphasis on reasonable procedures for meeting the needs of commerce in a way that is fair and equitable to consumers.<sup>87</sup> The law was amended with the Consumer Credit Reporting Reform Act of 1996 (the 1996 Amendments) amid widespread credit report inaccuracies.<sup>88</sup> The 1996 Amendments emphasized a remedial approach, rather than a preventative one, to solve the problem of inaccurate credit reporting<sup>89</sup> by creating the dispute resolution process that remains today.<sup>90</sup> Under the remedial scheme, when a consumer disputes information on his or her credit report with a CRA, the CRA has a duty to conduct a reasonable “reinvestigation”<sup>91</sup> of the disputed information.<sup>92</sup> CRAs typically

---

82. *Id.*

83. *See* Wu, et. al, *supra* note 22, at 18.

84. *See* Kittell, *supra* note 59, at 48; Wu, et. al, *supra* note 22, at 12.

85. Wu, et. al, *supra* note 22, at 18.

86. CRAs collect information from furnishers (e.g. lenders and debt collectors) without authorization from consumers. While furnishers of information have a relationship with individuals as customers, CRAs have no such relationship with the individuals on whom they sell information. *See id.* at 4–5.

87. 15 U.S.C. §§ 1681(a)–(b) (2018).

88. Brendan Delany, *Identity Theft: The Fair Credit Reporting Act and Negligent Enablement of Imposter Fraud*, 54 CATH. U. L. REV. 553, 559 (2005).

89. *Id.*

90. *Id.* at 560.

91. Under the FCRA's remedial scheme, the CRA is said to have conducted an “investigation” when it automatically reports information that furnishers send it over the e-OSCAR system. Wu, *supra* note 36, at 156–59. A “reinvestigation” is the process by which a CRA looks into the

reinvestigate disputed information by sending Automated Consumer Dispute Verification (ACDV) forms, over the e-OSCAR system, to the party that furnished the information to the CRA.<sup>93</sup> The furnisher then verifies the related tradelines as accurate—allowing the CRA to leave the disputed tradelines on the consumer report—or inaccurate, in which case the CRA must delete the disputed tradelines.<sup>94</sup> Like the CRA’s re-investigation, the furnisher’s investigation is governed by a reasonability standard.<sup>95</sup> If the furnisher cannot verify the disputed tradelines, it must inform the CRA requesting verification (along with all other CRAs to whom it has reported the disputed information) that the tradelines might be inaccurate.<sup>96</sup>

Courts hold that, under the FCRA, consumers have a private right of action against both CRAs and furnishers where an investigation is conducted unreasonably.<sup>97</sup> The reasonability of a furnisher’s investigation depends in part on what the furnisher learns about the dispute from the relevant CRA.<sup>98</sup> For example, where a CRA fails to inform the furnisher that a consumer’s dispute arises from identity theft, the furnisher’s cross-checking of the consumer’s personal information (provided by the CRA) against the information in its payment systems (provided by the identity thief) should be deemed reasonable.<sup>99</sup> In such a case, the CRA fails to put the furnisher on notice that a normal cross-checking of consumer information is not enough, thus leaving liability with the CRA, for

---

information automatically reported through e-OSCAR to determine whether the information is indeed accurate. *Id.* at 142–43.

92. 15 U.S.C. § 1681i (As amended in 1996). Before 1996, § 1681i pertained to the requirement that CRAs maintain reasonable procedures to ensure maximum possible accuracy, which is now codified in § 1681e(b). The provisions are separate causes of action and should not be confused. In the case of identity theft, a plaintiff might, for example, argue that a CRA failed to maintain reasonable procedures to not report fraudulent transactions in a consumer report, perhaps by alleging the consumer’s file was mixed with that of the identity thief. Such an argument is a discussion for another day. This note is focused on the reasonability of CRA re-investigations triggered by an identity theft victim’s dispute of inaccurate information published in his credit report, against a CRA under the new § 1681i.

93. Wu, *supra* note 36, at 157; *About Us*, *supra* note 34.

94. 15 U.S.C. §§ 1681i, 1681s-2(b).

95. 15 U.S.C. § 1681s-2(b) (providing a private cause of action against furnishers who conduct unreasonable investigations of the information that consumers dispute as inaccurate).

96. 15 U.S.C. § 1681s-2(b).

97. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1157 (9th Cir. 2009); *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 225–26 (3d Cir. 1997); *Henson v. CSC Credit Servs.*, 29 F.3d 280, 287 (7th Cir. 1994); *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993); *Carvalho v. Equifax Info. Servs., Inc.* 629 F.3d 876, 888 (9th Cir. 2010).

98. *See Gorman*, 584 F.3d at 1157.

99. “If a CRA fails to provide ‘all relevant information’ to a furnisher, then the consumer has a private cause of action against the CRA[,] but not against the furnisher.” *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 38 (1st Cir. 2010).

unreasonable “reinvestigation”.<sup>100</sup> However, the CRA cannot simply punt its reasonable reinvestigation duty to the furnisher by letting it know the consumer disputes the information as resulting from identity theft. Rather, where a CRA knows the furnisher might be an unreliable source of information—like in the case of identity theft<sup>101</sup>—the CRA’s reinvestigation into the disputed tradeline must do more than simply parrot the conflicted furnisher.<sup>102</sup>

Notably, the 1996 Amendments did not include a discussion of how the remedial scheme should work in the context of identity theft.<sup>103</sup> That does not however preclude courts from applying the reasonability requirement from the 1996 Amendments’ to identity theft victims’ unreasonable reinvestigation claims.<sup>104</sup> Indeed, it is inaccurate to report tradelines as belonging to a consumer when they in fact belong to an identity thief, and a CRA’s reinvestigation cannot be reasonable where all the CRA does is ask the conflicted furnisher to verify the tradeline as accurate.

#### **B. THE FCRA PROVIDES THE ONLY FEASIBLE CAUSE OF ACTION FOR REMEDYING IDENTITY THEFT ON CREDIT REPORTS**

Identity theft victims have limited recourse to remedy the harm caused by the inclusion of fraudulent accounts on their credit report.<sup>105</sup> Common law negligence claims were defeated as courts held consumers lack the special relationship with CRAs and furnishers necessary to impose a duty of care in the handling of their credit report information.<sup>106</sup> Courts have also declined to recognize a property right for individuals’ private information.<sup>107</sup> Defamation claims against CRAs have seen mixed results as a requisite showing of malice creates a high evidentiary hurdle for consumer plaintiffs.<sup>108</sup>

---

100. A CRA must provide “all relevant information regarding the dispute that the [CRA] has received from the consumer.” Gorman, 584 F.3d at 1157 (quoting 15 USC § 1681i(a)(2)(A)).

101. See *supra* notes 50–51 and accompanying text (describing how furnishers are incentivized to wrongly verify false accounts in order to collect on a debt).

102. See Kittell, *supra* note 58, at 50.

103. Couch, *supra* note 75, at 592.

104. *Id.* at 597.

105. See Delany, *supra* note 88, at 569.

106. *Id.*

107. Erin Dowe, *Frustration Station: Attempting to Control Your Credit* 16 GEO. MASON U. C.R. L. J. 359, 372–73 (2006).

108. Compare, e.g., *Cushman v. Trans Union Corp.*, 115 F.3d 220, 229 (3d Cir. 1997) (remanding to lower court to determine whether plaintiff produced evidence sufficient for a showing of malice) with *Blackwell v. Chex Systems, Inc.* 2020 WL 2615630 at \*8 (E.D. Pa. May 22, 2020) (finding a defamation claim survived a motion to dismiss where the CRA continued to publish inaccurate credit report information it knew was false). See also Thomas J. Goger, *Sufficiency of Showing of Malice or Lack of Reasonable Care to Support Credit Agency’s Liability for Circulating Inaccurate Credit Report*, 40 A.L.R. 3d 1049 (Originally published in 1971) (“It is generally agreed that mere negligence on the part of the credit agency is not sufficient to constitute malice and it has been held that the presence of malice may be rebutted by evidence that

With only limited remedies under the common law for consumers harmed by false credit report information, Congress created a statutory cause of action with the FCRA.<sup>109</sup> The FCRA provides for actual damages and attorney fees in cases of negligent violations of its provisions, and punitive damages for willful violations.<sup>110</sup> However, the FCRA also limited consumers' recourse.<sup>111</sup> Notably, the remedial scheme provided for by the 1996 Amendments preempted states from enacting more heightened requirements for the credit reporting industry,<sup>112</sup> and the preemption provisions were expanded even further with the Fair and Accurate Credit Transactions Act (FACTA) in 2003.<sup>113</sup> Thus, the stakes are high for the question of whether a CRA should be held to the FCRA's reasonable reinvestigation requirement in the identity theft context, as the dispute resolution process and private rights of action against CRAs and furnishers for investigating disputed information unreasonably represent the only practical remedy.<sup>114</sup>

### C. CONGRESSIONAL AMENDMENTS TO THE FCRA IN 2003 FALL SHORT OF FIXING THE PROBLEM

FACTA provided for fraud alerts, credit freezes, and reporting blocks to alleviate identity theft's impact on credit reports.<sup>115</sup> But the provisions are insufficient.<sup>116</sup> The fraud alert provisions allow consumers to contact a CRA which must then place a nationwide fraud alert on the consumer's report.<sup>117</sup> Credit freezes in turn allow consumers to halt all access to their credit reports until the consumer lifts the freeze.<sup>118</sup> Reporting blocks might have solved the problem if not for a provision allowing CRAs to decline to block the fraudulent information.<sup>119</sup> Each of the actions are triggered only by the

---

the agency circulated a corrected report promptly upon learning of its error and by evidence that when the report was made, the agency had reasonable grounds to rely upon the truth of the information contained therein."); Schein & Phillips, *supra* note 23, at 330 ("At common law, credit bureaus had extremely limited responsibility for reporting errors, and when sued for defamation, a bureau was able to raise the defense of conditional privilege.")

109. Schein & Phillips, *supra* note 23, at 330–33.

110. 15 U.S.C. §§ 1681n, 1681o.

111. Delany, *supra* note 88, at 562–63.

112. *Id.*

113. Schein & Phillips, *supra* note 23, at 336.

114. Gary M. Victo & Ian B. Lyngklip, *Remedies for Identity Theft Victims: Strategies for Protecting and Preserving Clients' Rights*, 85 MICH. B.J. 35, 36 (2006).

115. 15 U.S.C. §§ 1681c-1, c-2.

116. See Dowe, *supra* note 108, at 382–84 (explaining that FACTA's provisions establish a nationwide fraud alert system but noting that "the damage to one's credit history could already be complete" by the time a consumer places a fraud alert); Couch, *supra* note 75, at 585 (explaining how creditors and debt collectors continue collection efforts even after a consumer asserts an account was fraudulently opened in his name).

117. FED. TRADE COMM'N, IDENTITY THEFT: A RECOVERY PLAN 25 (2018).

118. *Id.* at 5.

119. See 15 U.S.C. § 1681, c-2(c).

consumer's request.<sup>120</sup> Additionally, the law provides for consumers to include statements, published alongside delinquent tradelines on their credit report, disputing the tradelines as the result of identity theft.<sup>121</sup> But lenders can simply ignore, or disbelieve, consumer statements claiming that they were the victims of identity theft and as a result the statements hardly change lenders' decisions on whether to extend credit and at what rates.<sup>122</sup> Notably, Quicken, a personal finance company and affiliate of Quicken Loans, explained in a post on its website that, "[e]xplanatory statements, since they cannot change the facts of your credit report, may be viewed [by prospective lenders, landlords, and employers] simply as excuses."<sup>123</sup>

A cursory look through recent credit reporting complaints reported in the Consumer Financial Protection Bureau's (CFPB) public consumer complaint database further supports the necessity of using the 1996 Amendments' remedial approach to encourage accurate credit reporting. One consumer complained in April 2020, following an identity thief's use of credit cards, utilities, and an apartment lease in his name, that he placed both a fraud alert and a security freeze on his accounts—the FACTA solutions to the identity theft problem—only to be denied credit, a place to live, and a job.<sup>124</sup> In addition, the consumer asserted that the identity thief gained the personal information to open the fraudulent accounts from Equifax's consumer data breach.<sup>125</sup> Four consumers came forward in May 2020 with similar stories. The first and second of those complaints were from consumers asserting that they were denied employment due to an identity thief's fraudulent charges being included on their credit reports.<sup>126</sup> Another consumer, after filing a police report describing identity theft, complained that she could not get CRAs to remove fraudulent charges from her account, yet again resulting in denial of a job despite a fraud alert she

---

120. *Id.*

121. *See* Dowe, *supra* note 108, at 384.

122. *See* Couch, *supra* note 75, at 585 (explaining how creditors and debt collectors continue collection efforts even after a consumer asserts an account was fraudulently opened in her name).

123. This post was removed from Quicken's website sometime between June 2008 and January 2009, according to Internet Archive, a non-profit collector of historical webpages. A screenshot of the page can be found through Internet Archive's "Wayback Machine." Quicken, "Banking: When Consumer Statements Can Help," <https://web.archive.org/web/20080629022705/http://www.quicken.com:80/cms/viewers/article/banking/39623>. (screenshot of webpage dated June 29, 2008; accessed Oct. 26, 2019). The post was originally cited by Erin Dowe in a paper published in 2006. Dowe, *supra* note 108, at 384 n.180.

124. Complaint ID 3597009, Consumer Fin. Prot. Bureau (Aug 20, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3597009>.

125. *Id.*

126. Complaint ID 3663672, Consumer Fin. Prot. Bureau (Aug 20, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3663672>; Complaint ID 3634662, Consumer Fin. Prot. Bureau (Aug 20, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3634662>.

had placed on her consumer report.<sup>127</sup> Finally, yet another consumer complained that he filed an identity theft report with the FTC, a complaint with the CFPB, and a dispute with TransUnion, all seeking to have fraudulent charges removed from the consumer's credit report to no avail.<sup>128</sup> Thus, the examples provide yet more evidence of fraud alerts and credit freezes failing to solve the problem of identity theft in consumer reports.

#### **D. CONFLICTS OF INTEREST UNDERMINE THE INTEGRITY OF THE DISPUTE RESOLUTION PROCESS IN CASES OF IDENTITY THEFT**

Absent legal penalties, CRAs have little incentive to correct errors on consumers' credit reports in cases of identity theft or otherwise.<sup>129</sup> In fact, CRAs might have good reason to ignore errors.<sup>130</sup> During a 2000 FTC identity theft workshop, a representative of a CRA trade group said CRAs had new products in the works with the capacity to conduct more diligent vetting of consumer information.<sup>131</sup> The same theme—CRAs developing business lines that profit from the risk of identity theft rather than correcting for it as part of their obligation to report accurately—is apparent in credit monitoring services offered by the three largest CRAs.<sup>132</sup> Indeed, as TransUnion explained in its annual disclosure, increased identity theft from data breaches drove consumer subscriptions to credit monitoring and identity protection services up by approximately 20% between 2015 and 2018.<sup>133</sup> Notably, the FCRA requires that CRAs maintain procedures to ensure “maximum possible accuracy.”<sup>134</sup> In spite of that requirement, CRAs can profit from the pervasiveness of identity theft by selling credit

---

127. Complaint ID 3649172, Consumer Fin. Prot. Bureau (Aug 20, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3649172>.

128. Complaint ID 3655467, Consumer Fin. Prot. Bureau (Aug 20, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3655467>.

129. Jeff Sovern, *The Jewel of Their Souls: Preventing Identity Theft Through Loss Allocation Rules*, 64 U. PITT. L. REV. 343, 362 (2003).

130. *Id.*

131. *Id.* at 363 n.70.

132. *See* Delany, *supra* note 88, at 556 n. 16.

133. TransUnion, Annual Report (Form 10-K), at 4 (Feb. 14, 2019) (Describing growing consumer subscriptions to credit monitoring services as a driver of growth for the company's consumer facing business, driven by increased identity theft risks and increased availability of free credit report information). TransUnion's annual report does not break out revenues for its consumer division specifically, but Equifax's and Experian's do. Equifax's Global Consumer Solutions business, which houses its credit monitoring services, reported \$371.8 million in revenue in 2018 despite “being negatively impacted by the 2017 cybersecurity incident.” Equifax Inc., Annual Report (Form 10-K), at 38 (Feb. 21, 2019). Experian's consumer division in turn reported \$985 million in revenue in 2018. Experian PLC, Experian Annual Report: Year Ended Mar. 31, 2019, at 3 (Experian is headquartered in Dublin, Ireland, so its annual disclosure was not made via Form 10-K).

134. 15 U.S.C. § 1681e(b).



monitoring services rather than simply sniffing out identity theft as part of the consumer reporting process.<sup>135</sup>

The interests of furnishers can also be in conflict with those of consumers.<sup>136</sup> Furnishers have a strong incentive to verify inaccurate information as accurate where the account disputed is fraudulently opened by an identity thief in the consumer's name.<sup>137</sup> Lenders and debt collectors, for example, cannot collect debts from consumers if they declare the debt actually belongs to an unknown imposter.<sup>138</sup> This helps explain why the standard dispute resolution process employed by CRAs cannot work where the alleged inaccuracy pertains to identity theft absent the private causes of action adopted by the 1996 Amendments' remedial scheme.<sup>139</sup> Creditors lacking supporting evidence of the disputed tradelines would not want to admit the inadequacy of their records for fear of having to prove the debt in an action to collect.

### III. CIRCUITS ARE SPLIT ON THE TEST FOR UNREASONABLE REINVESTIGATION CLAIMS IN THE IDENTITY THEFT CONTEXT

Courts have developed two approaches for deciding the validity of claims against CRAs where a consumer alleges the CRA, using the standard dispute resolution process, failed to conduct a *reasonable* reinvestigation of identity theft tradelines. The first, developed by the Third Circuit in *Cushman v. Trans Union Corp.*, holds that reasonability of reinvestigation is a question of fact for the jury to resolve based on a balancing of CRA burden against consumer harm.<sup>140</sup> This approach leaves the cost of reinvestigation where it belongs, with the CRA in accordance with its statutory duty to verify the accuracy of disputed credit report information.<sup>141</sup> The second, developed by the Seventh Circuit in *Brill v. Trans Union*, requires identity theft victims to prove their innocence by a preponderance of the evidence as to the identity theft tradelines in order to overcome a

---

135. See Delany, *supra* note 88, at 556 n. 16.

136. Wu, et. al, *supra* note 22, at 18–19.

137. *Id.* at 6.

138. See *id.*

139. *Id.* at 18–19.

140. See *Cushman v. Trans Union Corp.*, 115 F.3d 220, 225–26 (3d Cir. 1997) (citing *Henson v. CSC Credit Servs.*, 29 F.3d 280, 287 (7th Cir. 1994). *Cf.* *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) (holding—three years prior to codification of the unreasonable investigation cause of action against CRAs and furnishers in §§ 1681i and §1681s—that a CRA negligently violated the FCRA by taking an unreasonably long time to investigate information disputed as resulting from identity theft, noting that “[t]he [FCRA] places the burden of investigation squarely on [the CRA].”).

141. *Infra* notes 195–196 and accompanying text (quoting 15 U.S.C. § 1681i).

motion for summary judgment by a defendant CRA. That approach shifts the cost of reinvestigation from the CRA to the consumer.<sup>142</sup>

Additionally, some lower courts have held that identity theft victims' unreasonable reinvestigation claims must fail as a matter of law regardless of what evidence consumers offer CRAs as to their identities, thus dismissing claims at the pleading stage.<sup>143</sup> Under this standard, a consumer bears the heavy burden of investigating the identity theft and litigating to a judgment that the consumer is not responsible for the debt.

The muddled caselaw appears to represent a tension over wanting to hold CRAs to account for including erroneous and harmful tradelines on consumer reports without opening the courts up to a flood of frivolous consumer claims. The solution that will follow is to require that CRAs engage in actual investigations—not just parroting conflicted furnishers—but with consumers having to make good faith efforts to assist the CRA.

#### A. THE THIRD CIRCUIT'S TEST: LEAVING IT TO THE JURY

The Third Circuit was the first federal appellate court to weigh in on the question of whether a CRA should have to do more than just parrot a conflicted furnisher as part of its reinvestigation into disputed tradelines related to identity theft. As the court explained in *Cushman v. Trans Union Corp.*, the plain language of the FCRA requires CRAs to bear the burden of reinvestigating disputed credit report information.<sup>144</sup> The court wrote, “[A] ‘reinvestigation’ that merely shifts the burden back to the consumer and the credit grantor cannot fulfill the obligations contemplated by the statute.”<sup>145</sup> The court applied two factors described by the Seventh Circuit in *Henson v. CSC Credit Services* to inquire into the reasonability of the CRA's reinvestigation.<sup>146</sup> The first factor is “whether the consumer has alerted the reporting agency to the possibility that the source [i.e. the furnisher] may be unreliable or the reporting agency itself knows or should know that the

---

142. See *Brill v. TransUnion LLC*, 838 F.3d 919, 920–22 (7th Cir. 2016) (holding a CRA's reinvestigation reasonable as a matter of law where the CRA did no more than verify disputed information with its furnisher in response to a consumer asserting identity theft because a consumer failed to submit evidence proving their identity was stolen).

143. See, e.g., *Brill v. Trans Union LLC*, No. 15-CV-300-SLC, 2015 WL 9095103, at \*3–4 (W.D. Wis. Dec. 16, 2015) (holding a consumer plaintiff's unreasonable reinvestigation claim a collateral attack on the legal validity of a debt, thus dismissing the consumer's claim, before the Seventh Circuit Court of Appeals dismissed the consumer's claim on different grounds)

144. *Cushman*, 115 F.3d at 225 (3d Cir. 1997) (citing *Stevenson*, 987 F.2d at 293 (5th Cir. 1993)). See also 15 U.S.C. §1681i.

145. *Cushman*, 115 F.3d at 225 (3d Cir. 1997).

146. *Cushman*, 115 F.3d at 224–25 (3d Cir. 1997). The Seventh Circuit in *Brill* cited *Henson* but declined to apply the *Henson* test to the facts before it, instead ruling that the CRA's reinvestigation in that case was reasonable as a matter of law. *Brill*, 838 F.3d at 921 (citing *Henson v. CSC Credit Services*, 29 F.3d 280, 287 (7th Cir. 1994)). The two factors that the Third Circuit considers are only a couple of “a number of factors,” indicating other factors could be considered even though they have not been so far. *Cushman*, 115 F.3d at 225 (3d Cir. 1997).

source is unreliable.”<sup>147</sup> The second factor is “the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer.”<sup>148</sup> The court explained, “Whatever considerations exist, it is for ‘the trier of fact [to] weigh the[se] factors in deciding whether [the CRA] violated the provisions of section 1681i.’”<sup>149</sup>

Applying the *Henson* factors, the *Cushman* court held the CRA in that case was not entitled to summary judgment where the consumer alleged it conducted an unreasonable reinvestigation by verifying disputed tradelines only with furnishers.<sup>150</sup> The consumer’s dispute in *Cushman* related to an identity thief’s fraudulent credit card charges, and the furnishers in the case were the credit card lenders.<sup>151</sup> Notably, the CRA’s reinvestigation in *Cushman* was conducted by an employee who was paid an hourly wage of \$7.50 with an expectation of conducting ten investigations per hour.<sup>152</sup> While investigating the dispute, the employee did not request pertinent documents from the furnishers or take any step beyond merely calling the credit card providers to ask whether the accounts were accurate.<sup>153</sup> Further, the CRA’s employee did not disclose to the furnishers that the accounts were disputed as fraudulent.<sup>154</sup> Thus, the court found that a reasonable jury could find the CRA violated its statutory duty to conduct a reasonable reinvestigation of the disputed accounts.<sup>155</sup> As the court explained:

The jury could have concluded that after [the CRA] was alerted to the accusation that the accounts were obtained fraudulently, and then confronted with the credit grantors’ reiteration of the inaccurate information, [the CRA] should have known that the credit grantors were ‘unreliable’ to the extent that they had not been informed of the fraud. . . . Similarly, the jury could have concluded that seventy-five cents per investigation was too little to spend when weighed against *Cushman*’s damages.<sup>156</sup>

The *Cushman* approach has tended to result in rulings for consumers in unreasonable reinvestigation claims against CRAs.<sup>157</sup> For example, in

---

147. *Cushman*, 115 F.3d at 225 (3d Cir. 1997) (quoting *Henson*, 29 F.3d at 287 (7th Cir. 1994)).

148. *Id.* at 225 (quoting *Henson*, 29 F.3d at 287 (7th Cir. 1994)).

149. *Id.* at 225–26 (quoting *Henson*, 29 F.3d at 287 (7th Cir. 1994)).

150. *Id.* at 226. The court’s opinion noted that the trial court ruled against the CRA’s motion for summary judgment but later granted summary judgment for the CRA *sua sponte*, after presentation of *Cushman*’s case at trial. *Id.* at 222–23.

151. *Id.* at 226.

152. *Id.* at 222. The CRA’s investigation here, conducted by an employee, differs from the industry standard dispute resolution process in which CRAs send ACDVs to furnishers with a codified description of the dispute. *See Kittell*, *supra* note 59, at 48; *About Us*, *supra* note 35.

153. *Cushman*, 115 F.3d at 222 (3d Cir. 1997).

154. *Id.* at 226.

155. *Id.*

156. *Id.* at 226.

157. *See, e.g.* *Blackwell v. Chex Sys., Inc.*, No. 19-3419, 2020 WL 2615630 at \*6-8 (E.D. Pa. May 22, 2020).

*Blackwell v. Chex Systems*, the U.S. District Court for the Eastern District of Pennsylvania held that “parroting information it received from the furnisher is not enough to fulfill [a CRA’s] obligation” to conduct a reasonable reinvestigation where a consumer’s dispute relates to identity theft, because in such a case a consumer has “alerted [the CRA] that the source of information from furnishers may be unreliable.”<sup>158</sup> The court cited *Cushman*, rephrasing the rule as a three-factor test:

Whether the credit reporting agency must go beyond the original source depends on a number of factors, including: (1) whether the consumer has alerted the consumer reporting agency that the original source may be unreliable; (2) whether the consumer reporting agency itself knows or should know that the original source is unreliable; and (3) the comparative costs of verifying the accuracy of the original sources versus the potential harm the inaccurate information may cause the consumer.<sup>159</sup>

#### **B. THE SEVENTH CIRCUIT’S TEST: THE CONSUMER SHOULD BEAR THE COST OF INVESTIGATING**

The Seventh Circuit held in *Brill v. Trans Union* that a CRA’s reinvestigation was reasonable as a matter of law where the CRA continued to report a tradeline disputed as resulting from identity theft following a reinvestigation in which the CRA did no more than verify the account’s accuracy with the furnisher.<sup>160</sup> Notably, the furnisher in that case was a conflicted source of information given it was attempting to collect on the account.<sup>161</sup> To reach its decision, the court emphasized that Brill failed to submit evidence proving he was the victim of identity theft.<sup>162</sup> As for the CRA’s statutory obligation to reasonably reinvestigate the disputed tradeline, the court found no investigatory duty for the CRA beyond the standard dispute resolution process.<sup>163</sup> First, the court found it unduly burdensome for a CRA to hire a handwriting expert to compare Brill’s signature with the signature used for the disputed account.<sup>164</sup> As the court explained:

Forcing a credit reporting agency to hire a handwriting expert in every case of alleged forgery would impose an expense disproportionate to the likelihood of an accurate resolution of the dispute over whether it was

---

158. *Id.* at \*8.

159. *Id.* at \*5 (citing *Dixon-Rollins v. Experian Info. Sols., Inc.*, 753 F. Supp. 2d 452, 458 (E.D. Pa. 2010) (in turn citing *Cushman, v. Trans Union Corp.*, 115 F.3d 220, 225 (3d Cir. 1997)). In addition, the court noted that “[t]he grave responsibility imposed under § 1681i(a) must consist of something more than merely parroting information received from other sources.” *Id.* (citing *Schweitzer v. Equifax Info. Sols. LLC*, 441 F. App’x 896, 904 (3d Cir. 2011).

160. *Brill v. TransUnion LLC*, 838 F.3d 919, 922 (7th Cir. 2016).

161. *See id.* at 921.

162. *Brill*, 838 F.3d at 921 (7th Cir. 2016).

163. *Id.* at 921–922.

164. *Id.* at 920.

indeed forgery. And so the FCRA's provisions for identity theft, 15 U.S.C. §§ 1681c-1, c-2, sensibly ask persons who believe they are or may be victims of credit fraud to report to the police before turning to the credit reporting agency. As far as we know, Brill didn't do that."<sup>165</sup>

Second, the court rejected the consumer's suggestion that the CRA analyze the handwriting itself, finding such an approach "undeveloped and unsupported."<sup>166</sup> Third, the court rejected the consumer's suggestion that the CRA evaluate the furnisher's procedures for verifying customers' identities, finding the consumer was in a better position to evaluate the furnisher's procedures than the CRA.<sup>167</sup> Finally, the court wrote of a suggestion that the CRA interview employees of the furnisher that it "might well be unduly burdensome for [the CRA] to ask [the furnisher] to identify, and put [the CRA] in touch with, the employees."<sup>168</sup> Thus, the Seventh Circuit seems to treat the costs of investigating identity theft as part of a consumer's burden of proof as the plaintiff in unreasonable reinvestigation cases against CRAs.<sup>169</sup> As a result, the Seventh Circuit moves the cost of reasonably reinvestigating disputed tradelines from CRAs to identity theft victims themselves.

The Seventh Circuit's finding in *Brill* that additional investigative steps by the CRA would be unduly burdensome was guided by the fact that the consumer in that case already settled a claim over the same account with its furnisher.<sup>170</sup> As the court explained, Brill was in a better position than the CRA to investigate the disputed information because he had the opportunity to collect information from the furnisher as to its verification processes during the discovery stage of his case against the furnisher.<sup>171</sup> The court wrote, "It was his decision to settle his suit against Toyota rather than use discovery procedures to explore the issue of forgery in depth."<sup>172</sup> Of course, such a finding overlooks the FCRA's statutory requirement that the burden of conducting a reasonable reinvestigation falls only on the CRA.<sup>173</sup>

---

165. *Id.* at 921. The FCRA provisions that the court cites are the ones that FACTA added to the law. As explained, they hardly solve the problem. Part II (Section C).

166. *Id.* at 922.

167. *Id.* (noting that the plaintiff could have deposed the furnisher's employees during its suit against the furnisher).

168. *Id.*

169. *See id.* at 921 ( "As the plaintiff he has the burden of proof, but rather than bear that burden he invokes the statutory duty of reinvestigation by the credit reporting agency to shift the burden of proof to TransUnion, insisting that TransUnion should have done more than check with [the furnisher] Toyota...").

170. *Id.* at 920-22.

171. *Id.* at 922.

172. *Id.*

173. 15 U.S.C. § 1681i. *See also* Couch, *supra* note 75, at 597 (explaining that, while the FCRA was not designed specifically for identity theft victims, the statute was intended to leave the costs of accurate credit reporting with CRAs where CRAs are best positioned to reduce the risk of inaccurate credit reporting).

### C. THE BEWILDERING FACTUAL OR LEGAL QUESTION TEST

In order for a consumer to make out a viable unreasonable reinvestigation claim against a CRA, some courts require that the consumer show “factual inaccuracy” of the disputed tradelines.<sup>174</sup> If the disputed tradeline is not factually inaccurate but rather relates to a legal question, the consumer’s unreasonable reinvestigation claim is defeated without any inquiry into CRA burden or consumer harm.<sup>175</sup> In the identity theft context, this pleading requirement for plaintiffs can lead to a CRA winning on a motion to dismiss despite a reinvestigation that does nothing more than parrot a conflicted furnisher.<sup>176</sup> CRAs have argued that an identity theft victim cannot make out an unreasonable reinvestigation claim without a court order declaring the disputed debts as unenforceable against the consumer.<sup>177</sup> They contend this is necessary because CRAs would otherwise have to act like courts of law to investigate identity theft.<sup>178</sup> Thus, the CRAs argue, identity theft victims’ unreasonable reinvestigation claims fail to show factual inaccuracy but instead raise impermissible “collateral attack[s] on the legal validity of consumer debts.”<sup>179</sup> For courts deferring to this CRA argument, identity is not a matter of fact but only a question of law.<sup>180</sup>

The factual-or-legal-question test makes little sense in the identity theft context. A consumer report is not a judgment, and it cannot discharge a consumer of a debt or otherwise free him from an obligation described in a tradeline. Perhaps the test is motivated by a concern that a consumer could lie about identity theft to have tradelines that they did indeed incur removed from their consumer reports. Of course, if that is the concern, the creditor would still have the right to bring a debt collection action against the consumer. Obviously, if a consumer sought to offer his consumer reports—now excluding the creditor’s tradelines that the CRA could not verify—as evidence to defend such a debt collection action, the creditor could respond with the fact that roughly a quarter of credit reports contain “potentially

---

174. *See, e.g., Brill v. Trans Union LLC*, No. 15-CV-300-SLC, 2015 WL 9095103, at \*3–4 (W.D. Wis. Dec. 16, 2015) (holding a consumer plaintiff’s unreasonable reinvestigation claim a collateral attack on the legal validity of a debt, thus dismissing the consumer’s claim, before the Seventh Circuit Court of Appeals dismissed the consumer’s claim on different grounds) (citing *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 89091 (9th Cir. 2010) and *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008)).

175. *See, e.g., Carvalho*, 629 F.3d at 891-92 (9th Cir. 2010) (“Because CRAs are ill equipped to adjudicate contract disputes, courts have been loath to allow consumers to mount collateral attacks on the legal validity of their debts in the guise of FCRA reinvestigation claims”) (citing *DeAndrade*, 523 F.3d at 68 (1st Cir. 2008)).

176. *See, e.g., Brill v. Trans Union LLC*, 2015 WL 9095103 at \*5..

177. *See, e.g., id.* at 3.

178. *See, e.g., id.*

179. *See, e.g., id.*

180. *See, e.g., id.* at 4 (holding the disputed consumer report accurate as a matter of law because only a court of law or a furnisher could cancel the consumer’s debt).

material” errors.<sup>181</sup> Once the creditor earned a judgment, the tradeline would reappear on the consumer report.

The bewildering factual-or-legal-question test was rightly abandoned on appeal by the Seventh Circuit in *Brill v. Trans Union*,<sup>182</sup> albeit for the troubling put-the-burden-on-the-consumer test, and perhaps only due to the fact that the consumer had since settled a lawsuit against the furnisher over the fraudulent debt.<sup>183</sup> As the lower court in *Brill* unnecessarily lamented:

It’s not that the court lacks sympathy or empathy for Brill’s situation, but the avenues of relief available to Brill do not include an FCRA claim against Trans Union. The FCRA does not provide a basis to hold Trans Union liable for continuing to report [the furnisher’s] determinations regarding Brill and the lease extension. The FCRA’s reasonable reinvestigation requirement does not impose a legal duty on Trans Union to consider Brill’s handwriting evidence and make its own determination that [the furnisher’s] report was inaccurate.<sup>184</sup>

On the contrary, the court could have ordered the CRA to delete the identity theft tradeline from Brill’s credit report.<sup>185</sup> A CRA does not have to act like a court of law to verify the truthfulness of its consumer reports but rather only investigate in the normal sense of the word.<sup>186</sup>

The lower court in *Brill* cited as support for its decision two circuit-level opinions that gave rise to the factual-or-legal-question test: the First Circuit’s in *DeAndrade v. Trans Union LLC* and the Ninth Circuit’s in *Carvalho v. Equifax Information Services*.<sup>187</sup> Neither of those cases related to identity theft but instead involved questions of contractual interpretation.<sup>188</sup> Thus, even if courts decide to apply the factual-or-legal-

---

181. CONG. RSCH. SERV., *supra* note 22, at 9 (citing FTC, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, (Dec. 2012)), <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf>).

182. *See Brill v. TransUnion LLC*, 838 F.3d 919, 922 (7th Cir. 2016) (declining to discuss the lower court’s rationale for dismissing the consumer’s complaint—that the consumer’s identity was a legal question thus excusing the CRA from its obligation to investigate).

183. *See* Part III (Section B) (describing the Seventh Circuit’s holding in *Brill v. Trans Union*).

184. *Brill v. Trans Union LLC*, No. 15-CV-300-SLC, 2015 WL 9095103, at \*5 (W.D. Wis. Dec. 16, 2015).

185. 15 U.S.C. § 1681i; *See infra* notes 195–196 and accompanying text (quoting the statute).

186. Merriam-Webster’s dictionary defines “investigate” as “to observe or study by close examination and systematic inquiry.” *Investigate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/investigate> (last visited on Sept. 20, 2020). As explained, CRA reinvestigations tend only to verify disputed accounts with the furnisher (e.g. is this the person who made the transaction?)—a useless inquiry given the furnisher’s records in the case of identity theft would include only the stolen consumer information. *See Kittell, supra* note 59, at 48.

187. *Brill*, 2015 WL 9095103 at \*3 (citing *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 890-91 (9th Cir. 2010) and *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008)).

188. *Carvalho*, 629 F.3d at 891 (9th Cir. 2010) (“Because CRAs are ill equipped to *adjudicate contract disputes*, courts have been loath to allow consumers to mount collateral attacks on the legal validity of their debts in the guise of FCRA reinvestigation claims . . . For example, in

question test to identity theft cases, the caselaw that gave rise to the rule can easily be distinguished.<sup>189</sup> As the District Court for the Northern District of Georgia wrote in *Bailey v. SCANA Energy Marketing*, “[a] dispute that a reported account is the result of identity fraud is the sort of factual dispute that a CRA is expected to investigate.”<sup>190</sup>

Like the Seventh Circuit in *Brill v. Trans Union*, courts requiring consumers to prevail in legal actions against furnishing creditors wrongly shift investigatory costs from the CRA to the consumer. However, the cost shift here also means prevailing in lawsuits against all the furnishing creditors behind the identity theft tradelines. That requirement offends financial justice for a couple reasons. First, identity theft victims are unnecessarily harmed by the consumer reports while they litigate the debts’ validity.<sup>191</sup> Second, many consumers lack the access to justice needed to litigate the fraudulent accounts.<sup>192</sup> To be clear, even if a CRA rightly removes identity theft tradelines from identity theft victims’ consumer reports, the risk from unequal access to justice remains a big problem for consumer reports. A well-lawyered furnishing creditor could indeed prevail in a debt collection action against an identity theft victim,<sup>193</sup> thus allowing the CRA to resume reporting of the identity theft tradeline. However, there is no need for courts and CRAs to push identity theft victims out of financial society before such a judgment.

---

*DeAndrade*, the dispute centered on whether the consumer had ratified an allegedly fraudulent mortgage.”)

189. Cf. *DeAndrade*, 523 F.3d at 68 (1st Cir. 2008); *Carvalho*, 629 F.3d at 893 (9th Cir. 2010).

190. *Bailey v. SCANA Energy Mktg., Inc.*, No. 1:18-CV-1725-AT-JKL, 2018 WL 7575542, at \*10 (N.D. Ga. Dec. 20, 2018) (holding a consumer plaintiff’s unreasonable reinvestigation claim a factual rather than legal question, and thus not a collateral attack on the legal validity of a debt, and therefore sufficient to overcome a motion to dismiss) (citing *DeAndrade*, 523 F.3d at 68 (1st Cir. 2008)).

191. See *supra* notes 22–27 and accompanying text (explaining how inaccurate consumer reports can result in loss of access to credit, housing, and employment).

192. See THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS (May 2020), at 13, <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf>. (explaining that consumers typically have legal representation in less than 10 percent of debt claims). See also APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES (2009), at 1-2. (explaining that more than 40 percent of consumer credit cases resulted in default judgments and that some of the judgments were entered against consumers who do not actually owe the debt).

193. See APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES (2009), at 1-2 (“Since all creditors [in typical consumer debt cases] are represented by counsel and the defenses available to debtors can be complex, the gross disparity in representation means that debtors often never raise the overwhelming majority of legitimate defenses available to them. Creditors are able to obtain judgments against debtor defendants without ever needing to submit proof of the debt or the amount owed.”).



#### IV. SOLUTION

The most obvious solution is for all courts to simply apply the law as it is written: A CRA must investigate consumer disputes related to identity theft reasonably, and that means doing more than simply verifying the disputed tradeline with a conflicted furnisher and punting the costs of an actual investigation to the consumer.<sup>194</sup>

The FCRA provides that a CRA must conduct a “reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of [a] 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.”<sup>195</sup> Paragraph (5) describes how a CRA must treat inaccurate or unverifiable information.

If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete *or cannot be verified*, the consumer reporting agency shall— (i) *promptly delete* that item of information from the file of the consumer, *or modify* that item of information, as appropriate, based on the results of the reinvestigation; and (ii) promptly notify the furnisher of that information that the information has been modified or deleted from the file of the consumer.<sup>196</sup>

If the CRA cannot verify the disputed information through a reasonable reinvestigation then it must delete it or modify it based on what the CRA has learned from a reasonable reinvestigation.<sup>197</sup> Doing nothing more than verifying the disputed information with its original and conflicted source—the furnisher—should be *prima facie* unreasonable, with the burden then moving to the CRA to show that its costs to actually verify the accuracy of the information outweigh the harm the disputed accounts cause the consumer. Courts have however been hesitant to adopt that simple answer.

While the Third Circuit held in *Cushman* that reasonability of a CRA’s reinvestigation is a question of fact for the jury to solve based on a balancing of the burden of a CRA’s reinvestigation against the harm that the disputed accounts cause the consumer,<sup>198</sup> the Seventh Circuit in *Brill* shifts investigatory costs to the consumer based on an approach that focuses almost exclusively on CRA costs with little inquiry into consumer harm.<sup>199</sup>

---

194. *See supra* note 185 (explaining that the CRA’s do not “investigate” consumer disputes in the normal sense of the word).

195. 15 U.S.C. § 1681i(a)(1)(A).

196. 15 U.S.C. § 1681i(a)(5)(A).

197. 15 U.S.C. § 1681i(a).

198. *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997).

199. *Compare Brill v. TransUnion LLC*, 838 F.3d 919, 920–22 (7th Cir. 2016) (holding a CRA’s reinvestigation reasonable as a matter of law where the CRA declined to delete or modify the disputed item following an investigation that did no more than verify disputed information

In other words, the Seventh Circuit says the identity theft victim bears the burden of proving his innocence to avoid the harm of an inaccurate consumer report. Muddling the law even further is the potential for courts to remove the First and Ninth Circuits factual-or-legal-question test from its contract-dispute facts, instead using it to dismiss identity theft victims claims at the pleading stage.<sup>200</sup> Indeed, the plain text solution has yet to win the day, perhaps reflecting a hesitancy by courts to open their doors to a wave of consumer lawsuits alleging CRAs failed to reasonably reinvestigate identity theft transactions. What matters is the law and its purpose. Here, that is to hold CRAs responsible for accurate consumer reporting, and to allow people harmed by inaccurate reports to have them corrected.<sup>201</sup> Therefore, the best path forward is a new standard that harmonizes the Third and Seventh Circuit's approaches with the FCRA's remedial scheme and FACTA's identity theft provisions.

#### **A. HARMONIZING THE CIRCUIT SPLIT IN LIGHT OF THE FCRA AS AMENDED BY FACTA**

The rationales underlying holdings against identity theft victims alleging unreasonable reinvestigations appear based on a desire to put part of the burden of accurate credit reporting on consumers themselves. Putting investigatory burden on consumers means lessening the burden on CRAs. A CRA's investigatory burden is a key component of the Third Circuit's *Cushman* standard: a CRA on notice that its furnisher is not a reliable source of information must bear the burden of investigation above and beyond the furnisher verification if the burden of a reasonable investigation is lower than the harm caused by the consumer report.<sup>202</sup> Therefore, a consumer could conduct some good faith investigatory acts which might alleviate the concerns underlying the Seventh Circuit's standard,<sup>203</sup> and those acts could be read as lowering the CRA's investigatory burden thus harmonizing a solution into the Third Circuit's approach from *Cushman*.

#### **B. THE PROPOSED TEST**

To prevail on an unreasonable reinvestigation claim against a CRA where the consumer disputes tradelines as inaccurate due to identity theft,

---

with its furnisher in response to a consumer asserting identity theft, because a consumer failed to submit evidence proving their identity was stolen) *with* 15 U.S.C. § 1681i(a) (stating that a CRA must conduct a reasonable reinvestigation of the disputed information and delete or modify the disputed information in accordance with the reinvestigation if the disputed information cannot be verified)..

200. *See* Part III (Section C) (describing the factual-or-legal question test and how it is inappropriate in the identity theft context).

201. *See* 15 U.S.C. §§ 1681e(b), 1681i.

202. Part III (Section A) (describing the Third Circuit's holding in *Cushman v. Trans Union*).

203. *See* Part III (Section B) (describing the Seventh Circuit's holding in *Brill v. Trans Union*).

the consumer could be required to show good faith. The good faith showing could include factors related to (1) mitigation of damages and (2) helping the CRA correct the reports, for example. A consumer meeting just one factor could be plenty sufficient for a good faith finding. In light of the FCRA's purpose to encourage fair and equitable credit reporting, this good faith showing by the consumer would have to be an exceptionally low pleading hurdle. Such a showing is not required by the statute for a consumer to prevail in an unreasonable reinvestigation claim against a CRA, but it would serve to harmonize the caselaw.

Some factors to consider for showing an effort by the consumer to mitigate damages could include:

- Placing a fraud alert on their credit file in accordance with FACTA.
- Placing a credit freeze on their credit file in accordance with FACTA.

Some factors to consider for showing an effort by the consumer to help the CRA correct the identity theft tradelines on the consumer report could include:

- Sending some information in the dispute letter corroborating that an identity thief and not the consumer opened the accounts (e.g. statement from a witness providing an alibi, the consumer's signature to compare to forged signatures, a copy of a police report the consumer filed with local law enforcement as to the identity theft, potential suspects that the CRA might look into by comparing spending patterns of the suspect with the disputed tradelines).
- Using discovery to inquire into the furnisher's reliability in those instances that a furnisher has brought a debt collection action against the consumer, and the consumer has been able to afford such litigation.
- Unreturned phone calls and messages left with the CRA and/or furnisher.
- Filing of an Identity Theft Report with the FTC.
- Filing of consumer complaints with the CFPB.
- Timely response to any CRA questions or inquiries following-up on the consumer's dispute.

## V. CONCLUSION

The full harm from data breaches compromising consumers' personal information is not yet known, but identity theft surely follows.<sup>204</sup> As CRAs profit from consumers' information without consent, and fail to protect it from hackers, it is only right that they actually investigate the accuracy of their reports. Without diligent investigation, the CRA wrongly pushes consumers out of financial society for an imposter's crime. That can mean

---

204. See Wu, et. al, *supra* note 22, at 12.

the loss of a job, access to credit, and even a place to live. Whether right or wrong, Congress endorsed consumer reports as a metric for lending and other types of consumer screening when it passed the FCRA. In doing so, it required CRAs to maintain procedures meant to ensure “maximum possible accuracy”<sup>205</sup> and created liability for CRAs where they report information that they cannot verify with a reasonable reinvestigation.<sup>206</sup> The dual purposes of the law can only be served if courts allow consumers the fair and equitable remedies promised in the 1996 Amendments.<sup>207</sup> The statutory language is sufficiently clear to allow that, and the *Henson* court’s rationale, applied to identity theft in *Cushman*, provides a clear solution. To follow the Seventh Circuit’s standard in *Brill* would not only turn a blind eye to the FCRA’s text and purposes but would effectively deny consumers their only remedy for being cast out of financial society. Of course, the concerns apparent in the Seventh Circuit’s test could be alleviated by a good faith requirement for consumers, which could naturally be read into the *Cushman* burden-harm balancing approach with due recognition of FACTA’s identity theft provisions.

*Ryan Bolger\**

---

205. 15 U.S.C. § 1681e(b).

206. 15 U.S.C. § 1681i(a).

207. Part II (Section A) (describing how the remedial scheme was incorporated into 15 U.S.C. § 1681i).

\* B.A., Ohio Wesleyan University, 2011; J.D. Candidate, Brooklyn Law School, 2020. This Note is dedicated first and foremost to my friends and family for all their support over the last few years. I would also like to thank my professors at Brooklyn Law School for challenging and encouraging me to pursue my interests in financial justice. Last and not least, my colleagues on the Brooklyn Journal of Corporate, Financial & Commercial Law deserve much of the credit for this Note.