FAIR CREDIT REPORTING ACT OVERVIEW AND CASE UPDATE

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Justin K. Sauls primarily represents financial institutions in complex lawsuits including Fair Credit Reporting Act, Fair Debt Collection Practices Act, Telephone Consumer Protection Act, deceptive trade practice laws, breach of contract, fraud, and other similar consumer claims. Justin has also served as both in-house and outside counsel in the area of mortgage banking compliance with a particular emphasis on advising banks, mortgage originators/servicers, and other financial service providers on compliance with the laws governing their business.

Representative Experience

Represented national credit reporting agency in FCRA litigation and other consumer credit claims.

Successfully briefed and argued motions to dismiss and other dispositive motions on behalf of national credit reporting agency.

Successfully negotiated zero-dollar dismissals and other favorable settlements in consumer credit litigation.

Provided lender defense in consumer lawsuits concerning wrongful sequestration, conversion, deceptive trade practices, debt collection practices, and foreclosure.

Served as legal counsel in the compliance audit and loan servicing practices review of a large publicly-traded national mortgage servicer by the California Department of Business Oversight.

Advised mortgage originator/servicer on multi-state litigation, including review of pleadings, coordination of pre-trial activities and motions, production of discovery, and strategy concerning hearings, trial, and appeal.

Advised mortgage originator/servicer on the business impact of the CFPB Mortgage Servicing Rules and assisted with changes in policies and procedures.

Advised mortgage originator/servicer on internal operations and production department processes to comply with all applicable mortgage loan origination/servicing laws and investor guidelines.

Advised mortgage originator/servicer on internal QC findings and monitored remediation and self-reporting efforts with respect to the company's originations channels.

Advised mortgage originator/servicer on company's loss mitigation activities pursuant to repurchase demands and HUD PETR/VA deficiency claims. Responsible for the development of a team of underwriters that performed forensic analysis in connection with investor/agency repurchase/indemnification claims.

Advised mortgage originator/servicer on recovery efforts against correspondent lenders and brokers, i.e., contract disputes and remediation efforts related to unsalable loans, early payment default, early payoff, pair-offs, trailing documents, escrow shortages etc.

OVERVIEW OF FAIR CREDIT REPORTING ACT AND CASE LAW UPDATE

There has been a consistent increase in Fair Credit Reporting Act ("FCRA") litigation in recent years despite an overall decline in lawsuits filed pursuant to other consumer protection statutes. Most consumer protection counsel will frequently find themselves handling an FCRA claim or being asked whether one exists. This paper provides an overview of the FCRA along with recent trends and theories of liability under the statute. It begins with a discussion of the origin of the FCRA and its key amendments, includes a review of the most frequently cited provisions under the statute, and concludes with a case law update.

I. OVERVIEW OF THE FCRA

In 1970, Congress passed the FCRA to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. The Consumer Credit Reporting Reform Act of 1996 imposed duties on furnishers of credit information with regards to inaccuracy and handling of disputes. The Fair and Accurate Credit Transaction Act of 2003 ("The FACT Act") established a national fraud alert system, required truncation of account numbers on receipts, and gave consumers the right to a free annual credit disclosure each year. Pursuant to the Consumer Protection Act of 2010, the Federal Trade Commission ("FTC") now shares its enforcement role with the Consumer Financial Protection Bureau ("CFPB"). In March 2020, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act was signed into law, which temporarily amended the FCRA in response to the economic fallout caused by the COVID-19 pandemic. The CARES Act specifically impacts credit reporting by governing the reporting of "accommodations," i.e., agreements to defer or to forbear payments or modify loan terms for the purpose of providing assistance to consumers affected by COVID-19.

II. KEY PROVISIONS OF THE FCRA

Under the FCRA, consumers may seek relief for negligent or willful violations of the statute's permissible purpose, compliance, and disclosure provisions. The FCRA also requires that consumer reporting agencies ("CRA") and the creditors reporting information to those CRAs ("furnishers") reasonably reinvestigate consumer disputes regarding the accuracy of that information.

A. § 1681e Compliance Procedures and § 1681i Procedure in Case of Disputed Accuracy

i. The Requirement of a Factual Inaccuracy

Consumers often bring claims against CRAs alleging statutory violations of §§ 1681e(b) and 1681i of the FCRA. The existence of a factual inaccuracy is a principal element of each of these claims. *See Elliot v. TRW, Inc.*, 889 F. Supp. 960, 962 (N.D. Tex. 1995) ("The offensive information in the credit report must be shown to be inaccurate, prior to an inquiry into the reasonableness of the reporting procedures") (citing *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991)); *see also Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 267 n.3 (5th Cir. 2000) ("In order to make out a prima facie violation under § 1681e(b) a consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information.") (quoting *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995)); *Kuehling v. Trans Union, LLC*, 137 F. App'x 904, 908 (7th Cir. 2005) ("Without evidence of some inaccuracy in the Trans Union report or reinvestigation, Kuehling cannot establish that Trans Union violated the FCRA – either § 1681e(b) or § 1681i(a)(1)(A).").

ii. Reporting Can Be Technically Accurate But Misleading and Still Violate the FCRA

Credit information can be technically accurate but misleading and still satisfy the inaccuracy element of §§ 1681e and 1681i. For instance, in *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619 (6th Cir. 2018), the court held that the existence of a trial modification payment plan and the consumer's compliance with the terms of that plan were relevant information about the status of his mortgage loan that should have been captured on his credit report *Id.* at 639. The *Pittman* court considered the non-reporting of the fact that the consumer was paying his mortgage under the trial plan to be potentially misleading because, according to the plan guidelines, "[a]fter all trial period payments are timely made and . . . all the required documents [submitted], [plaintiff's] mortgage [would] be permanently modified." *Id.* at 625. Consequently, in part, because the TPP was effectively a prelude to entering into a permanent modification, i.e., significant information for a reviewing creditor, the *Pittman* court considered its non-reporting to be misleading. *Id.* At 639.

A consumer must present evidence that accurate information is misleading to a creditor because his or her subjective belief regarding the purported misleading nature of credit reporting is not sufficient to support a claim of inaccuracy. *See Shaw v. Equifax Info. Solutions, Inc.*, 204 F. Supp. 3d 956, 961 (E.D. Mich. 2016) (holding that a plaintiff's personal opinion constitutes "'mere speculation that the notation was misleading' and is insufficient to support a claim of inaccuracy under the FCRA."); *Barakat v. Equifax Info. Servs., LLC*, No. 16-10718, 2017 WL 3720439, at *3 (E.D. Mich. Aug. 29, 2017) ("Courts have repeatedly held that a personal opinion is 'mere speculation that the notation was misleading' and is therefore insufficient to support a claim of inaccuracy under the FCRA.") (citing *Dickens v. Trans Union Corp.*, 18 F. App'x 315, 318 (6th Cir. 2001)).

iii. Legal Disputes Are Not Inaccuracies Under the FCRA

Typically only factual inaccuracies are redressable under the FCRA and, where the accuracy of reporting depends on the resolution of a legal conflict or interpretation of a contract, courts have deemed the alleged inaccuracy to be a *legal dispute* and, therefore, not actionable under the FCRA. *Wright v. Experian Info. Solutions, Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015) (holding that a reasonable reinvestigation does not require CRAs to resolve legal disputes about the validity of the underlying debts they report); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 891 (9th Cir. 2010)); *Cahlin*, 936 F.2d at 1160 ("No reasonable reinvestigation on the part of [the CRA] could have uncovered any inaccuracy in Cahlin's report because there was never any factual deficiency in the report."); *Tuttobene v. Trans Union, LLC*, No. 219CV01999APGNJK, 2021 WL 2188232, at *2 (D. Nev. May 28, 2021) ("Trans Union is not in a position to adjudicate that dispute between a consumer and a furnisher of information.") (*citing Carvalho*, 629 F.3d 876, 891 (9th Cir. 2010)).

iv. A Failure to Maintain Reasonable Procedures to Assure Maximum Possible Accuracy Violates § 1681e(b)

In addition to an inaccuracy, consumers seeking relief under § 1681e(b), must plead and prove: the CRA failed to follow reasonable procedures to ensure maximum possible accuracy of its reports; and the CRA's failure to follow reasonable procedures caused actual damages to a

plaintiff. *Cahlin,* 936 F.2d at 1156-60; *Smith v. E-BackgroundChecks.com, Inc.*, 81 F. Supp. 3d 1342, 1357 (N.D. Ga. 2014); *Bermudez v. Equifax Info. Servs., LLC,* No. 6:07-cv-1492, 2008 WL 5235161, at *2 (M.D. Fla. Dec. 15, 2008). In fact, the FCRA imposes no liability for inaccuracies when a CRA has in place, and follows, reasonable procedures. *See Grigoryan v. Experian Info. Solutions, Inc.*, 84 F. Supp. 3d 1044, 1067 (C.D. Cal. 2014) ("A credit reporting agency does not violate § 1681e(b) or § 1785.14(b) 'simply by reporting information that may be inaccurate.'") (quoting *Darrin v. Bank of Am., N.A.*, No. CV 12–00228 MCE, 2014 WL 1922819, *6 (E.D. Cal. May 14, 2014)). Rather, compliance with § 1681e(b) is determined by an evaluation as to whether the CRA's procedures for preparing a consumer's credit report are reasonable and designed to prevent inaccuracies. *Guimond,* 45 F.3d at 1334 ("Liability under § 1681e(b) is predicated on the reasonableness of the credit reporting agency's procedures in obtaining credit information."); *Grigoryan,* 84 F. Supp. 3d at 1067 (quoting *Guimond,* 45 F.3d at 1333).

Further, liability only arises under § 1681e(b) when a CRA issues an inaccurate consumer report to a third party. *Wantz v. Experian Info. Solutions,* 386 F.3d 829, 834 (7th Cir. 2004); *TRW Inc. v. Andrews,* 534 U.S. 19, 28-31 (2001); *Acton,* 293 F. Supp. 2d at 1097. In order to recover under § 1681e(b) for negligence, a plaintiff must plead and prove actual damages. 15 U.S.C. § 1681o; *Grigoryan,* 84 F. Supp. 3d at 1077. Additionally, a plaintiff must prove his actual damages were caused by the CRA's conduct. *See Banga v. Experian Information Solutions, Inc.*, 473 Fed. App'x. 699, 700 (9th Cir. 2012) ("The district court properly granted summary judgment on Banga's claims for negligent violations under § 1681o of the Act because she failed to raise a triable dispute as to whether defendants' conduct resulted in actual damages"); *Banga v. First USA NA,* 29 F. Supp. 3d 1270, 1280 (N.D. Cal. 2014) ("To the extent this claim alleges a negligent violation of the FCRA, summary judgment in favor of Chase is warranted because [p]laintiff has failed to adduce evidence raising a genuine issue for trial as to whether she has suffered any actual damages caused by Chase").

v. A Failure to Conduct a Reasonable Reinvestigation Violates § 1681i

To state a claim under § 1681i, a consumer is required to plead and prove: (1) her consumer file contains inaccurate or incomplete information; (2) she notified the CRA of the alleged inaccuracy; (3) the dispute is not frivolous or irrelevant; (4) the CRA failed to respond or conduct a reasonable reinvestigation of the disputed item(s); and (5) the consumer sustained damages caused by the CRA. *Carvalho,* 629 F.3d at 891; *Steed v. Equifax Info. Servs., LLC,* No. 1:14-cv-00437-SCJ-CMS, 2016 WL 7888040, at *11 (N.D. Ga. July 15, 2016) (citing *Lazarre,* 780 F. Supp. 2d at 1334); *Bermudez,* 2008 WL 5235161, at *4. A plaintiff can only sue a CRA for that which it has put the CRA on notice. *See Herisko v. Bank of America,* 367 Fed.Appx. 793, 794 (9th Cir. 2010) ("In order to trigger a credit reporting agency's duty under the FCRA to investigate a claim of inaccurate information, a consumer must notify the agency of the purported reporting error."). With respect to A CRA's duties to conduct a reasonable reinvestigation under the FCRA, the Ninth Circuit in *Ghazaryan v. Equifax Info. Servs., LLC,* 740 F. App'x 157, 158 (9th Cir. 2018), described the specific type of reinvestigation that is reasonable as involving a: review and consideration of all relevant information submitted by the consumer; notification to the furnisher within five business days; and a prompt correction or deletion of any inaccurate, incomplete, or unverifiable information. *Ghazaryan,* 740 at 158. The *Ghazaryan* court also recognized Automated Consumer Dispute Verification ("ACDV") [1] as a process properly envisioned by the

[1] E-Oscar, a web-based system, allows CRAs and furnishers to process consumer disputes electronically via ACDV.

FCRA. *Id.* Likewise, the U.S. Court of Appeals for the Fifth Circuit recently affirmed a lower court's decision finding that a CRA's use of the ACDV system to report information to a furnisher was reasonable as a matter of law. *Barron v. Equifax Info. Servs., L.L.C.*, 802 F. App'x 161, 163 (5th Cir. 2020) ("We agree with the district court that Barron has offered no reasonable factual basis for finding the defendants should have been on notice of a need to go beyond the ACDV system as to this dispute.").

vi. The Requirement To Add a Brief Statement of Dispute

Consumers may also allege violations of §§ 1681i(b) and (c), which require CRAs, when properly requested, to include a statement in a consumer's credit report explaining that the consumer disputes the accuracy of the reporting. Specifically, if a CRA's reinvestigation of a consumer's dispute does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute, which must be reported in subsequent credit reports. *See Henry v. Dovenmuehle Mortg.*, No. 219CV00360MMDNJK, 2020 WL 1290787, at *5 (D. Nev. Mar. 18, 2020). (internal citations omitted). A request to add a statement of dispute in the actual dispute letter requesting the dispute, before the reinvestigation to be conducted by the CRA has culminated has been held to be invalid. *See id.*

B. § 1681g Requires Full Disclosure To Consumers of Information Reporting in Their Credit Files

To survive summary judgment on a § 1681g claim, a plaintiff must present evidence to show that the CRA failed to provide the consumer with his or her file following a consumer's request for same. "The operative question under § 1681g is whether a disclosure is unclear such that the consumer cannot determine the accuracy of the information in that disclosure." *Alexander v. Equifax Info. Services, LLC, et al.*, 2018 WL 3025939 (D. Nev. June 15, 2018). Section 1681g(a)(1), in part, states that upon request, a CRA shall disclose "[a]ll information in the consumer's file at the time of the request . . .". 15 U.S.C. § 1681g(a)(1). Federal courts and the FTC have limited the scope of the term "file" to material included in a consumer report that would be sent to a third party. The Seventh Circuit in *Gillespie v. Trans Union Corp.*, 482 F.3d 907, 908-10 (7th Cir. 2007), held that "file" meant information contained in a consumer report produced by the CRA. While a "consumer report" is a report prepared for third parties, a "consumer disclosure" is the consumer reporting agency's credit "file" that it discloses to the consumer. *Johnson v. Equifax, Inc.*, 510 F. Supp. 2d 638, 645 (S.D. Ala. 2007).

C. § 1681b Requires that Credit Reports Only Be Furnished for a Permissible Purpose

The FCRA imposes a duty on CRAs to adopt reasonable procedures to guard against the furnishing of a consumer report for an impermissible purpose. *See* 15 U.S.C. §§ 1681b; *Younger v. Experian Info. Sols., Inc.*, 817 F. App'x 862, 870 (11th Cir. 2020). A CRA is only allowed to provide a credit report to a third party for an express authorized purpose, as enumerated by the FCRA:

- in response to the order of a court having jurisdiction to issue such an order, a subpoena issued in connection with proceeding before a federal grand jury, or a subpoena issued in accordance with specified statutory provisions.
- in accordance with the written instructions of the consumer to whom it relates.

- to a person which it has reason to believe will use the information for certain stated purposes.
- in response to a request by the head of a state or local child support enforcement agency (or a state or local government official authorized by the head of such an agency), if the person making the request makes certain certifications to the consumer reporting agency.
- to an agency administering a state plan for uses to set an initial or modified child support order.
- to the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act or the Federal Credit Union Act, or other applicable federal or state law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

15A Am. Jur. 2d Collection and Credit Agencies § 52.

D. § 1681s-2 Contains Responsibilities of Furnishers of Information Under the FCRA

The FCRA imposes certain affirmative duties on furnishers of information. Furnishers must: (1) provide CRAs with accurate information (*See* § 1681s–2a); and (2) conduct an investigation if a consumer disputes information the furnisher has reported to a CRA (*See* § 1681s–2(b). When a consumer disputes the completeness or accuracy of information reporting on a credit report with a CRA, the CRA must notify the furnisher of that disputed information. § 1681i(2). Upon receiving notice of said dispute, § 1681s–2(b) requires the furnisher to: investigate the dispute; review all relevant information received from the CRA; and report the results of the investigation back to the CRA. § 1681s–2(b)(1)(A)–(C). If, pursuant to that investigation, the furnisher determines that the information it previously provided to a CRA was inaccurate, the furnisher must report the updated and accurate results to all CRAs. § 1681s–2(b)(1)(D). Per § 1681s–2(b)(1)(E), the furnisher must also modify, delete, or permanently block the subject inaccurate information from the furnisher's future reporting to the CRAs. Per § 1681s–2(b), a consumer has a private right of action against furnishers that fail to conduct a reasonable investigation of disputes. *See Saunders v. Branch Banking & Tr. Co. of Va.*, 526 F.3d 142, 149 (4th Cir. 2008); *Abukhodeir v. AmeriHome Mortg. Co., LLC*, No. 8:21-CV-563-WFJ-JSS, 2021 WL 3510814, at *2–3 (M.D. Fla. Aug. 10, 2021); *Bauer v. Target Corp.*, No. 12-cv-00978-AEP, 2013 WL 12155951, at *6 (M.D. Fla. June 19, 2013).

E. Consumers May Seek Relief For Willful or Negligent Violations of the FCRA

Per *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58-59 (2007), the "willfully" found in § 1681n is established by presenting evidence to: (1) demonstrate the CRA had a practice or policy that was objectively unreasonable in light of the FCRA's statutory language; and (2) allege how the CRA ran a risk of violating the FCRA that was substantially greater than the risk associated with a reading that was merely careless. *Id.* A plaintiff must show that a CRA acted in a manner that made it highly probable harm would follow. *Id.* at 69. A CRA's interpretation of its obligations under the FCRA can be erroneous and *still* not be considered willful. *Id.* at 69-70. In

accordance with § 1681o, a consumer must plead and prove a violation of the FCRA that caused actual damages.

III. CASE LAW UPDATE AND THEORIES OF LIABILITY

A. Dispute Notation Cases

Consumers, primarily in the Northern District of Georgia, have brought claims alleging that the presence of a dispute notation (required to be added by a furnisher upon notification of a consumer to that furnisher that she disputes her account) can be an inaccurate item of information per § 1681i. Specifically, consumers argue that once the consumer changes her mind about whether she wants to dispute an account, that consumer should be able to only notify the CRA, without notifying the furnisher directly, to remove that dispute notation (which can impact, e.g., a consumer's credit by resulting in challenges in mortgage underwriting). Conversely, CRAs and furnishers argue that, once a consumer changes her mind about whether she wants to dispute an account, that consumer must notify the creditor of that account directly (§ 1681s-2(a)(3)), and that creditor will, in turn, notify the CRA (*Id.*), and the CRA will then report same on outgoing credit reports going forward (§ 1681c(f)). Section 1681s-2(a)(3) of the FCRA spells out a furnisher's duty to provide a notice of dispute to a CRA as follows:

> If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

§ 1681s-2(a)(3). Section 1681c(f) describes a CRA's duty to then report that notice of dispute on credit reports:

> If a consumer reporting agency is notified pursuant to section 1681s-2(a)(3) of this title that information regarding a consumer who was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information.

§ 1681c(f). Although, arguably, the FCRA does not expressly describe the proper procedure for removing notices of dispute from a consumer's files, several Northern District of Georgia courts have found §§ 1681e(b) and 1681i claims against CRAs could not be maintained where a consumer failed to request removal of a notice of dispute directly with the furnisher. *See Carol Jones v. Equifax Info. Servs., LLC, et al.*, No. 2:20-cv-00253-RWS, ECF No. 34 at 13–18 (N.D. Ga. June 14, 2021) (citing *Hardnett v. Equifax Info. Servs., LLC*, No. 120CV03017LMMRDC, 2021 WL 2201301 (N.D. Ga. Apr. 26, 2021); *White v. Equifax Info. Servs., LLC*, No. 120CV01870LMMAJB, 2020 WL 9607010 (N.D. Ga. Nov. 27, 2020), *report and recommendation adopted sub nom. White v. Wells Fargo Bank, N.A.*, No. 120CV01870LMMAJB, 2021 WL 2020612 (N.D. Ga. Feb. 17, 2021); *Briscoe v. Equifax Info. Servs., LLC*, No. 120CV02239WMRCMS, 2020 WL 10046994 (N.D. Ga. Oct. 27, 2020), *report and recommendation adopted*, No. 1:20-CV-02239-WMR, 2021 WL 2376663 (N.D. Ga. Jan. 12, 2021); *McGee v. Equifax Info. Servs., LLC*, No. 118CV04144MHCCMS, 2019 WL 2714505 (N.D. Ga. Mar. 19, 2019), *report and recommendation adopted*, No. 1:18-CV-4144-MHC-CMS, 2019 WL 2714497 (N.D. Ga. Apr. 9, 2019)); *but see, e.g., Griffin v. Equifax Info. Servs., LLC, et al.*,

1:20-cv-02316-CCB, ECF No. 65 at 17 (N.D. Ga. July 21, 2021); *Jordan v. Equifax Info. Servs., LLC, et al.*, 3:20-cv-00199-TCB-RGV, ECF No. 68 at 41–43 (N.D. Ga. July 21, 2021) (holding that if a consumer could have or had alleged that they reported the original inaccurate information (i.e., the information originally deemed to be disputed which caused the original reporting of the notice of dispute) directly to a CRA, the claim against the CRA could potentially proceed).

B. Pay Status Cases

In this line of cases, a typical fact pattern involves the alleged inaccuracy of a credit entry reporting on an account with the *historical* pay status (i.e., the pay status the account had at the time of its closing). Consumers will typically argue that listing a closed account, which has, e.g., a $0 balance, with the historical pay status of, e.g., *90 days past due* (the status of the account at the moment it was paid off), is misleading. CRAs and furnishers, conversely, argue that the reported historical pay status, taken as a whole in reviewing the entire credit entry, is neither inaccurate nor materially misleading. *Settles v. TransUnion LLC,* No. 3:20-cv-00084, 2020 WL 6900302 (M.D. Tenn. Nov. 24, 2020). However, in *Macik v. JP Morgan Chase Bank, N.A.*, No. 3:14-cv-0044, 2015 WL 12999728 (S.D. Tex. May 28, 2015), report and recommendation adopted, 2015 WL 12999727 (S.D. Tex. Jul. 31, 2015), a district court denied a CRA's motion for summary judgment holding that a fact issue existed as to the accuracy of continuing to report a historical pay status. Going forward, courts will continue to determine whether the reporting of a historical delinquency status on a credit report is accurate as a matter of law versus an item for a jury to determine.

C. CRA's Duty To Report

Consumers typically want positive accounts and positive payment history to appear on their credit reports and, for that reason, sometimes sue CRAs when such accounts or history is not reported. However, the question often posed in this theory of liability is whether or not a CRA has a duty to report all of a consumer's accounts or all information pertaining to those accounts. In *Hammer v. Equifax Info. Servs., LLC*, No. 3:18-CV-1502-C, 2019 WL 7602463, at *3 (N.D. Tex. Jan. 16, 2019), aff'd sub nom. Hammer v. Equifax Info. Servs., L.L.C., 974 F.3d 564 (5th Cir. 2020), when Equifax removed plaintiff's Capital One account from his credit file, the plaintiff argued that Equifax violated the FCRA when it "refused to place [the account] back on plaintiff's credit [file causing plaintiff to lose] a positive trade line demonstrating a long history of timely payments . . .". The *Hammer* court held that the FCRA does not impose an affirmative duty on CRAs to include all relevant information about a consumer. Going forward, CRAs will continue to test the application of this theory in instances where, e.g., a particular account is reported, but the payment history on that account is not fully reported, a common complaint among consumers.

D. CRA's Duty To Reinvestigate

In *Davis v. Experian Info. Sols., Inc.*, 849 F. App'x 690, 691 (9th Cir. 2021) a CRA argued that a consumer's dispute correspondence was unintelligible as to what was being disputed thus removing its requirement to reinvestigate. Specifically, due to the perceived unclear nature of the consumer's correspondence, Experian claimed to have not understood exactly what the consumer was disputing. Experian prevailed at the District Court level, the court finding that the plaintiff had not sufficiently notified Experian of the nature of her dispute and, therefore, Experian had no duty

to reinvestigate plaintiff's claims. However, the Ninth Circuit reversed and remanded holding that a dispute notice does not require *precise* language and the receipt of such a (vague) letter does not eliminate the duty to reinvestigate altogether. This case suggests that CRAs should err on the side of caution when making a determination as to whether or not a consumer's dispute, albeit unclear, should be reinvestigated.

E. *TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)*

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210, 210 L. Ed. 2d 568 (2021), an FCRA class-action, the U.S. Supreme Court held that a concrete injury requires more than the existence of a risk of harm that never materializes. Specifically, the Court held that certain class members needed more than a statutorily created right and cause of action to establish standing in federal court and that the Judiciary, not Congress, determines whether a concrete harm exists. The case involved Trans Union's OFAC potential-match alert notification, which appeared on Ramirez's credit file and a corresponding credit report that was sent to a car dealership resulting in denial of his credit application. Trans Union also sent Ramirez his credit disclosure (without the OFAC alert) and, separately, a notification of the OFAC alert, which plaintiff claimed violated the FCRA. Consequently, plaintiff alleged § 1681 e(b) and § 1681g claims and filed a suit on behalf of a class of over 8,000 members. Even though the OFAC potential-match alert was included in files of all class members, only about 1,800 of the 8,000 member class had credit reports sent to 3rd parties. Moreover, out of the 1,800 class members with credit report sent out, only Ramirez alleged a credit denial as a result of a Trans Union credit report. Accordingly, the Court held that the class members with no credit reports sent to third parties (and, consequently, with no credit denials) could only show *risk* of harm as opposed to *actual* harm, which was insufficient to establish standing under the FCRA. *Ramirez* firmly reinforces the notion that the FCRA is not a strict-liability statute and that technically inaccurate credit reporting must be accompanied by an actual injury to be redressable under the statute.

F. *Williams v. First Advantage LNS Screening Solutions*

In *Williams*, in a mixed file case brought pursuant to § 1681e, the Eleventh Circuit affirmed $250k in compensatory damages but reduced $3.3 million in punitive damages down to $1 million. The consumer in *Williams* sued defendant First Advantage in response to the CRA mixing his file with information of another individual possessing a criminal record. Based on evidence that the furnisher in the case did not follow its own mixed-file policies and procedures, the Eleventh Circuit affirmed the district court's denial of First Advantage's dispositive motion on plaintiff's willfulness claim. However, the court also found that the $3.3 million punitive damages (a 13:1 ratio with compensatory damages) was unconstitutional and likely a violation of the Due Process Clause. Going forward, this decision will continue to influence limits on punitive damages claims in FCRA cases.

G. *Luna v. Hansen & Adkins Auto Transport, Inc.*

In *Luna*, the Ninth Circuit interpreted the FCRA's disclosure requirements for employers conducting background checks on applicants. *Luna* focused on the format of the disclosure which, in that case, was a separate page included in a bulk of other application materials. Where the consumer argued that including the disclosure page within other materials violated the *standalone* requirement of the FCRA, the court rejected that argument holding that while the disclosure cannot

contain distinct information, "no authority suggests that a disclosure must be distinct in time, as well." Regarding the "clear and conspicuous" element of the FCRA's disclosure requirement, the *Luna* court reiterated that a disclosure has to be "readily noticeable" and in a "reasonably understandable form." Moreover, *Luna* held that the particular employer's disclosure, which included an all-caps and bold heading and basic explanatory statement) met the clear and conspicuous requirements of the FCRA.

H. *Davis v. C&D Security Management, Inc. et al.*

In *Davis*, the court confirmed that a consumer lacks Article III standing to state a claim under the FCRA based solely on the failure to receive a copy of a background report and a summary of rights. In *Davis*, the consumer applied for employment but was declined. The consumer then brought suit on behalf of a putative class claiming that the employer had failed to provide her with notice of the particular background check, a copy of her report, and summary of rights pursuant to the FCRA. Given that the consumer eventually became aware of her rights and timely brought suit against the employer, the *Davis* court held that the consumer lacked an actual injury-in-fact required for standing under the FCRA per *Spokeo*. The court also held that, because Davis could not establish her own standing, she also could not pursue relief on behalf of the class.