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THE (UN)FAIR CREDIT REPORTING ACT

*Alexandra P. Everhart Sickler**

I. INTRODUCTION

Robert Burrell discovered that he was a victim of identity theft in 2008.¹ The thief used Mr. Burrell's identity to purchase close to \$10,000 in goods and services using his credit card and to incur approximately \$1,000 in charges from a wireless telephone company.² He repeatedly told the companies that his identity had been stolen and that he was not responsible for the charges.³ Nonetheless, the companies continued to report to credit bureaus that Mr. Burrell failed to pay his debts, resulting in negative and inaccurate information on his credit report.⁴

The Fair Credit Reporting Act (the "FCRA") pur-

* Alexandra P. Everhart Sickler, Assistant Professor of Law, University of North Dakota School of Law. I respectfully dedicate this article to the Honorable Dickinson R. Debevoise, U.S. District Judge for the District of New Jersey. Judge Debevoise served as a federal judge for more than thirty-five years until his death in August 2015 at age ninety-one, and his tenure exemplified his devotion to public service, justice, equality, and opportunity. His decision in *Burrell v. DFS Svcs., LLC*, 753 F.Supp.2d 438 (D. N.J. 2010), which he acknowledges is legally correct but unjust, inspired this article. Additional acknowledgments include Chris Jay Hoofnagle, Christyne Vachon, and Jonathan Sickler for their thoughtful contributions.

¹ *Burrell v. DFS Svcs., LLC*, 753 F. Supp. 2d 438, 440 (D. N.J. 2010).

² *Id.*

³ *Id.*

⁴ *Id.*

ports to safeguard identity theft victims from this precise predicament, but its protections failed Mr. Burrell because it lacks effective tools for consumers to enforce them. As a consequence, one thief's actions over a few months in 2008 impacted Mr. Burrell for several years. In fact, when Mr. Burrell sued the companies for violations of the FCRA and other relevant state laws, the court reluctantly dismissed his claims, finding that he lacked a private right of action to enforce the companies' FCRA duties or otherwise hold the companies liable.⁵

Mr. Burrell could not maintain claims against the companies that furnished incorrect information to the credit bureaus for two reasons. First, the FCRA bars consumer lawsuits to enforce companies' duty to furnish accurate information to the credit bureaus.⁶ It permits suit against these companies only for failure to "reinvestigate" a dispute made to the credit bureau concerning inaccurate information.⁷ Enforcement of the accuracy norm against these companies is left mostly to the public regulators.⁸ Second, the FCRA preempted whatever state law claims Mr. Burrell could have otherwise raised against the companies.⁹

The judge who presided over Mr. Burrell's lawsuit offered some blunt criticism for the FCRA's shortcomings, which arise out of the rules governing its private right of action and negatively impact the ability of consumers to access justice.¹⁰ Judge Debevoise chastised Congress for creating a private right of action that thwarts rather than promotes the FCRA's goals:

⁵ See generally *id.*

⁶ *Burrell*, 753 F. Supp. 2d at 444-49; 15 U.S.C. § 1681s-2(a).

⁷ *Burrell*, 753 F. Supp. 2d at 444-49; 15 U.S.C. § 1681s-2(b).

⁸ See *Burrell*, 753 F. Supp. 2d at 444-49; 15 U.S.C. § 1681s.

⁹ *Burrell*, 753 F. Supp. 2d at 449-51; 15 U.S.C. §§ 1681h(e), 1681t(b)(1)(F).

¹⁰ *Burrell*, 753 F. Supp. 2d at 446 ("[T]he FCRA places the burden of ensuring the efficient functioning of the credit reporting system on the consumers themselves—laypeople who are, in most cases, in no position to carry out that task by jumping over the technical hurdles created by the statute. Such a scheme is troubling, to say the least.").

[C]ases like this one lead the Court to wonder how Congress could have possibly believed that the FCRA would carry out [its intended] functions. It is of little value to ordinary consumers, in part due to the fact that it is hopelessly complex—the statute is drafted in hyper-technical language and includes a sufficient number of internal cross-references to make even the most dedicated legal practitioner consider a change in career. But the FCRA's substance is even more troubling than its complex form. The statute includes numerous provisions that limit consumers' ability to enforce its mandates either by explicitly barring private actions or by imposing such burdensome procedural requirements that no layperson could possibly be expected to comply.¹¹

He also censured the defendants' expediency in hiding behind the technicalities of the statute to escape liability for errors that it in fact made.¹²

The FCRA purports to ensure accuracy and confidentiality of consumers' financial and other personal information by imposing substantive requirements on the regulated entities.¹³ These requirements may then be enforced through a combination of Congressionally-mandated private and public mechanisms.¹⁴ Accuracy in

¹¹ *Id.* at 444 (internal citations omitted).

¹² *Id.* ("Though the Court is loath to reward [the Defendants'] effort to hide behind the esoteric strictures of the FCRA to defeat claims by a layperson like Mr. Burrell—who could not possibly have been expected to comply with the procedural requirements of that statute and who attempted to address the theft of his identity in a manner that most similarly-situated consumers would consider reasonable—Defendants' arguments relating to Mr. Burrell's FCRA claims are legally, if not morally, correct").

¹³ Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012) *et seq.*

¹⁴ 15 U.S.C. §§ 1681n (civil liability for willful noncompliance with

consumer credit reporting is fundamental to an individual consumer's access to credit at fair rates as well as other services and opportunities.¹⁵ Unfortunately, as Mr. Burrell and many other consumers have learned,¹⁶ although FCRA imposes duties on the credit reporting industry to ensure accuracy, the statute's mechanisms for enforcing those duties and the norms it purports to promote are inadequate.

The blame for the failure of FCRA enforcement lies with Congress. Enforcement mechanisms, private and public, are tools of policy implementation. Congress creates and deploys these tools to enforce the substantive duties of the laws it enacts. The laws are only as effective as the mechanisms Congress puts in place to enforce them.

FCRA's flawed enforcement mechanisms are a reflection of Congressional priorities, legislative compromise, and Congress's historically fragmented and reactive approach to regulating the consumer credit market. The result is a hybrid private-public enforcement regime that is not cohesive and has created regulatory voids. For example, although the FCRA includes a private right of action to enforce its substantive obligations, it also contains numerous provisions that limit consumers' ability to enforce those provisions either by expressly preclud-

the FCRA), 1681o (civil liability for negligent noncompliance with the FCRA), and 1681s (providing for public enforcement).

¹⁵ NATIONAL CONSUMER LAW CENTER, *THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES: FAIR CREDIT REPORTING* § 1.1.1 (8th ed. 2013) ("A good credit history is a significant asset for many consumers. Information contained in a consumer's credit reporting file affects their access to home mortgages, car loans, credit cards, utility services, residential tenancies, employment, and even insurance. In addition, it can control the rate at which consumers may obtain credit.").

¹⁶ *60 Minutes: 40 Million Mistakes: Is Your Credit Report Accurate?*, (CBS television broadcast Aug. 25, 2013), <http://www.cbsnews.com/news/40-million-mistakes-is-your-credit-report-accurate-25-08-2013> (featuring stories of consumers whose efforts to correct credit reports errors were unsuccessful even after years and with legal representation).

ing individual suits or by imposing procedural hurdles that are difficult to clear.¹⁷ Additionally, complexities and ambiguities in the statute have given rise to a number of lower court divisions about the scope of the private right of action, only further impeding the FCRA's efficacy.¹⁸ Finally, pre-financial crisis public enforcement of the FCRA was not particularly robust, which meant that the public regulator did not comprehensively police the behavior of the regulated entities.¹⁹

This Article deconstructs the FCRA's enforcement regime, catalogs its flaws, and recommends how Congress could design a more effective enforcement regime. Section II briefly explains the purposes and history of the FCRA. Section III outlines the parameters of its enforcement model. Section IV examines the failure of FCRA enforcement. Finally, Section V charts a path of recommendations for Congress to consider in restructuring the FCRA's enforcement mechanisms in order to promote the statute's accuracy norm.

II. THE FCRA

The Fair Credit Reporting Act ("FCRA"), enacted in 1970, governs the collection, compilation, and use of consumer credit information and provides the regulatory framework for the credit reporting system in the United States.²⁰ Congress enacted the FCRA to ensure accuracy

¹⁷ See, e.g., 15 U.S.C. § 1681s-2(a) (imposing a duty of accuracy on companies that furnish information to credit bureaus but barring a private right of action for consumers to enforce that duty).

¹⁸ See Section IV.B, *infra*.

¹⁹ See Section IV.A, *infra*.

²⁰ 15 U.S.C. § 1681 *et seq.* Credit bureaus collect and assemble an individual consumer's credit information for use by lenders, insurance companies, employers, landlords, and other entities in making decisions affecting a consumer's eligibility for credit, insurance, employment and other purposes. See 15 U.S.C. § 1681b for a list of permissible uses of consumer reports. Information included in consumer reports generally may include consumers' credit history and payment patterns, as well as demographic and identifying information and public record information (e.g., arrests, judgments, and bankruptcies). Consumer report information may be used by lenders

and privacy of consumers' personal and financial information for the protection of consumers and the efficient functioning of the banking system.²¹ To that end, the FCRA regulates the activities of three categories of entities in the nationwide consumer reporting system: (1) consumer reporting agencies ("credit reporting agencies" or "credit bureaus");²² (2) those who use consumer reports ("users") such as lenders, insurance companies, and prospective employers; and (3) those who furnish information to credit reporting agencies ("furnishers").²³ The FCRA purports to fulfill its purposes by imposing substantive requirements on the entities the statute regulates. For example, the FCRA requires that credit bureaus "adopt reasonable procedures" to maintain "confidentiality, accuracy, relevance, and proper utilization of" consumer credit information.²⁴ Users may only solicit consumer reports for a permissible purpose and to notify consumers of any adverse action concerning an extension of credit, both provided for in the FCRA.²⁵ These requirements may then be enforced through a combination of Congressionally-mandated public and private mecha-

and other users to predict the risk of future nonpayment, default, or other adverse events.

²¹ 15 U.S.C. § 1681 (stating Congressional findings and statement of purpose). See also FEDERAL TRADE COMMISSION REPORT: FORTY YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH INTERPRETATIONS 1 (Jul. 2011) available at <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf> (acknowledging that the FCRA is designed to (1) prevent inaccurate or misleading information in consumer credit reports; (2) "prevent misuse of sensitive consumer information;" and (3) "promote the efficiency of the national banking and consumer credit systems.").

²² 15 U.S.C. §§ 1681a(t) and 1681a(p) defines "consumer reporting agency" and "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis."

²³ A furnisher is an entity that provides information that relates to consumers to a CRA for inclusion in consumer reports. 12 C.F.R. § 1022.41(c).

²⁴ 15 U.S.C. § 1681(b).

²⁵ See 15 U.S.C. §§ 1681b and 1681a(k).

nisms.²⁶

Fair credit reporting promotes consumer access to credit and other services and opportunities.²⁷ Inaccurate information on a consumer's credit report can have devastating results for that individual's access to credit, employment, insurance, or even a place to live.²⁸ Incomplete and inaccurate consumer reports harm consumers in terms of their ability to obtain credit at fair rates.²⁹ A lender considers a consumer's credit history in evaluating her creditworthiness for all kinds of credit from mortgage and student loans to credit cards.³⁰ A landlord relies on a consumer's credit report to decide whether to rent her property to a potential tenant.³¹ A prospective employer may use a credit report to decide whether to hire a job applicant.³² An insurance company may use a consumer's credit report to decide what rates to underwrite insurance involving the consumer.³³ Negative information on a consumer report translates into a lower credit score, which in turn adversely affects a consumer's ability to obtain credit or insurance on favorable terms, if at all, or to obtain employment.³⁴

Accuracy in credit reporting does not just protect consumers. It is also important to efficient functioning

²⁶ See generally 15 U.S.C. §§ 1681s (administrative enforcement), 1681n (private right of action for willful violation of the FCRA), and 1681o (private right of action for negligent violation of the FCRA).

²⁷ *Credit Reports: What Accuracy and Errors Means for Consumers*, Hrg. before the Subcomm. On Consumer Protection, Product Safety, and Insurance, S. Hrg. 113-060 (May 7, 2013).

²⁸ See *id.*

²⁹ See *id.*

³⁰ See 15 U.S.C. § 1681b(a)(3)(A).

³¹ See 15 U.S.C. § 1681b(a)(3)(F).

³² See 15 U.S.C. § 1681b(a)(3)(B).

³³ See 15 U.S.C. § 1681b(a)(3)(C).

³⁴ CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 273 (2016). Hoofnagle also discusses the ambiguities surrounding how credit scores are calculated and used. As is generally understood, the Fair Isaac Corporation, or FICO, score is most widely used, but the FCRA does not mandate a particular scoring model or methodology and multiple scoring systems exist.

of the credit markets and central to a healthy economy.³⁵ Accordingly, all credit reporting industry participants should want the FCRA to advance accuracy in consumer reporting.

Developments in technology and the contemporary market for consumer credit have put a spotlight on FCRA enforcement and its shortcomings. These developments include the exponential rise in the use of consumer credit and in the volume of credit transactions, as well as the automation of the credit reporting industry.³⁶ Each of the big three credit bureaus—Equifax, Experian, and TransUnion—currently maintains at least 200 million individual consumer files.³⁷ Approximately 10,000 entities furnish information to them about individual consumers.³⁸ These entities transmit information on over 1.3 billion consumer credit accounts every month.³⁹ These developments, combined with the rise of identity theft in the 1990s, all heighten the risk that an individual consumer's credit history contains inaccurate and negative

³⁵ *Id.*

³⁶ Robert Hunt, *A Century of Consumer Credit Reporting in America* (Fed. Res. Bank. Phil., Working Paper No. 05-13, Jun. 2005).

³⁷ See *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (documenting that Experian processes over 50 million updates daily on approximately 200 million individual consumer files); *Jianqing Wu v. Trans Union*, 2006 WL 4729755, * 7 (D. Md.) (same regarding Equifax); Brief of Amicus Curiae Trans Union, LLC, 2006 WL 3355849, * 1, filed in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007) (stating that Trans Union's database contains approximately 3.7 billion items of information associated with approximately 200 million consumers and receives over 2 billion pieces of data per month from approximately 85,000 furnishers). See also Tara Seigel Bernard, *TransUnion, Equifax, and Experian Agree to Overhaul Credit Reporting Practices*, NEW YORK TIMES (Mar. 9, 2015) available at http://www.nytimes.com/2015/03/10/business/big-credit-reporting-agencies-to-overhaul-error-fixing-process.html?_r=0.

³⁸ CONSUMER FINANCIAL PROTECTION BUREAU: KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 3 (Dec. 2012).

³⁹ *Id.*

information.⁴⁰

When Congress enacted the FCRA, legislators believed the reporting of inaccurate and misleading information was the most serious problem in the credit reporting industry.⁴¹ By the mid-1990s, it became clear that consumer report inaccuracies failed to abate despite passage of the FCRA, and the challenges of correcting them continued to plague consumers and credit reporting agencies.⁴² Congress largely attributed these prob-

⁴⁰ See, e.g. Testimony of Travis B. Plunkett, Legislative Director, before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Financial Services Regarding the Role of the Fair Credit Reporting Act in the Credit Granting Process (Jun. 12, 2003) available at: <https://epic.org/privacy/preemption/plunkett6.12.03.pdf>.

⁴¹ 15 U.S.C. § 1681(a).

⁴² S. Rep. 104-85 at 18 ("To generalize, the chief concerns that are implicated by the FCRA are: 1. the accuracy of consumer reports and problems associated with resolving disputed information; 2. the privacy concerns raised by unfettered access to consumers reports; 3. operational concerns implicated by differing statutory schemes regulating the credit reporting industry at the state level; and 4. ambiguities as to what constitutes a "consumer report" for the purposes of the FCRA that have hampered the business operations of both credit reporting bureaus and credit report user."). H.R. Rep. 103-486 ("The most common complaint [sic] that the Committee has received regarding that credit reporting system is that consumer reports are riddled with errors, and that even after incorrect or incomplete information is discovered, it can be virtually impossible to correct the information in the consumer's file. In many cases, once an error is discovered by the consumer, it takes several months and sometimes years to have it corrected. Moreover, there is no assurance that, once inaccurate and incomplete information is corrected in a consumer's file, it will remain corrected. The problem with consumer report errors and the difficulty involved in promptly correcting those errors was revealed to the Committee during its hearings on the FCRA over the past several years. Consumer advocates, state law enforcement officials, and federal regulators all testified that the number of errors in consumer reports was unacceptably high and that the process for reinvestigating consumer disputes was lengthy and inefficient. The FTC has testified that the number of complaints about the credit reporting industry exceeded the number for any other category of complaints in both 1991 and 1992 and predicted the same re-

lems to the increased use of computers to transmit and store consumer information, and the increased volume of data that need to be transmitted and recorded due to the rise of consumer credit use.⁴³ One industry expert added that the credit reporting market offered little incentive to police and correct accuracy problems because lenders rather than borrowers were the credit reporting agencies' primary customers.⁴⁴ As such, Congress amended the statute in 1996, approximately 25 years after it first enacted the FCRA.⁴⁵

The Consumer Credit Reporting Reform Act of 1996 (the "CCRRA") extensively amended the FCRA in a number of areas, mostly designed to address inaccuracy issues under the guise of increased consumer protection.⁴⁶ To that end, the amendments imposed new duties

sult for 1993.").

⁴³ S. Rep. 104-85 at 18 ("A number of problems in the FCRA's implementation and interpretation have arisen in the years since the law's enactment. Many of these problems are a result of ambiguities in the statute; other problems have arisen as the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years.").

⁴⁴ *Hearing before the Subcomm. On Consumer Affairs and Coinage of the H. Comm. On Banking, Finance, and Urban Affairs*, 102d Cong. 60-61 (1991) (statement of Dr. Culnan, Georgetown Univ. School of Bus. Admin.).

⁴⁵ Congress has amended the FCRA several times, most notably in 1996 and 2003. The two most extensive amendments were the Consumer Credit Reporting Reform Act of 1996 ("the CCRRA"), Pub. L. No. 104-208 (Sept. 30, 1996) and the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub. L. No. 108-159 (Dec. 4, 2003).

⁴⁶ Many of the changes contained in the CCRRA had been proposed in prior bills in the Senate or House of Representatives in 1994 and 1995. These bills' legislative history is informative. In 1994, the House Committee on Banking, Finance, and Urban Affairs approved H.R. 1015, 103d Cong. (2d Sess. 1994), the Consumer Reporting Reform Act of 1994, and the Senate passed S. 783, 103d Cong. (1st Sess. 1994), the Consumer Reporting Act of 1994. In 1995, S. 650, the Economic Growth and Regulatory Paperwork Reduction Act of 1995, was introduced but failed to pass. See, e.g., S. Rep. No. 104-185, 104th Cong. (1st Sess. 1995); H. Rep. 103-486, 103d Cong. (2d Sess. 1994). See also Carol A. Ahern & Jeffrey P. Taft, *The Consumer Credit Reporting Reform Act of 1996: An Attempt to Make the Fair*

on the regulated entities with the goal of improving accuracy in credit reporting.⁴⁷ First, it expanded the duties of credit bureaus, particularly in regard to their responses to consumers' disputes.⁴⁸ Specifically, it established a 30-day time frame for completion of a reinvestigation, mandated written notice to the consumer of the results of the investigation within five days of its completion, and added restrictions on the reinsertion of items that were deleted following a dispute.⁴⁹ The CCRRA also increased the obligations of users of consumer reports, particularly employers.⁵⁰

Most significantly, the CCRRA imposed duties on a class of entities not previously treated – furnishers.⁵¹ A furnisher is an entity that provides information—positive and negative—about consumers to the credit bureau to include in consumer reports.⁵² Most often furnishers are lenders and creditors, entities that also purchase and use credit reports to decide whether and on what terms to provide credit to consumers.

Furnisher duties and liability, in particular, were pressure points among legislators.⁵³ A strong lobby argued against imposing any liability on furnishers, citing the risk of a dramatic increase in litigation.⁵⁴ The bill that passed was a compromise on furnisher liability, precluding consumers from privately enforcing the furnishers' new duty of accuracy while allowing them to sue to enforce furnishers' duty to reinvestigate disputed report information following a consumer's complaint to the

Credit Reporting Act More Fair, 51 Consumer Fin. L.Q. Rep. 304, 314 (1997).

⁴⁷ See generally *id.*

⁴⁸ Pub. L. No. 104-208 codified at 15 U.S.C. § 1681i.

⁴⁹ *Id.*

⁵⁰ Pub. L. No. 104-208 codified at 15 U.S.C. § 1681m.

⁵¹ Pub. L. No. 104-208 codified at 15 U.S.C. § 1681s-2.

⁵² 12 C.F.R. § 1022.41(c).

⁵³ *Hearing before the Subcomm. On Consumer Affairs & Coinage of the H. Comm. on Banking, Fin., and Urban Affairs*, 102d Cong. 84, 86 (1991).

⁵⁴ *Id.*

credit bureau.⁵⁵ The CCRRA also increased remedies for civil liability⁵⁶ and expanded enforcement authority for the Federal Trade Commission (the “FTC”), giving it power to sue in federal court for violations of the FCRA.⁵⁷

Congress then passed the Fair and Accurate Credit Transactions Act of 2003 (the “FACTA”), which further amended the FCRA.⁵⁸ These amendments focused on preemption, identify theft, and accuracy issues.⁵⁹

Industry was concerned over the imminent expiration of FCRA’s preemption of certain state causes of action, and wanted to shore up continued preemption of those state laws.⁶⁰ Between 1996 and 2003, the incidence of identity theft had escalated and reached an intolerable level, and industry was concerned about liability under state legislation.⁶¹ Industry convinced Congress to permanently extend the FCRA’s preemption of state laws, “under the theory that states would create conflicting obligations that could harm a national consumer reporting system.”⁶² The FTC supported industry over consumer interests on this issue and its success was a foregone conclusion.⁶³

⁵⁵ 15 U.S.C. § 1681s-2, as amended by Pub. L. No. 104-208 (1999).

⁵⁶ 15 U.S.C. § 1681s.

⁵⁷ *Id.*

⁵⁸ FACTA, Pub. L. No. 108-159, 117 Stat. 1952 (Dec. 4, 2003).

⁵⁹ S. Rep. No. 108-166, 108th Congress, 1st Sess, Amending the Fair Credit Reporting Act, p. 6-7 (Oct. 17, 2003); H. Rep. No. 108-263, 108th Congress, 1st Sess, Fair and Accurate Credit Transactions Act of 2003, p. 7 (Sept. 4, 2003).

⁶⁰ Before FACTA, the FCRA provided that its preemptions of state laws would not apply to state laws that were enacted after January 1, 2004 and that, offered consumers greater protections than those of the FCRA. Congress not only eliminated that provision, it added a long list of new preemptions that significantly limit states’ abilities to regulate much of the FCRA’s subject matter and conduct requirements. FACTA § 711 (2003).

⁶¹ HOOFNAGLE, *supra* note 30 at 276 (“The 1996 amendments preempted state law until 2003, and during this time, identity theft became a major concern and topic of state legislation.”).

⁶² HOOFNAGLE, *supra* note 30 at 276.

⁶³ HOOFNAGLE, *supra* note 30 at 288 (“The FTC’s leadership used its

Two FACTA sections try to improve the accuracy of information and give consumers a new right to dispute data included in reports directly with the company that furnished it.⁶⁴ One provides for federal agencies to promulgate accuracy guidelines for financial institutions and other creditors that furnish information to credit bureaus.⁶⁵ In July 2009, the agencies published the guidelines that companies should follow to ensure the accuracy and integrity of information they furnish to a credit reporting agency, ostensibly providing a guide to furnish FCRA compliance.⁶⁶ The other gives consumers the ability to directly dispute inaccurate information with furnishers.⁶⁷ But the FCRA still precludes individual consumers from suing furnishers directly for violations arising out of their accuracy duties.⁶⁸ Instead, public regulators monitor compliance with the guidelines.

Despite Congress's attempts to overhaul the FCRA in 1996 and 2003, inaccuracies continue to plague consumers. In a landmark Congressionally-mandated study, the FTC concluded that twenty-three percent of consum-

muscle to lobby for permanent preemption of state law. Agency leaders styled the 2003 amendments as a 'reauthorization' (it wasn't—the FCRA would continue to exist even if Congress took no action). In testimony to Congress, its first recommendation—discussed before identity theft provisions and free consumer report rights—was to permanently renew preemption.”).

⁶⁴ Though not the focus of this Article, the FACTA amendments also tried to provide consumers with tools to fight identity theft and restore their credit worthiness. FACTA, FACTA §§ 111-115, 151 -157, codified at 15 U.S.C. §§ 1681a, 1681c-1, 1681c-2, 16821g, 1681m, 1681s.

⁶⁵ FACTA § 312(a), FCRA § 623(e)(1), codified at 15 U.S.C. § 1681s-2(a)(8)(A).

⁶⁶ See 16 C.F.R. § 660 (Jul. 1, 2009); Regulation V, 12 C.F.R. § 1022.42.

⁶⁷ FACTA § 312(c), FCRA § 623(a)(8) (codified at 15 U.S.C. § 1681s-2(a)(8)(A)).

⁶⁸ FCRA § 1681s-2(a)(8) gives a consumer the right to directly dispute inaccurate information but FCRA § 1681s-2(c) bars furnisher liability for any violations of FCRA § 1681s-2(a), including any regulations issued thereunder.

ers identified an error on their credit reports.⁶⁹ Thirteen percent experienced a change in their credit score as a result of correcting the error.⁷⁰ Five percent of the study participants had errors that, once corrected, improved their credit score so that they could obtain credit at a lower price.⁷¹ The report suggests that over 10 million consumers are paying higher rates for credit as a result of report inaccuracies.⁷²

FCRA has failed to promote accuracy in consumer reporting for two principal reasons. First, industry has never embraced the FCRA's accuracy and fairness mandates and acts in numerous ways to undermine them.⁷³ Second, as explained below, the FCRA's enforcement regime has proved inadequate to protect consumers and promote accuracy in consumer credit reporting.⁷⁴ The failure of FCRA enforcement arises out of a history of limited public enforcement and a structurally weak private right of action, particularly with regard to companies that furnish information to the credit bureaus.⁷⁵ The next section outlines the FCRA enforcement model and previews the flaws in its design and implementation that have caused regulatory voids in its enforcement.

III. THE FCRA ENFORCEMENT MODEL

The FCRA enforcement framework is a hybrid

⁶⁹ FEDERAL TRADE COMMISSION: REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (Jan. 2015), *available at* <https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ HOOFNAGLE, *supra* note 30 at 275. Hoofnagle explains the myriad ways the credit reporting industry has undermined the FCRA's fairness and accuracy norms, for instance, by employing an electronic verification system for reinvestigations that works a form of automated injustice in that disputed information is never actually investigated.

⁷⁴ *See* Sections III and IV *infra*.

⁷⁵ *Id.*

model of public and private enforcement.⁷⁶ Congress has authorized certain public regulators to enforce the statute through a mix of regulation and enforcement actions, and also has authorized private civil litigation by individual consumers in a narrow set of circumstances.⁷⁷

The FCRA's hybrid enforcement model is typical of many of our laws regulating consumer credit.⁷⁸ Consumer credit regulation in the United States consists of disparate statutes, regulations, and common law at the federal and state levels. These laws regulate by product (residential mortgage loan, student loan, payday loan, and auto finance, credit cards), by stage of the transaction (solicitation, application, origination, servicing, collection), and by concern (access to credit, fair lending, credit reporting, and debt collection). The result is a decentralized "patchwork" of federal and state laws that attempts to protect consumers through a combination of public enforcement and private rights of action without any singular or cohesive regulatory framework.⁷⁹

⁷⁶ Public enforcement has been defined as the "use of public agents . . . to detect and sanction those who violate the law." A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45 (2000).

⁷⁷ See generally 15 U.S.C. § 1681s for administrative enforcement and 15 U.S.C. §§ 1681n, 1681o for civil liability (i.e. private enforcement).

⁷⁸ Between 1965 and 1975, Congress passed a number of statutes designed to protect consumers with respect to financial products and services, including without limitation the Truth in Lending Act, see 15 U.S.C. § 1601 *et seq.*, the Fair Debt Collection Practices Act, 15 U.S.C. § 1691 *et seq.*, the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* At the time, Congress acknowledged the need for private enforcement mechanisms to supplement public enforcement, so many of the statutes provided private rights of action not recognized under the common law or with reduced burdens of proof. Congress also provided for public enforcement of these laws.⁷⁸ Public enforcement was the province of the federal prudential banking regulators (particularly the Federal Reserve Board) and other federal agencies, such as the Federal Trade Commission (FTC) and the Department of Housing and Urban Development (HUD).

⁷⁹ Edward Crane et al., *U.S. Consumer Protection Law: A Federalist*

There are two explanations for this state of the law. The first lies with U.S. federalism, which allocates sovereign powers to both the federal and state governments.⁸⁰ Where there are shared powers, the potential for multiple layers of regulation exists.⁸¹ The second explanation reflects a historical pattern in the development of consumer protection law in the United States.⁸² That pattern reveals that consumer protection law evolves only when government actors respond *ex post* to a socio-economic and political crisis, which demands some kind of regulatory action to prevent recurrence of the cause of the crisis.⁸³ Recent history supports this latter explanation.

Our collective experience during the global financial crisis and ensuing recession demonstrates that the enforcement regimes of these laws were inadequate to deter undesirable practices related to the extension of credit and collection of debt. Public regulators failed to identify, redress, and deter consumer credit abuses until after they had become systemic and inflicted both micro- and macro-level economic and social consequences. Private lawsuits were slow to expose abuses. Congress responded to the crisis *post hoc* by enacting the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (the “Dodd-Frank Act”).⁸⁴ The Dodd-Frank Act created a new federal agency, the Consumer Financial

Patchwork, 78 DEF. COUNS. J. 305 (Jul. 2011).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Waller Brady and Acosta, *Consumer Protection in the United States: An Overview*, 2011 EUR. J. CONS. L. 853 (2011).

⁸³ *Id.* (“This pattern began against the background of the 19th century common law, which emphasized freedom of contract and caveat emptor (let the buyer beware). Over time, specific crises and political events led to both the creation of government bureaucracies with jurisdiction over specific products and practices affecting consumers and a broad array of private rights of actions where consumers can sue for damages, injunctions, attorney fees, and litigation costs if they can show harm from the illegal practice.”).

⁸⁴ Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, Pub. L. No. 111-203 (July 21, 2010).

Protection Bureau (the "CFPB"), to strengthen public enforcement of consumer credit laws and prevent recurrence of the abuses and practices that culminated in the crisis.⁸⁵ The Dodd-Frank Act grants the CFPB exclusive or shared jurisdiction to enforce all or a portion of eighteen federal consumer financial laws⁸⁶ and their implementing regulations.⁸⁷ Among the goals of the new agency is to consolidate the enforcement of consumer credit regulations.⁸⁸

⁸⁵ Title X of the Dodd-Frank Act establishes the CFPB as an independent agency within the Federal Reserve that has executive agency status. Dodd-Frank § 1011. The CFPB regulates the offering and provision of consumer financial products and services under federal consumer financial laws. Dodd-Frank § 1021. The Bureau seeks to implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that market for consumer financial products and services are fair, transparent and competitive. *Id.*

⁸⁶ These laws include all or select portions of the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801 *et seq.*, the Consumer Leasing Act of 1976, 15 U.S.C. § 1667 *et seq.*, the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, the Fair Credit Billing Act, 15 U.S.C. § 1666 *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, the Home Owners Protection Act of 1998, 12 U.S.C. § 4901 *et seq.*, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, the Federal Deposit Insurance Act, 12 U.S.C. § 1831t(c)-(f), the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802-09, the Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801 *et seq.*, the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1601 note, the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*, the S.A.F.E. Mortgage Licensing Act of 1974, 12 U.S.C. § 5101 *et seq.*, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, the Truth in Savings Act, 12 U.S.C. § 4301 *et seq.*, Section 626 of the Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701. *See* Dodd-Frank Act, § 1002(12).

⁸⁷ These regulations include Regulations B through P as well as Regulations V, X, Z, and DD.

⁸⁸ The CFPB has two sources of enforcement authority. First, Section 1036 of the Dodd Frank Act imposes general civil liability for violations of federal consumer financial services laws by covered persons and entities. The second source of the CFPB's enforcement authority

Although Congress created the CFPB in an effort to consolidate public regulation of consumer credit laws, public enforcement of the FCRA remains extremely fragmented at the federal level. For example, at least four federal agencies have some enforcement authority with respect to FCRA.⁸⁹ The CFPB, the FTC and other federal financial agencies including the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, are currently authorized to enforce the FCRA as to entities over which they have jurisdiction, while the CFPB also has supervisory authority and primary rule-making authority as a result of the Dodd-Frank Act.⁹⁰

Further, public enforcement of the FCRA historically has been less than vigorous, perhaps because Congress did not sufficiently empower the FTC to regulate and enforce the FCRA.⁹¹ Post-financial crisis public enforcement of the credit reporting system appears to be more robust.⁹² For example, the CFPB is more closely policing the practices of credit bureaus and furnishers, but it is too early to adequately assess the success of its efforts.⁹³

Further, Congress's post-financial crisis initiative largely ignores the private rights of action. The Dodd Frank Act does not create private rights of action for consumers or amend existing ones. That said, it does not preclude existing private rights of action that a consum-

is Section 1031 of the Dodd-Frank Act, which broadly empowers the CFPB to take action to prevent and address "unfair, deceptive, or abusive acts and practices" or UDAAPs. In exercising this authority, the CFPB may act to enforce regulations it promulgates, pursuant to Section 1031(b), that declare particular acts or practices to be UDAAPs, and it may also seek to redress and prevent practices it deems to be UDAAPs during the course of its enforcement actions.

⁸⁹ See 15 U.S.C. § 1681s(a).

⁹⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act § 1011-12.

⁹¹ See Section IV.A. *infra*.

⁹² *Id.*

⁹³ *Id.*

er has under federal or state law. This means that the FCRA's private right of action remains intact, but without any clarification, improvements, or amendments.

Although the FCRA includes a private right of action to enforce some of its substantive provisions against some of the entities it regulates, the statute also contains numerous provisions that limit consumers' ability to enforce those provisions either by expressly precluding individual suits or by imposing procedural hurdles that are difficult to satisfy.⁹⁴ Additionally, complexities and ambiguities in the statute have given rise to a number of lower court divisions about the scope of the private right of action, only further impeding the FCRA's efficacy.⁹⁵ The divisions are attributable to poor structural design in the rules that govern the private right of action, such as standing, preemption, and remedies, among others.

The failure of FCRA enforcement means that the norms the FCRA seeks to protect, particularly with regard to accuracy of consumers' personal information, are under-enforced. Mr. Burrell's experience is representative of many other consumers, who are unable to obtain justice at an individual level by enforcing the regulated entities' obligation to maintain accurate information.⁹⁶ His experience highlights the imperative for redesigning the FCRA's enforcement mechanism.

In practice, neither public nor private enforcement is perfect. Broadly speaking, they share many of the same goals. Both are policy implementation tools deployed to detect, correct, and deter socially and/or economically undesirable conduct. But the mechanisms by which they achieve those goals are distinct, and the

⁹⁴ See Section IV.B *infra*.

⁹⁵ *Id.*

⁹⁶ *Credit Reports: What Accuracy and Errors Means for Consumers*, Prepared Statement of Brenda Faith Campbell Hrg. before the Subcomm. On Consumer Protection, Product Safety, and Insurance, S. Hrg. 113-060 (May 7, 2013) (testifying as to her years-long battle to obtain justice arising out of errors on her credit report, which entailed over \$17,000 in attorney's fees and costs).

tradeoffs inherent in the mechanisms are often in opposition.⁹⁷ Further, either can result in under- or over-enforcement of the law.⁹⁸ Rather than view these two types of enforcement as existing in separate spheres of influence, it is better to regard them as complementary enforcement mechanisms that support the relevant regulatory framework.⁹⁹ The goal therefore should be a hybrid model of enforcement.

But, as our experience with FCRA enforcement indicates, mere use of a hybrid private-public enforcement model does not guarantee optimal enforcement of the

⁹⁷ For a discussion of the relative advantages and disadvantages of private and public enforcement, see Burbank, Farhang, & Kritzer, 17 *Private Enforcement*, LEWIS & CLARK L. REV. 637, 661 (2013); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106 (2005).

⁹⁸ A fragmented enforcement regime is subject to the dual risks of under-and over-enforcement. Under-enforcement can arise when there are numerous uncoordinated regulators who fail to devote resources to monitoring a product, party or market participant because some or all of them believe incorrectly that the other regulator is adequately addressing the concern. Over-enforcement can arise where the numerous regulators, public and private, are simultaneously devoting resources to a particular concern leading to multiplicative enforcement.

⁹⁹ David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L. J. 616, 623 (2013) ("Legal scholarship . . . has moved away from a binary conception of the choice between public and private enforcement and is instead exploring their intersections."); Burbank, Farhang, & Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661 (2013) ("The choice of private enforcement must be understood in relation to potential sources of public enforcement Public and private enforcement can be treated as substitutes for one another, or can be used in a complementary fashion. Although public and private enforcement are sometimes used independently of one another, they are also commonly used in combination, with some powers being delegated to administrative actors, while others are left to private litigants and courts within the same statute."); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (Mar. 2012) ("Private regulation through litigation is integral to the structure of the modern administrative state.").

underlying laws. Public and private enforcement must be strategically designed and deployed to effectively enforce substantive laws.¹⁰⁰ Policymakers - legislators, regulators, and the judiciary - shape enforcement tools through legal rules that can encourage or discourage public and private regulators from enforcing the law.¹⁰¹ As explored below, Congress may deploy a hybrid public-private enforcement mechanism to enforce a statute like FCRA with good intentions, but the mechanism may ultimately fail in practice to advance the statute's purpose.

IV. THE FAILURE OF FCRA ENFORCEMENT

A. *Limited Public Enforcement of the FCRA Caused a Regulatory Void*

An examination of the public enforcement mechanism and regulatory activity before and after Dodd-Frank's reforms shows that pre-financial crisis public enforcement was not sufficiently vigorous to fulfill the FCRA's goals and caused a regulatory void. Before Dodd-Frank, the public enforcement mechanism was not robust for a couple of reasons. First, the FTC lacked the ability to promulgate rules to regulate business practices in the credit reporting industry. And second, the FTC's enforcement activity was minimal.

Congress initially limited the FTC's ability to regulate *ex ante* the business practices of the regulated enti-

¹⁰⁰ Burbank, Farhang, and Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 710 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (Mar. 2012).

¹⁰¹ Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106 (2005) ("[T]he desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors with the result that making such determinations therefore requires familiarity with the nature of the particular policy problem, the substantive goals of the regulatory scheme, and the likely interaction of private lawsuits with other elements of the government's enforcement strategy").

ties. As originally passed, the FCRA entrusted primary enforcement authority of its provisions to the FTC but prohibited the FTC from issuing regulations.¹⁰² This meant that the FTC lacked authority to promulgate rules, which could have regulated the activities of the credit bureaus, users, and furnishers to prevent and deter unfair practices concerning accuracy in consumer credit reports.

Congress lifted this prohibition in 1999, almost thirty years later.¹⁰³ Then Congress amended the FCRA in 2003 to specifically require the FTC to issue regulations to implement some of its provisions.¹⁰⁴ As a result of these amendments, the FTC promulgated regulations that applied to the credit bureaus, users, and *non-bank* furnishers.¹⁰⁵ This furnisher limitation was unfortunate for consumers and accuracy because it exempted lending furnishers—i.e., banks—from the purview of FTC regulations.

The FCRA, as originally enacted, did deputize the FTC with enforcement authority.¹⁰⁶ Specifically, the FTC

¹⁰² Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 506(b) (1999) (striking 15 U.S.C. § 1681s(a)(4)).

¹⁰³ *Id.*

¹⁰⁴ Fair and Accurate Credit Reporting Act of 2003, Pub. L. No. 108-159 (2003).

¹⁰⁵ The FTC withdrew many of its FCRA regulations in April 2012 in connection with the CFPB's assumption of primary rulemaking authority for the FCRA, and the CFPB republished the rules. See 77 Fed. Reg. 22201 (Apr. 13, 2012) (to be codified at 16 C.F.R. §§ 320, 321, 322, 603, 60, 611, 613, 614 and 902).

¹⁰⁶ 15 U.S.C. § 1681s(a) ("For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C. § 45 (a)), and shall be subject to enforcement by the Federal Trade Commission under section 5(b) of that Act [15 U.S.C. § 45 (b)] with respect to any consumer reporting agency or person that is subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other

may seek injunctive and ancillary relief administratively or through federal district courts.¹⁰⁷ Further, the FTC may file suit in federal court to recover civil penalties of up to \$3,500 per violation, "in the event of a knowing violation, which constitutes a pattern or practice of violations."¹⁰⁸ In a federal court action, the FTC also may seek monetary relief in the form of redress or disgorgement and other equitable relief.¹⁰⁹

Despite its longstanding enforcement authority, civil enforcement activity during the FTC's pre-financial crisis tenure was limited. During its forty-year history of enforcing the FCRA, the FTC brought just 87 enforcement actions against credit bureaus, users of consumer reports, and furnishers of information to credit bureaus.¹¹⁰ Because the FCRA originally was focused on credit bureaus and users, much of the FTC's efforts targeted them, largely omitting furnishers as targets of enforcement activity.¹¹¹

jurisdictional tests under the Federal Trade Commission Act.").

¹⁰⁷ *See id.*

¹⁰⁸ *See* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 450 (codified as amended at 15 U.S.C. § 1681s(a)) (the amount set forth in the statute, as enacted in 1996, is \$2,500 per knowing violation). Subsequently, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, the FTC increased the amount to \$3,500 per violation, effective February 9, 2009. *See* 74 Fed. Reg. 857 (Jan. 9, 2009) (to be codified at 16 C.F.R. § 1). Courts consider the degree of culpability, any history of similar conduct, ability to pay, the effect on ability to continue to do business, and such other matters as justice may require in calculating any penalty amount. *See* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 450 (codified as amended at 15 U.S.C. § 1681s(a)).

¹⁰⁹ 15 U.S.C. § 1681s.

¹¹⁰ FEDERAL TRADE COMMISSION REPORT, FORTY YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH INTERPRETATIONS 1 (Jul. 2011), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>.

¹¹¹ *See id.* at 109-111.

The FTC's relatively limited enforcement of the FCRA reflected Congressional priorities. Congress intended that private enforcement be the primary method of policing the credit reporting industry's compliance with the FCRA.¹¹² Likewise, the FTC has embraced Congressional intent that individual consumers play a more critical role in enforcing the law.¹¹³ During the legislative hearings that culminated in the CCRRA amendments, the FTC acknowledged that the FCRA "was designed to be largely self-enforcing" and urged Congress to enact amendments that would maintain "the capacity of consumers to bring private actions to enforce their rights under the statute."¹¹⁴

Second, the limited public enforcement with respect to furnishers reflected the mechanisms provided for in the statute. There were no duties imposed on furnishers until 1996, 25 years into FCRA enforcement.¹¹⁵ Regulation of furnishers, put simply, was not a priority. Congress also later curtailed the scope of the FTC's enforcement authority with respect to furnisher liability by limiting the FTC's civil penalty authority.¹¹⁶ Specifically, in a civil enforcement action, a court may not impose a civil penalty on a furnisher for failure to provide accurate information to credit bureaus¹¹⁷ unless the furnisher commits the violation after that court has already issued an order or injunction prohibiting FCRA violations.¹¹⁸

Congress's inaction with respect to furnishers over many years caused a regulatory void. The failure to impose substantial duties on furnishers and to authorize the public regulators to police compliance with those duties meant that an entire category of credit reporting in-

¹¹² NATIONAL CONSUMER LAW CENTER, *supra* note 11, at § 11.1.

¹¹³ S. Rep. No. 103-209, at 6 (1993).

¹¹⁴ *Id.*

¹¹⁵ Consumer Credit Reporting Reform Act of 1996 ("the CCRRA"), Pub. L. No. 104-208 (Sept. 30, 1996)

¹¹⁶ 15 U.S.C. § 1681s(a)(2)(C).

¹¹⁷ Furnishers must provide accurate information to credit bureaus pursuant to 15 U.S.C. § 1681s-2(a)

¹¹⁸ 15 U.S.C. § 1681s(a)(2)(C).

dustry participants was left unregulated. Even after the FCRA nominally imposed duties on furnishers, it appears the public regulators did not prioritize enforcement. Perhaps a dearth of resources among competing agency concerns kept furnisher compliance from being a priority. Perhaps FTC regulators believed that the private enforcement mechanism was sufficiently effective to motivate FCRA compliance and deter violations. Whatever the reason, the minimal level of public regulation and enforcement vis-à-vis furnishers imposed heavy lifting on the FCRA's private right of action.¹¹⁹

In the wake of the global financial crisis, the CFPB and the FTC have committed to more robust public enforcement of the FCRA.¹²⁰ Both federal regulators have increased their scrutiny of users and furnishers of consumer information to facilitate more robust public enforcement of the FCRA.

The CFPB examines the FCRA's regulated entities for their compliance with the FCRA's requirements for handling consumers' credit information within the purview of its supervisory authority.¹²¹ The CFPB's increased attention initially focused on monitoring how credit bureaus satisfied their dispute-handling obligations under

¹¹⁹ See *infra* Section IV.B.

¹²⁰ Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau, Credit Reporting Field Hearing, Detroit, Michigan (July 16, 2012) available at <http://www.consumerfinance.gov/newsroom/prepared-remarks-by-richard-cordray-on-credit-reporting/>; *Credit Reports: What Accuracy and Errors Means for Consumers*, Hearing before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the Comm. on Commerce, Science, and Transportation, 113th Cong. 113-060 (2013); *The Accuracy and Completeness of Consumer Credit Reports: Hearing before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the Comm. on Commerce, Science, and Transportation*, 113th Cong. 5 (2013) (statement of Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection, F.T.C.) ("Vigorous enforcement of the FCRA is a high priority of the Commission.").

¹²¹ The CFPB's supervisory authority is provided for in Dodd-Frank §§ 1024 and 1025, codified at 12 U.S.C. §§ 5514-5515.

the FCRA.¹²² And as recently as 2015, the CFPB discovered one or more entities had failed to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information furnished to CRAs.¹²³

The CFPB signaled its particular focus on furnisher compliance with bulletins issued in September 2013 and February 2014, addressing specifically the duty of furnishers to investigate and respond to consumer disputes.¹²⁴ According to the CFPB, the FCRA requires that furnishers investigate and respond to the dispute and consider “all information” relevant to the dispute.¹²⁵ Further, the CFPB expressed its concern that creditors did not have systems and other resources to properly investigate disputes, and warned creditors that if it found violations of the FCRA it would “take appropriate supervisory and enforcement actions to address violations and seek all appropriate corrective measures, including remediation of harm to consumers.”¹²⁶ In its February 27, 2014, bulletin, the CFPB states that it “will continue to monitor furnishers’ compliance with the FCRA regarding consumer disputes of information they have furnished to

¹²² Consumer Financial Protection Bureau, Supervisory Highlights 5 (Winter 2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf; Consumer Financial Protection Bureau, Supervisory Highlights 5 (Fall 2014), *available at* http://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf; Consumer Financial Protection Bureau, Supervisory Highlights 9 (Spring 2014), *available at* http://files.consumerfinance.gov/f/201405_cfpb_supervisory-highlights-spring-2014.pdf.

¹²³ See Consumer Financial Protection Bureau, Supervisory Highlights (Fall 2015), *available at* http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

¹²⁴ Consumer Financial Protection Bureau, CFPB Bulletin 2013-09 (Sept. 3, 2013); Consumer Financial Protection Bureau, CFPB Bulletin 2014-01 (Feb. 27, 2014).

¹²⁵ Consumer Financial Protection Bureau, CFPB Bulletin 2013-09 (Sept. 3, 2013)

¹²⁶ *Id.*

[consumer reporting agencies], [and] [f]urnishers should take immediate steps to ensure they are fulfilling their obligations under the law.”¹²⁷

The FTC has also augmented its efforts to regulate credit bureaus, users, and furnishers since 2008. With regard to furnishers, the FTC created the Furnisher Rule, effective July 1, 2010,¹²⁸ which prescribes regulations furnishers must comply with in the event a consumer directly disputes her credit report information with the furnisher. In 2013, the FTC brought its first enforcement action against a furnisher for violations of the Furnisher Rule, resulting in a \$3.5 million settlement—the second largest penalty in the history of the FTC’s FCRA enforcement history.¹²⁹ A 2015 study released by the FTC found that 23% of the consumers in the study identified inaccurate information in their credit reports.¹³⁰

¹²⁷ Consumer Financial Protection Bureau, CFPB Bulletin 2014-01 (Feb. 27, 2014).

¹²⁸ 15 U.S.C. § 1681s-2(e)(1) required the FTC to establish and maintain guidelines for furnishers regarding the accuracy and integrity of information, to prescribe regulations requiring furnishers to establish reasonable policies and procedures to implement those guidelines. The FTC published those regulations, respectively, at 16 C.F.R. § 610 and 16 C.F.R. § 660. In July 2011, the Dodd-Frank Act transferred this rulemaking authority to the CFPB, and the CFPB republished those regulations at 12 C.F.R. § 1022, respectively at subparts N and E. The FTC enforces these CFPB regulations with respect to entities over which the FTC retains jurisdiction under the FCRA.

¹²⁹ See Complaint, *United States v. Certegy Check Servs., Inc.*, No. 1:13-cv-01247 (D.D.C. Aug. 15, 2013). Certegy Check Services, Inc., one of the nation’s largest check authorization service companies, has agreed to pay \$3.5 million to settle Federal Trade Commission charges that it violated the Fair Credit Reporting Act (FCRA). This is the first Commission action alleging violations of the Furnisher Rule, which went into effect on July 1, 2010.

¹³⁰ FEDERAL TRADE COMMISSION: REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (Jan. 2015), *available at* <https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf>.

Some states have also taken action to fill the regulatory void. In March 2015, New York Attorney General Eric Schneiderman settled a matter requiring the three nationwide credit bureaus to switch from an automated verification system to one that actually investigates disputes.¹³¹ This settlement requires those three credit bureaus to use humans to perform manual reviews of disputes instead of automating the process.¹³²

Macro-level consequences of the increased public oversight in this area remain to be assessed as of the writing of this Article. The reality is that for more than four decades, the vast majority of the FCRA's existence, a relatively thin public enforcement mechanism created a regulatory void that Congress ostensibly filled with a private right of action. The next section describes and deconstructs the structure of the private right of action to illuminate the flaws in its design.

B. Flawed Private Right of Action Impairs Individual Access to Justice

Congress included a private enforcement mechanism in the FCRA in acknowledgement that a consumer's interest in accuracy and privacy of her financial and other personal information is important. The FCRA expressly deputizes individuals with authority to enforce *some* of its requirements against *some* of its regulated entities.¹³³

Specifically, a consumer has a private right of action against *any person*—credit bureaus, users, and furnishers—for *negligent* violations of the FCRA.¹³⁴ A pre-

¹³¹ HOOFNAGLE, *supra* note 30 at 280 (discussing *In the Matter of Investigation by Eric T. Schneiderman, Attorney General of the State of New York of Experian Information Solutions, Inc.; Equifax Information Services, LLC; and TransUnion LLC* (Mar. 2015)).

¹³² *Id.*

¹³³ 15 U.S.C. §§ 1681n, 1681o. Before the 1996 amendments, sections 1681n and o provided for suit against a CRA or against a user of credit information, but not against a furnisher.

¹³⁴ 15 U.S.C. § 1681o.

vailing consumer is entitled to any actual damages sustained as a result of the negligent noncompliance plus the costs of the action and reasonable attorney's fees.¹³⁵

A consumer also has a private right of action against *any person* for a *willful* violation of the FCRA.¹³⁶ A prevailing consumer is entitled to any actual damages sustained by the consumer as a result of the willful noncompliance, or statutory damages of not less than \$100 and not more than \$1,000, whichever is greater, plus punitive damages as the court may allow, together with costs of the action plus reasonable attorney's fees.¹³⁷

These provisions appear straightforward enough in terms of the structural design of FCRA's private enforcement mechanism. The complexities and weaknesses in the structural design of the FCRA private right of action arise for other reasons.

First, Congress limited the scope of the private right of action in a number of ways in response to industry pressures. The FCRA precludes furnishers from private litigation liability for violating the FCRA except where a furnisher has failed to comply with the statutory reinvestigation procedure.¹³⁸ The statute appears to exempt users from all private litigation liability as well.¹³⁹ That leaves the credit bureaus subject to the greatest exposure for liability by private litigants.¹⁴⁰ In short, the statute's extensive liability exemptions for users and furnishers—who often overlap—mean the FCRA's private enforcement mechanism has enormous gaps.

¹³⁵ *Id.*

¹³⁶ 15 U.S.C. § 1681n.

¹³⁷ *Id.*

¹³⁸ See generally 15 U.S.C. § 1681s-2b; see also *infra* Section IV.B.1.

¹³⁹ See 15 U.S.C. § 1681m.

¹⁴⁰ The FCRA provides for private right of action against credit bureaus in two respects, both based on inaccuracy claims: (1) 1681e(b) claim failure to maintain reasonable procedures to maintain maximum possible accuracy of the information contained in consumer reports; and (2) 1681i claim to dispute the accuracy or completeness of information in her file.

Second, the judiciary has curtailed consumers' incentives to privately enforce the FCRA through its interpretations of the statute. Gaps in the structural design of FCRA's private enforcement mechanism have led to divided decisional law interpreting the statutes, resulting also in under-enforcement of the FCRA.¹⁴¹ With regard to FCRA, such gaps include-without limitation-identifying who has standing to assert a claim, articulating pleading standards to properly state a claim, specifying when FCRA preempts state law causes of action against regulated entities, interpreting fee- and cost-shifting rules, among others.

The remainder of this paper examines several of the more prominent flaws in FCRA's private right of action, including its extensive liability exemptions for the entities it purports to regulate. By illustrating the flaws in the structural design of the private right of action, the paper provides a blueprint for considerations and guidelines lawmakers may use to amend the FCRA's enforcement mechanism.

1. Exemptions from private litigation liability for furnishers and users creates another regulatory void

The FCRA did not impose any duties on the furnishers of information to credit bureaus until Congress enacted the CCRRA in 1996.¹⁴² These duties, codified in Section 1681s-2, require that furnishers provide "accurate information" to credit reporting agencies,¹⁴³ and re-investigate information disputed by a consumer after receiving notification of the dispute from a credit bureau.¹⁴⁴ The CCRRA also expanded the civil liability sections of the FCRA to permit a private right of action against any person—as opposed to just credit bureaus

¹⁴¹ Further, many of these same issues arise under other statutes that regulate consumer credit and otherwise protect consumers, such as the TCPA and the FDCPA, as noted below.

¹⁴² CCRRA, codified at 15 U.S.C. § 1681s-2.

¹⁴³ 15 U.S.C. § 1681s-2(a).

¹⁴⁴ 15 U.S.C. § 1681s-2(b).

and users—who willfully or negligently violates the statute.¹⁴⁵ This latter amendment superficially makes furnishers subject to private litigation liability.

However, there is currently no private remedy under the FCRA for many furnisher violations. Subsection 1681s-2(a) imposes affirmative duties on furnishers to provide accurate information to credit bureaus, but subsections 1681s-2(c) and (d) exempt furnishers from private litigation liability for violations of those duties.¹⁴⁶ Subsection (c) expressly provides that the FCRA's private right of action, articulated in Sections 1681n and o, does not apply to a furnisher's failure to comply with the accuracy duties enumerated in subsection (a).¹⁴⁷ Subsection (d) provides that only public regulators have the ability to enforce furnishers' Section 1681s-2(a) accuracy duties.¹⁴⁸ Consequently, the FCRA precludes private enforcement of most of the duties imposed on furnishers to protect consumers.

FCRA Section 1681s-2(b) does provide a narrow private right of action to enforce a furnisher's reinvestigation obligations in response to a credit reporting agency's request relating to a consumer's dispute that originates with the credit bureau.¹⁴⁹ But this too has been the subject of dispute among courts.¹⁵⁰ In this context, a consumer must first dispute the accuracy of information

¹⁴⁵ See Pub.L. 104-208 at § 2412; 110 Stat. 3009 at § 2412 (1996) ("section 616 of the [FCRA] . . . is amended by striking 'Any consumer reporting agency or user of information which' and inserting '(a) IN GENERAL, any person who' ").

¹⁴⁶ See generally 15 U.S.C. §§ 1681s-2.

¹⁴⁷ 15 U.S.C. § 1681s-2(c) (FCRA sections 1681n and o "do not apply to any failure to comply with subsection (a) of this section.").

¹⁴⁸ 15 U.S.C. § 1681s-2(d) (Furnishers' accuracy duties "shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials and the State officials identified in that section.").

¹⁴⁹ See 15 U.S.C. 1681s-2 (b).

¹⁵⁰ See e.g., *Davis v. Sallie Mae, Inc.*, 2009 WL 2525303, at 3 (N.D. Tex. 2009) (some courts have concluded that there is no private right of action at all against furnishers).

on her credit report with the credit reporting agency and then rely on the credit bureau to notify the furnisher of the dispute.¹⁵¹ A furnisher need not honor a dispute received directly from the consumer, whether oral or written, under the FCRA.¹⁵² Even in the face of this procedural hurdle, which is difficult to identify within the statute, a consumer does not have a cause of action against the furnisher for reporting inaccurate information—only a cause of action to enforce the furnisher's role in the reinvestigation procedure designed to resolve a consumers' allegation of inaccuracy.¹⁵³

Such a narrowly drawn private right of action against furnishers created another regulatory void. Mr. Burrell, introduced earlier in this Article, is an oft-cited example of the gap in the FCRA's private right of action. He contacted the furnisher directly about the inaccurate, negative information on his credit report, and when unsuccessful, he sued the furnishers directly for noncompliance with the FCRA.¹⁵⁴ The court reluctantly informed Mr. Burrell that the FCRA requires a consumer to contact the credit reporting agencies to dispute information on his credit report.¹⁵⁵ That dispute would then trigger the statute's reinvestigation procedure that involves the furnishers.¹⁵⁶ If the furnishers failed to fulfill their duties in connection with the reinvestigation, Mr. Burrell could sue them for noncompliance with the FCRA reinvestigation

¹⁵¹ A furnisher's § 1681s-2(b) duties arise only after a furnisher receives notice of dispute from a credit bureau. Notice of a dispute to a furnisher by a consumer directly does *not* trigger a furnisher's duty to reinvestigate under section 1681s-2(b). *See id.* ("While a furnisher of information may have liability for violations of 1681s-2(b), it is clear that any liability for alleged violation of 1681s-2(b) does not arise until a consumer reporting agency reports an inaccuracy to the furnisher and the furnisher fails to correct the error.").

¹⁵² *See id.*

¹⁵³ After the credit bureau receives a notice of dispute from a consumer, the credit bureau, must then obtain verification of the disputed information from the furnisher in accordance with FCRA § 1681i.

¹⁵⁴ *See Burrell*, 753 F. Supp. 2d at 444-49.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

duties.¹⁵⁷

Consumers' inability to privately enforce furnishers' duty to maintain accurate information diminishes furnishers' motivation to maintain accuracy *and* to correct inaccurate information. The matter is left entirely to public enforcement. What could possibly be the rationale to support such a rule?

The legislative history is clear that Congress intended to protect furnishers from consumer lawsuits arising out of inaccuracies, preferring instead to reserve enforcement authority for federal and state agencies.¹⁵⁸ The House Report articulates opposition to even a modest addition of privately enforceable duties for furnishers because of the potential risks of increased costs and unnecessary litigation.¹⁵⁹ This suggests that the weak furnisher duties imposed by the CCRRA are borne of Congress's desire to legislate something rather than nothing to address inaccuracies in consumer credit reporting rather than a desire to provide meaningful remedial relief for consumers dealing with credit report inaccuracies.

The Ninth Circuit also has examined Congress's reasons for gap in furnisher liability.¹⁶⁰ It explained that "Congress did not want furnishers of credit exposed to suit by any and every consumer dissatisfied with the credit information furnished."¹⁶¹ Consequently, legislators decided that a furnisher's accuracy duties should be

¹⁵⁷ *Id.*

¹⁵⁸ H.R. Rep. 103-486 (1994) ("[Section 1681s-2(a)] bars private citizens from bringing suit against furnishers of information for violations of certain duties imposed on them").

¹⁵⁹ *Id.* ("[W]e are concerned that the bill may foster unnecessary litigation. The bill establishes a series of new duties for furnishers of credit information that may increase costs through litigation or otherwise prove counterproductive.").

¹⁶⁰ *Nelson v. Chase Manhattan Mtg. Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002) (upholding the viability of a private right of action under section 1681s-2(b)).

¹⁶¹ *Id.*

enforceable only by federal or state government agencies.¹⁶² Although the Ninth Circuit noted that “[t]he statute has been drawn with extreme care, reflecting the tug of the competing interests” of consumers, credit bureaus, and furnishers and users of credit information, such an insubstantial enforcement mechanism leads to speculation that Congress failed to use due care.¹⁶³

Congress has similarly exempted users from the FCRA’s private enforcement mechanism, creating yet another regulatory void. FCRA Section 1681m requires users of consumer reports to provide certain notices to consumers.¹⁶⁴ These notices include notices of adverse actions based on consumer reports, among others.¹⁶⁵ Specifically, users are required to notify consumers when the report leads the user to offer the consumer credit on materially less favorable terms than the best available to others.¹⁶⁶

The FCRA’s private right of action against users of consumer credit reports is similarly superficial. The FCRA nominally imposes a number of duties on users of consumer credit reports in Section 1681m.¹⁶⁷ But Congress eliminated private enforcement of these duties with the FACTA.¹⁶⁸ The FACTA added a subsection to Section 1681m that appears to exempt all of Section 1681m’s requirements from private enforcement.¹⁶⁹

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 15 U.S.C. § 1681m.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ FACTA § 311 added subsection (h) to FCRA § 1681m so as to eliminate private rights of action for violations of § 1681m. 15 U.S.C. § 1681m(h)(8) “Enforcement” provides that: “Sections 1681n and 1681 of this title shall not apply to any failure by any person to comply with this section,” and that “this section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.” 15 U.S.C. § 1681m (h)(8)(A)-(B).

¹⁶⁹ See 15 U.S.C. § 1681m(h)(8)(A). (“Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this

Some courts attribute the defect to inadvertent drafting error.¹⁷⁰ These courts speculate that Congress inadvertently eliminated the private right of action due to a drafting error, and intended that the liability exemption apply only to the new subsection, not to all of Section 1681m.¹⁷¹ But many courts adhere to the plain language of the statute and conclude, to the detriment of consumers, that the amendment unambiguously eliminates a private right of action to enforce the entire section against users.¹⁷²

Thus, Congress has substantially eliminated private litigation liability for two of the three types of entities FCRA regulates—furnishers and users. The resulting private enforcement regime is alarmingly flimsy when one considers the primary purpose of the FCRA: ensuring fairness and accuracy of consumer information contained in consumer credit reports.

section.”) (emphasis added). See also 15 U.S.C. § 1681m(h)(8)(B) (“This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section”).

¹⁷⁰ See, e.g., *Barnette v. Brook Rd., Inc.*, 429 F. Supp. 2d 741, 749 (E.D. Va. 2006).

¹⁷¹ *Id.* (“the limitation in § 1681m(h)(8) should read ‘subsection’ rather than ‘section,’ thereby applying solely to subsection (h) and not eliminating the private right of action for violations of the remainder of § 1681m”).

¹⁷² See e.g. *Perry v. First Nat. Bank*, 459 F.3d 816 (7th Cir. 2006), *reh’g denied* (FACTA amendment that eliminates a private right of action for violations of user disclosure requirements applies to all of section 1681m, rather than only to specific subsection under which amendment was listed). See also *Soroka v. JP Morgan Chase & Co.*, 500 F. Supp. 2d 217, 223 (S.D.N.Y. 2007). (“The unambiguous plain language of the FCRA makes it clear that Congress intended for this section to be enforced only by federal administrative agencies.”); *Shellman v. Country Wide Home Loans, Inc.*, 2006 WL 1544427 (N.D. Ind. 2006); *Murray v. Cross Country Bank*, 399 F. Supp. 2d 843 (N.D. Ill. 2005); *Bonner v. Home123 Corp.*, 2006 WL 1518974 (N.D. Ind. 2006); *Bruce v. Grieger's Motor Sales, Inc.*, 422 F. Supp. 2d 988 (N.D. Ind. 2006); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053 (N.D. Cal. 2006); *Stavroff v. Gurley Leep Dodge, Inc.*, 413 F. Supp. 2d 962 (N.D. Ind. 2006); *Villagran v. Freeway Ford, Ltd.*, 2006 WL 964731 (S.D. Tex. 2006).

2. Circuit-level split concerning standing has eliminated the FCRA private right of action in some jurisdictions

A catalog of the weaknesses in the FCRA's private enforcement mechanism should include its ambiguity about who has standing to enforce the statute. For example, under the current liability scheme, the FCRA's statutory cause of action for willful violations does not clearly require a showing of actual harm.¹⁷³ A consumer plaintiff who pleads a willful FCRA violation may obtain damages for actual harm *as well as* statutory damages ranging from \$100 to \$1,000 and punitive damages.¹⁷⁴ As written, it appears a plaintiff is entitled to statutory damages for technical violations of the statute even if she has not suffered any actual damages.¹⁷⁵

As a result, the federal judiciary is divided about whether a bare violation of the statute, without demonstrable actual harm, is sufficient to confer constitutional standing on a plaintiff to enforce the statute. The Second and Fourth Circuits have ruled that while a technical violation satisfies statutory standing, a FCRA plaintiff must demonstrate actual injury-in-fact, or more concrete harm, to satisfy constitutional standing requirements.¹⁷⁶ The Ninth, Sixth, Seventh, and Eighth Circuits have found no injury-in-fact is needed to confer constitutional standing where statutory damages are recoverable, the statutory violation is a sufficiently concrete injury to the plaintiff to satisfy constitutional standing requirements.¹⁷⁷ The U.S. Supreme Court has en-

¹⁷³ See 15 U.S.C. § 1681n(a) (2006) ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . damages of not less than \$100 and not more than \$1,000.").

¹⁷⁴ *Id.*

¹⁷⁵ See *id.*

¹⁷⁶ *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009); *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (allowing uninjured plaintiffs to sue "conflates statutory standing with constitutional standing").

¹⁷⁷ *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412-14 (9th Cir. 2014), *cert.*

tertained this question recently in *Robins v. Spokeo, Inc.* but has not yet resolved it.¹⁷⁸

The Supreme Court's *Spokeo* decision will have consequences for consumers' ability to sue to enforce the FCRA and other consumer protection measures, such as the Telephone Consumer Protection Act, the Truth in Lending Act (the "TILA"), the Electronic Funds Transfer Act (the "EFTA"), the Fair Debt Collection Practices Act (the "FDCPA"), and the Fair Housing Act (the "FHA"), among others.¹⁷⁹ All of these statutes permit plaintiffs to recover statutory damages where actual damages for violations are often difficult to prove or nonexistent. For example, consumers suing under the TILA can seek up to \$1,000 per statutory violation while those suing for FDCPA violations can obtain a maximum of \$1,000 in statutory damages.¹⁸⁰

granted, 135 S. Ct. 1892 (2015); *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 499-500 (8th Cir. 2014); *Beaudry v. TeleCheck Servs.*, 579 F.3d 702 (6th Cir. 2009); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006).

¹⁷⁸ *Spokeo*, *supra* note 154, at 412-14. *Spokeo* involves a suit under the FCRA by Thomas Robins, an individual, who alleges that Spokeo, Inc., an online "people search engine" published inaccurate information about him. *Id.* at 410. Spokeo aggregates this information from publicly available data and does not verify the accuracy of the information it provides. FCRA limits the circumstances in which consumer reporting agencies may provide "consumer report[s] for employment purposes," 15 U.S.C. § 1681b(b)(1) (2006), and requires such agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. 15 U.S.C. § 1681e(b). The case focuses on whether Robins was actually harmed when Spokeo published the inaccurate information. *Spokeo*, *supra* note 154, at 412. Robins alleges that the bare violation of the FCRA is sufficient injury to satisfy constitutional standing requirements. *Id.* at 411-12. Robins claimed the inaccurate information in Spokeo's search results actually harmed his employment prospects, which cost him money. *Id.* at 411. Spokeo counters that an FCRA plaintiff should have to show some concrete harm. *Id.* at 412.

¹⁷⁹ See 47 U.S.C. § 227(b)(3)(B) (2006); 15 U.S.C. §§ 1640(a), 1692k(a) (2006).

¹⁸⁰ See 47 U.S.C. § 227(b)(3)(B); see also 15 U.S.C. §§ 1692k(a).

Congress likely intentionally structured the FCRA's statutory cause of action—and many others—in order to further its fairness and accuracy norms. The ability to recover for statutory violations even in the absence of actual damages is meant to deter credit bureaus, users, and furnishers from engaging in unlawful conduct and promotes their compliance with the statute. If consumers cannot rely on the penalties set out in these statutes designed to protect consumers, it will be harder for consumers to enforce the statutes' substantive obligations against companies.

3. Conflicting decisional law concerning interpretation of the preemption rules

The FCRA has ambiguous preemption provisions that further diminish the strength of its private enforcement mechanism. The statutory ambiguities have given rise to divisive decisional law, with the result that consumers lack predictability about whether they have a federal or state private remedy, or any at all.¹⁸¹

As originally enacted, the FCRA contained a “limitation of liability” provision, Section 1681h(e), and a general preemption provision, section 1681t. Section 1681h(e) grants credit bureaus, users, and furnishers a qualified immunity from certain state law tort claims.¹⁸²

¹⁸¹ The judicial policymaking that results from private litigation generates concerns about unpredictability and inconsistency among individual litigants, thereby negatively affecting their incentives to sue. That said, conflicting decisional law may have some value. See Burbank, Farhang and Kritzer, *supra* note 81 at 664 (“As distinguished from the imposition of a policy solution at the top of a centralized and hierarchical bureaucracy, litigation of an issue among many parties and interests, and across many judicial jurisdictions, can lead to a multiplicity of policy responses to a problem, and successful policy solutions will gain traction and spread.”).

¹⁸² Fair Credit Reporting Act § 610, codified at § 1681h(e) (“No consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to

It eliminates defamation, invasion of privacy, and negligence actions except as "to false information furnished with malice or willful intent to injure such consumer."¹⁸³ While clear on its face, the qualified immunity provision has generated confusion and division in implementation as the federal judiciary has tried to interpret it in conjunction with Section 1681t, the FCRA's preemption provision.

Section 1681t had limited preemptive force in its original form. It preempted state laws only where inconsistent with the FCRA.¹⁸⁴ The CCRRA, however, expanded FCRA's preemptive force with respect to furnishers.¹⁸⁵ Specifically, subsection 1681t(b)(1)(F) appears to preempt all state statutory and common law claims with regard to furnisher duties to provide accurate information and re-investigate disputed information.¹⁸⁶

District courts are divided about how to reconcile these two provisions with respect to furnisher liability for state law claims under the FCRA. Congress did not specifically provide in the CCRRA that Section 1681t supersedes 1681h. Congress has not repealed or revoked Section 1681h. And the legislative history is silent concerning reconciliation of the two provisions.

Without a clear manifestation of Congressional intent, courts have tried to discern its unexpressed intent and interpret the two provisions in a way to honor the purposes of the FCRA. However, three distinct approaches have emerged among the courts-total, tem-

section 1681g, 1681h, or 1681m of this title, except as to false information furnished with malice or willful intent to injure such consumer.").

¹⁸³ 15 U.S.C. § 1681h(e).

¹⁸⁴ 15 U.S.C. § 1681t (1970).

¹⁸⁵ 15 U.S.C. § 1681t (1996).

¹⁸⁶ It provides: "[n]o requirement or prohibition may be imposed under the laws of any State—with respect to any subject matter regulated under section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies." 15 U.S.C. § 1681t(b)(1)(F).

poral, and statutory—to reconcile these two provisions.

The “total” approach takes the view that subsection 1681t(b)(1)(F) preempts all state law causes of action against furnishers, whether based in statute or common law.¹⁸⁷ Courts adopting this approach have concluded that the adoption of subsection 1681t(b)(1)(F) constitutes an implied revocation of the limited liability granted under Section 1681h(e).¹⁸⁸

The “temporal approach” tries to reconcile the conflict between the two preemption sections based on the time period to which the state law claim relates.¹⁸⁹ It holds that subsection 1681t(b)(1)(F) preempts state law claims that arise after the furnisher receives a notice of dispute concerning the accuracy of information reported while Section 1681h(e) applies to claims that arise before the furnisher receives notice.¹⁹⁰

Finally, the “statutory” approach tries to harmonize the provisions by concluding that Section 1681t(b)(1) preempts only state statutory claims while Section 1681h(e) applies only to state common law claims.¹⁹¹

¹⁸⁷ See, e.g., *Campbell v. Chase Manhattan Bank, USA, N.A.*, 2005 WL 1514221 (D.N.J. 2005), *order amended on reconsideration*, 2005 WL 1924669 (D.N.J. 2005); *Purcell v. Universal Bank, N.A.*, 2003 WL 1962376 (E.D. Pa. 2003); *Jaramillo v. Experian Information Solutions, Inc.*, 155 F. Supp. 2d 356 (E.D. Pa. 2001); *Gordon v. Greenpoint Credit*, 266 F. Supp. 2d 1007, 1012 (S.D. Iowa 2003).

¹⁸⁸ See *id.*

¹⁸⁹ See, e.g., *Aklagi v. Nationscredit Fin. Servs. Corp.*, 196 F. Supp. 2d 1186, 1193–96 (D. Kan. 2002).

¹⁹⁰ See, e.g., *Vazquez-Garcia v. Trans Union De Puerto Rico*, 222 F. Supp. 2d 150 (D.P.R. 2002); *Ryder v. Washington Mut. Bank, FA*, 371 F. Supp. 2d 152 (D. Conn. 2005); *Malm v. Household Bank (SB), N.A.*, 2004 WL 1559370 (D. Minn. 2004); *Bank One, N.A. v. Colley*, 294 F. Supp. 2d 864 (M.D. La. 2003); *Aklagi*, 196 F. Supp. 2d at 1193–96.

¹⁹¹ See, e.g., *Watson v. Trans Union Credit Bureau*, 2005 WL 995687 (D. Me. 2005); *DiPrinzio v. MBNA America Bank, N.A.*, 2005 WL 2039175 (E.D. Pa. 2005); *Barnhill v. Bank of America, N.A.*, 378 F. Supp. 2d 696 (D.S.C. 2005); *Jeffery v. Trans Union, LLC*, 273 F. Supp. 2d 725 (E.D. Va. 2003); *Carlson v. Trans Union, LLC*, 259 F. Supp. 2d

There are arguments that discredit each of the approaches. For example, the total approach renders Section 1681h(e) a nullity while the temporal and statutory approaches do not.¹⁹² The temporal approach and the total approach run afoul of the canon of statutory construction which calls for the more specific provision to prevail over the more general one.¹⁹³ Under the statutory approach, the more specific provision—the limitation of liability provision in Section 1681h(e)—is unaffected by interpreting the more general provision—Section 1681t—to apply only to state statutory laws.¹⁹⁴

The point is that in the absence of clear preemption rules from Congress, the judiciary is left to structure *and* implement the rules that will apply to private litigants. In the context of FCRA enforcement, preemption fissures abound among and within districts. And those fissures render FCRA an empty shell. Consumers are left without federal or state recourse to enforce the FCRA because the preemption rules as drafted and implemented bar the way.

4. Conflicting decisional law concerning the availability of equitable remedies

The judiciary also disagrees about the scope and availability of remedies permitted by FCRA. Among the disputed issues is whether the FCRA permits a private

517 (N.D. Tex. 2003); *Nelski v. Ameritech*, 2004 WL 1460001 (Mich. Ct. App. 2004), *appeal denied*, 704 N.W.2d 700 (Mich. 2005); *Gordon*, 266 F. Supp. 2d 1007; *Reed v. Experian Information Solutions, Inc.*, 321 F. Supp. 2d 1109 (D. Minn. 2004); *Yutesler v. Sears Roebuck and Co.*, 263 F. Supp. 2d 1209 (D. Minn. 2003); *Gorman v. Wolpoff & Abramson, LLP*, 370 F. Supp. 2d 1005 (N.D. Cal. 2005); *Cisneros v. Trans Union, LLC*, 293 F. Supp. 2d 1167 (D. Haw. 2003); *McCloud v. Homeside Lending*, 309 F. Supp. 2d 1335 (N.D. Ala. 2004); *Jordan v. Trans Union LLC*, 377 F. Supp. 2d 1307 (N.D. Ga. 2005); *Johnson v. Citimortgage, Inc.*, 351 F. Supp. 2d 1368 (N.D. Ga. 2004).

¹⁹² *Barnhill v. Bank of America, N.A.*, 378 F. Sup. 2d 696 (D.S.C. 2005).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

plaintiff to obtain equitable relief such as an injunction precluding the reporting of inaccurate information or a declaratory judgment that information reported is inaccurate.¹⁹⁵ While Sections 1681n and 1681o provide for monetary relief for private litigants, they are silent regarding availability of any kind of equitable relief.¹⁹⁶ In contrast, Section 1681s expressly provides for injunctive relief in government enforcement actions.¹⁹⁷ And, as with preemption rules, the courts have tried to divine Congressional intent concerning the availability of equitable remedies for private FCRA litigants against a dearth of legislative history. The result is conflicting decisional law.¹⁹⁸

One view is that the plain language of the FCRA authorizes only government agencies to obtain equitable relief in a FCRA action.¹⁹⁹ These courts compare Congress's omission of equitable remedies in the private

¹⁹⁵ *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) (holding that the Court lacked the power to grant a private litigant's request for injunctive relief under the FCRA); *White v. First American Registry, Inc.*, 378 F. Supp. 2d 419 (S.D.N.Y. 2005) (holding the same); *Bumgardner v. Lite Cellular, Inc.*, 996 F. Supp. 525, 526-27 (E.D. Va. 1998) (holding the same); *Ditty v. CheckRite, Ltd.*, 973 F.Supp. 1320, 1338 (D. Utah 1997) (holding the same); *Mangio v. Equifax, Inc.*, 887 F.Supp. 283, 284-85 (S.D. Fla.1995) (holding the same); *Kekich v. Travelers Indem. Co.*, 64 F.R.D. 660, 668 (W.D. Pa.1974) (holding the same). *But see Engelbrecht v. Experian Info. Servs., Inc.*, 2012 WL 10424896, at *4-5 (C.D. Cal. 2012) (finding that injunctive relief is available to private litigants for violations of the FCRA); *Murray v. E*Trade Financial Corp.*, 2006 WL 2054381 (N.D. Ill. 2006) (holding the same).

¹⁹⁶ 15 U.S.C. §§ 1681n, 1681o.

¹⁹⁷ 15 U.S.C. § 1681s.

¹⁹⁸ Some courts have expressed disagreement with this view without ruling on this issue. *See, e.g., Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 709 (6th Cir. 2009) (expressing doubt that Congress's failure to expressly provide for injunctive relief for private plaintiffs means that a court cannot grant it); *Valentine v. First Advantage Saffert, Inc.*, 2009 WL 4349694 at *15 (C.D. Cal. 2009) (recognizing the split of authority and declining to address the issue); *Andrews v. Trans Union Corp. Inc.*, 7 F. Supp. 2d 1056, 1084 (C.D. Cal. 1998) (finding injunctive relief available), *aff'd in part, rev'd in part*, 225 F.3d 1063 (9th Cir. 2000), *rev'd on other grounds*, 534 U.S. 19 (2000).

¹⁹⁹ *See* sources cited *supra* note 171.

right of action with its explicit authorization of injunctive relief in government enforcement actions, and conclude that Congress intentionally limited the judiciary's equitable authority with respect to private FCRA litigants.²⁰⁰ This interpretation is based on the tenet that Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.²⁰¹

The contrasting view holds that a court may invoke its equitable powers and order injunctive or declaratory relief whenever appropriate unless Congress gives a "clear command" that such authority is prohibited.²⁰² These courts conclude that where Congress does not expressly enjoin equitable relief, injunctions and declaratory judgments are among the range of permissible remedies for FCRA plaintiffs.²⁰³ Accordingly, plaintiffs may seek, for example, an injunction which would bar the reporting of inaccurate information.

The unavailability of equitable relief for private FCRA plaintiffs harms consumers and undermines accuracy in consumer credit reporting, thereby subverting the statute's purpose. Without equitable relief, a plaintiff cannot obtain a court order mandating the correction of inaccurate credit report information. She cannot obtain an injunction which would stop the reporting or furnishing of inaccurate information. The exclusion of equitable relief also precludes certain class actions.²⁰⁴ To maintain

²⁰⁰ Compare 15 U.S.C. §§ 1681n, 1681o and 15 U.S.C. § 1681s.

²⁰¹ See *Washington*, 199 F.3d at 268-69.

²⁰² *Engelbrecht*, 2012 WL 10424896, at *4-5 (finding that injunctive relief is available to private litigants for violations of the FCRA); *Murray*, 2006 WL 2054381 (injunctive relief is available remedy for private litigants under FCRA because Congress did not specifically enjoin equitable relief).

²⁰³ See *Engelbrecht*, 2012 WL 10424896, at *4-5; *Murray*, 2006 WL 2054381.

²⁰⁴ See, e.g., *Washington*, 199 F.3d 263 (FCRA does not allow private litigants to obtain injunctive relief and accordingly, class certification was not proper under Fed. R. Civ. P. 23(b)(2)); cf. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) (implying that a FCRA class action in which plaintiffs recover damages and/or an in-

a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, plaintiffs must show that the “predominant relief sought is injunctive or declaratory.”²⁰⁵ Without equitable relief, private FCRA plaintiffs cannot aggregate their claims where their common goal is the correction or removal of inaccurate credit report information.

This section has examined only some of these flaws in FCRA’s private right of action against a backdrop of limited public enforcement activity. Nonetheless, this limited illustration highlights the imperative for structural reform of the FCRA’s enforcement mechanisms to more effectively promote accuracy in consumer credit reporting.

V. RECOMMENDATIONS FOR A MORE EFFECTIVE FCRA ENFORCEMENT REGIME

This Article recommends that Congress retain the FCRA’s hybrid public-private enforcement model but restructure the mechanisms in two ways. First, Congress should more effectively calibrate the roles, responsibilities, and actions of the public regulator(s)—the CFPB and the FTC—with the ability of individuals to enforce the FCRA as private regulators. Second, inherent to the first recommendation, Congress should restructure the private right of action so that the rules that govern consumer access to the courts are clearer and more deliberately designed to effectuate the statute’s accuracy norm.

With regard to calibrating the relative roles of the public and private litigator, Congress should consider whether any of the FCRA’s substantive obligations are better-suited to policing by a public regulator, such as the CFPB and the FTC.²⁰⁶ Evaluating when to deploy pub-

junction would be permissible).

²⁰⁵ Fed. R. Civ. P. 23(b)(2).

²⁰⁶ See generally Glover, *supra* note 73. Glover has proffered a conceptual framework for ascertaining whether and in what circumstances private enforcement mechanisms should be integrated into a regulatory scheme. “[T]he goal is to provide elements of a frame-

lic enforcement necessarily entails examining whether and in what circumstances a private right of action should be integrated into the enforcement regime.²⁰⁷ Accordingly, Congress should also consider whether to exclude a private enforcement mechanism or to deploy private litigation as a supplementary or primary regulator.²⁰⁸

Once Congress decides to integrate a private right of action into the FCRA's enforcement model, whether as an adjunct or primary regulator, it must entertain a second set of considerations, namely the specific rules that should govern the private right of action, such as standing, preemption, and remedies to name just a few. To design optimally effective rules, Congress should consider and weigh the potential rules against a number of general factors, such as the goals and purpose of the statute and the role of the public regulator.

The remainder of this Article charts a path for Congress to restructure the FCRA's enforcement mechanism. It does so by suggesting considerations or criteria that should influence what the revised enforcement regime looks like. Many of these considerations and criteria are not discernable in the FCRA's relatively bare legislative history, so it is difficult to ascertain whether they influenced the current enforcement regime. That said, Congress's historically piecemeal and reactive approach to legislating in the consumer credit space suggests Congress was not as thoughtful about structuring an optimally effective public-private enforcement regime as it could have been.

A. *Calibrating the FCRA's Public and Private Enforcement Mechanisms*

To calibrate the public and private enforcement

work for thinking more systematically about how to calibrate and design appropriate mechanisms of private enforcement within the contours of a given regulatory scheme." *Id.* at 1178-79.

²⁰⁷ *Id.* at 1177.

²⁰⁸ *Id.*

mechanisms in the FCRA, Congress should delineate those aspects of the statute that the relevant agencies will police through rulemaking, supervisory, and enforcement authority. In conjunction with such a decision, Congress should determine whether and in what circumstances to integrate a private right of action to enforce some of the law's provisions.²⁰⁹

As discussed, Congress carved out the bulk of furnisher liability from the statute's private right of action. Public regulation of furnisher compliance was inadequate and caused a regulatory void. This led to under-enforcement of furnishers' duty to provide accurate information to credit bureaus. Accordingly, the question of the appropriate level of potential furnisher liability presents an opportunity to discuss how to calibrate the FCRA's public and private enforcement mechanisms.

One obvious way to calibrate the enforcement mechanism is to amend the statute to give individual consumers a private right of action to remedy a furnisher's violation of its duties to provide accurate information.²¹⁰ Indeed it makes sense to integrate a private right of action with a public enforcement regime where, as here, public regulators have historically under-enforced a particular law.²¹¹

Until recently, this factor would have favored amending the FCRA to permit a private right of action against furnishers. It is true that the global financial crisis exemplifies failure in consumer credit regulation, and that failure arguably supports the need for private litigation to fill the regulatory voids in many areas, including fair credit reporting. That said, public enforcement of the

²⁰⁹ Burbank, et al., *supra*, note 73, at 672; see also Stephen B Burbank, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1547 (2014).

²¹⁰ Jeffrey Bills, *Fighting Unfair Credit Reports: A Proposal to Give Consumers More Power to Enforce the Fair Credit Reporting Act*, 61 UCLA L. REV. DISC. 226 (2013).

²¹¹ Glover, *supra* note 73, at 1204-17.

FCRA has been amplified in the wake of the crisis.²¹² For example, Congress delegated to the CFPB, the agency with relevant FCRA expertise, authority to consider whether and when a furnisher has a duty to reinvestigate a consumer's allegation of inaccuracy based on a direct request from the consumer.²¹³ Additionally, the CFPB has authority to supervise and examine regulated entities for compliance with the FCRA—an *ex ante* method of detecting and prohibiting violations—which may prove more effective to realizing the statute's goals than *ex post* enforcement powers and private litigation.²¹⁴ Against this backdrop of relatively more robust public enforcement, lawmakers may conclude legitimately that creating a private right of action against furnishers is unnecessary, having closed the regulatory void.²¹⁵

However, the increased attention by public regulators should not eliminate the viability of a private right of action against furnishers. Private regulation remains

²¹² See *supra* Section IV.A.

²¹³ The Dodd-Frank Act's amendments to the FCRA have tasked the CFPB with promulgating regulations which govern circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request from a consumer rather than a request from a credit bureau. See 15 U.S.C. § 1681s-2a(8) ("The [CFPB] shall prescribe regulations that shall identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer.").

²¹⁴ See HOOFNAGLE, *supra* note 30, at 275.

²¹⁵ Burbank, et al., *supra* note 73, at 661 ("[T]he choice of private enforcement must be understood in relation to potential sources of public enforcement."). This decision should be made in relation to the availability of public enforcement mechanisms and other market-based incentives that motivate the regulated entities to comply with the law. Likewise, where Congress decides, for whatever reason, to exempt certain entities or substantive provisions from individual consumer liability, it should consider whether there is a public regulator policing market behavior and business practices or other market-based deterrents.

an effective supplement to public regulation.²¹⁶ This is particularly true where the relevant law would benefit from a private right of action as a “failsafe” mechanism that functions as a supplementary rather than primary regulator.²¹⁷ In this context, the private right of action aims to deter and remedy harm that *ex ante* regulation does not prevent, whether as a result of gaps in the public enforcement mechanism or to ensure regulation of harmful practices that a public regulator may not be able to anticipate.²¹⁸

This may be the most compelling argument in a post-financial crisis environment for a private right of action against furnishers for noncompliance with their FCRA accuracy duties. Even where there is more rigorous public enforcement, inaccuracies will occur, either inadvertently or as a result of some intentional business practice.

For example, furnishers have failed to contact credit bureaus to update trade lines to reflect that a consumer’s debt has been discharged in bankruptcy.²¹⁹ This

²¹⁶ Burbank, et al., *supra* note 73, at 665 (“[private enforcement] can operate as a simple substitute for or adjunct to public enforcement”); Glover, *supra* note 73, at 1158 (“Even when public enforcement is relatively robust, private enforcement may serve a complementary regulatory role in the achievement of various substantive goals.”); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 706 (2011) (“Where deterrence is the primary goal, private enforcement can offer a critical supplement to public efforts, particularly in areas where over-enforcement is less of a concern.”).

²¹⁷ Glover, *supra* note 73, at 1198-1203.

²¹⁸ *Id.*

²¹⁹ See, e.g., *Belton v. GE Capital Consumer Lending, Inc (In re Belton)*, No. 12-23037, Adv. No. 14-08223 Complaint (Doc. No. 13) (Bankr. S.D.N.Y.) (filed Apr. 30, 2014) (alleging systemic practice of violating discharge injunction by attempting to collect discharged debt and by failing to furnish updated data to credit reporting agencies that such debts were discharged in bankruptcy); *Haynes v. Chase Bank USA NA (In re Haynes)*, Adv. No. 13-08370 (Bankr. S.D.N.Y.); *Bruce v. Citigroup Inc. et al. (In re Bruce)*, Adv. No. 14-08224 (Bankr. S.D.N.Y.); *Echevarria v. Bank of America Corp., (In re Echevarria)* Adv. No. 14-08216 (Bankr. S.D.N.Y.); *Anderson v. Credit One Bank NA (In re An-*

business practice arguably violates the FCRA—in that continuing to negatively report the debt as “charged off,” late or delinquent, or as having a balance of more than zero is inaccurate—and damages a consumer’s credit worthiness.²²⁰ It also potentially violates the bankruptcy discharge injunction, which protects attempts by a creditor to collect a debt which has been discharged in bankruptcy.²²¹ There is some evidence that creditors engage in this behavior to coerce collection on debts discharged in bankruptcy.²²² The practice is particularly abusive in that a consumer’s credit report reflects a notation that she filed for bankruptcy—and that notation remains for up to ten years—but the failure to update the trade line indicates to those considering her for credit that she did not receive a discharge.

Because the FCRA does not specify how furnishers should report individual discharged debts to credit bureaus, public regulators may not have been aware of this unfair, deceptive, and abusive business practice without consumer litigation. Because consumers cannot sue the furnishers for FCRA violations, their recourse is to return to the bankruptcy court to enforce the discharge injunction as a way to compel creditors to furnish accurate information to the credit bureaus concerning the extinguished liability for the debt. This class of debtors is dependent on the bankruptcy court’s views about whether its equitable powers authorize it to compel a creditor to furnish information to the credit bureau about the discharge. Some courts are reluctant to conclude that

derson), Adv. No. 15-08214 (Bankr. S.D.N.Y.); see also Jessica Silver-Greenberg, *Debts Canceled by Bankruptcy Still Mar Consumer Credit Scores*, NEW YORK TIMES (Nov. 12, 2014).

²²⁰ 15 U.S.C. § 1681s-2(a).

²²¹ 11 U.S.C. § 524(a)(2). A bankruptcy discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.” *Id.*

²²² See, e.g., *In re Zine*, 521 B.R. 31 (Bankr. D. Mass. 2014); *In re Goodfellow*, 298 B.R. 358 (Bankr. N.D. Iowa 2003); *In re Mayer*, 254 B.R. 396 (Bankr. N.D. Ohio 2000).

the failure to update is a violation of the discharge injunction.²²³ These courts require an additional showing that the purpose or effect of the failure to update is to collect the discharged debt, or that it negatively impacts on the debtor's ability to obtain credit, a job, or insurance.²²⁴ Where a consumer debtor is unsuccessful at the bankruptcy court, FCRA continues to bar access to justice, and inaccurate information remains on her report. Fortunately, private litigation in bankruptcy courts has raised the profile of this particular credit reporting practice, resulting in class action settlements against Bank of America and JPMorganChase, that compel these companies to change the practice.²²⁵ Private litigation thus fulfilled a failsafe function in this context.

That said, the CFPB may learn about questionable business practices through its supervisory and examination procedures and then marshal the information it has collected to alter furnisher practices and procedures with respect to reporting discharged debt to credit bureaus.²²⁶ Looking to a public regulator to compile, analyze, and act on information may be equally effective. Where a public regulator has superior access to and ability to evaluate information related to the harmful conduct and motivation to use that information to enforce the law, it should perhaps have primary enforcement authority.²²⁷ It has

²²³ See, e.g., *In re Giles*, 502 B.R. 892 (Bankr. N.D. Ga. 2013); *In re Montano*, 488 B.R. 695 (Bankr. D.N.M. 2013); *In re Reeves*, 369 B.R. 338 (Bankr. N.D. Ohio 2007); *In re Bruno*, 356 B.R. 89 (Bankr. W.D.N.Y. 2006).

²²⁴ See sources cited *supra* note 198.

²²⁵ John Kennedy, *BoA, Chase Agree to Delete Debt Discharged in Bankruptcy*, Law360 (May 11, 2015) available at: <http://www.law360.com/articles/654202/bofa-chase-agree-to-delete-debt-discharged-in-bankruptcy>.

²²⁶ See HOOFNAGLE, *supra* note 30, at 275 (“[T]he CFPB can supervise and examine companies for compliance with the FCRA. The CFPB may be able to detect more violations and interdict them earlier than is possible when using FTC-style, ex post enforcement powers.”).

²²⁷ Glover, *supra* note 73, at 1179-80. The “regulator with superior command of information relevant to potential wrongdoing” should have enforcement authority as long as it has sufficient incentives to mobilize the information to enforce the law. *Id.* at 1177-78; Burbank,

been suggested that consumer credit is one area in which a public regulator is better-suited to collect, analyze, and mobilize information about the business practices of consumer credit market participants in ways that materially affect operation of the consumer credit market and benefit consumers.²²⁸

This is arguably true with respect to furnisher liability because the CFPB has supervisory authority with respect to furnisher duties under the FCRA. It can use this authority to collect information about business practices and procedures with regards to providing information to consumer reporting agencies and identify and correct deficiencies at a systemic level. It could leverage this information to compel furnisher compliance in a number of ways. First, the CFPB could informally communicate with furnishers concerning best practices and procedures. Second, it could also initiate a civil enforcement action that seeks to halt the illegal furnisher practices and compel compliance. Finally, it could promulgate regulations that expressly require furnishers to adopt certain practices and procedures concerning discharged debt.

Another reason private enforcement of the FCRA against furnishers would be a useful supplement to public regulation is that it provides for remedies that public enforcement cannot. Private rights of action should be integrated with other regulatory efforts where necessary to ensure that the full range of potential remedies is available to redress wrongdoing, but without creating excessive liability for the regulated entities.²²⁹

Taken together, there are a number of arguments that robust public regulation of furnisher duties under the FCRA makes expanding the private right of action to

supra note 73, at 663 (It makes sense to efficiently use public resources to "focus enforcement efforts on violations that do not provide adequate incentives for private enforcement, while resting assured that those that do will be prosecuted by private litigants.").

²²⁸ Glover, *supra* note 73, at 1181-83.

²²⁹ *Id.* at 1178, 1190.

impose furnisher liability for inaccuracies (as opposed to merely a failure to reinvestigate) unnecessary. That said, the expanded private right of action could act to safeguard against potential gaps in public regulation—private litigation would be an adjunct regulator. Congress could then structure the rules of access to courts for consumers in ways to promote the FCRA's accuracy norm but try to filter frivolous or unnecessary lawsuits.

B. Structuring the Private Right of Action

Having decided that a particular statute or provision requires a private right of action, Congress must next design the rules that will govern consumer access to the courts. Of course, the effectiveness of private enforcement turns on the mechanism that controls it.²³⁰ Ideally, any private enforcement mechanism should balance two goals that are in tension: (1) providing adequate incentives to ensure that private regulators litigate, without which under-enforcement of regulatory objectives would result, and (2) while structuring the rules in a way that prevents over-enforcement of regulatory objectives.²³¹ Here, again the failure of FCRA enforcement informs the imperative for deliberate attention to the design of the rules that control the private right of action.

1. Considerations for Legislating Standing

The first rule of access Congress should prescribe is that of standing. It should delimit the scope of injury necessary for a private individual to sue to enforce the relevant law. In structuring private enforcement mechanisms, Congress should decide who will be permitted to seek remedies through private litigation, meaning who

²³⁰ David Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. 1913, 1935 (2014) (“[P]rivate enforcers can wield agenda-setting and lawmaking power, deploying a version of what critics have dubbed ‘regulation by litigation’ to set industry-wide rules via litigated judgments and settlements that might otherwise be achieved via legislation or administrative regulation.”).

²³¹ Burbank, et al., *supra* note 73, at 671-79.

has standing to enforce the statute.²³²

In particular, Congress should deliberate and decide whether enforcement of a particular provision requires a showing of actual damages as a threshold requirement to suit. Some consumer credit laws impose civil liability for technical violations of the statute, regardless of whether a plaintiff can demonstrate actual damages.²³³ A strict liability standard for technical violations without a showing of harm is meant to maximize the deterrent force of the statute. But there is less of an imperative to impose liability for technical violations where there exists a complementary public enforcement regime designed to focus on deterrence of harmful conduct. Where Congress provides for a strong public regulator, there is a more compelling case for requiring a plaintiff demonstrate actual harm. Where it does not, it makes more sense to permit individual consumers to sue regulated entities based on a theory of strict liability for technical violations.

In the context of the FCRA, the CFPB's extensive authority to supervise and regulate the credit reporting industry arguably moots the need to deploy a private right of action that imposes strict liability for technical FCRA violations. Vigorous public enforcement maximizes incentives to comply with the statute and suggests that the corresponding private right of action should be permitted only where a plaintiff has suffered actual harm.

One benefit of a rule that mandates a showing of actual harm in order to sue is efficient use of judicial resources. The rule filters out those instances where even if there is some violation, the plaintiff has not suffered quantifiable harm, thereby discouraging unnecessary and frivolous litigation. Such a rule also promotes the use of the private right of action as a failsafe mechanism—plaintiffs who suffer harm arising out of nascent but unfair practices are relatively more motivated to avail

²³² *Id.* at 672.

²³³ *See, e.g.*, 15 U.S.C. §§ 1681n, 1681o; *see also* 15 U.S.C. § 1640.

themselves of the private right of action for the benefit of all consumers.

Congress should also consider defining the scope of what constitutes actual harm in a way that tailors the standing requirements to the purposes of the statute. Actual harm is typically conceived of as monetary damages, or harm that can be quantified in monetary terms. But quantifying the harm of negative, inaccurate credit report information may be difficult or even deemed speculative. In the case of FCRA violations, the most obvious example of harm caused by negative, inaccurate information would be a lower credit score which may translate to a denial of credit or an offering of credit on less favorable terms. Calculating the monetary value of such harm, while not impossible, is difficult and potentially subject to attack. Nonetheless, the statute should acknowledge that this type of harm is sufficiently concrete to satisfy standing requirements of the private right of action. Congress should therefore consider what kind of harm the consumers suffer for violations of the statute in question, and make sure to account for those in crafting the standing requirement in the statute.

2. Considerations for Legislating Preemption Rules

Conflicting decisional law concerning the interpretation and scope of the FCRA's preemption rules highlights another aspect of a private enforcement regime to which Congress should devote particular attention. Preemption rules are important because they dictate as a threshold matter whether federal or state regulators control fair credit reporting policy.²³⁴ At a more granular and practical level, they delimit the paths of recourse available for consumers to access justice in fair credit reporting.

Congress created the FCRA's current preemption rules, but the judiciary implements those rules. The gap

²³⁴ Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 168 (2011); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1 (1995).

between structuring and implementing preemption rules highlights two challenges for Congress. First, Congress lacks the ability to control or police how the judiciary implements preemption rules once enacted.²³⁵ Implementation is an exercise in statutory construction.²³⁶ Resolution of statutory construction issue here depends in part on whether a court is inclined to construe ambiguities in favor of preemption or against preemption—in other words, a court's interpretation is colored by its inclinations concerning preemption.²³⁷ And where, as here, there are express preemption rules, the judiciary appears inclined towards a finding of preemption of federal law.²³⁸

A second challenge is that Congress legislates preemption rules designed to address existing social, legal, and economic conditions, and without the ability to predict social and economic change, Congress cannot be sure that those rules are appropriately drawn to adjust to future conditions.²³⁹ This is particularly true for consumer credit law, an area where Congress acts in reaction to socioeconomic events.

Accordingly, Congress should adopt a more inten-

²³⁵ Sharpe, *supra* note 209, at 177.

²³⁶ *Id.*

²³⁷ Stabile, *supra* note 209, at 37. ("The fact that express preemption analysis is viewed to be an exercise in statutory interpretation of the express preemption provision means that courts are limited in their ability to analyze freely whether federal law should preempt the particular state law claim with which the court is presented. While dynamic theories of statutory interpretation may give courts some leeway, there are limitations on the courts' ability to read around the language of an express preemption provision.").

²³⁸ *Id.*

²³⁹ Stabile, *supra* note 209, at 30-31. ("A second cause of problems created by express preemption provisions is that Congress cannot make a comprehensive and accurate determination at the time it enacts legislation regarding the appropriate breadth of that statute's preemptive reach. Not only does Congress enact legislation in light of particular issues and problems, but it enacts such legislation against an existing social and legal landscape that can be expected to change over time.").

tional approach to legislating the FCRA's preemption rules. First, Congress should define its preemption goals and second, it should consider how to best implement those goals, namely through the courts or an agency like the CFPB.²⁴⁰

Two general goals of preemption are uniformity of the law and regulatory efficiency.²⁴¹ Uniformity speaks to the federal interest in centralizing and controlling policy in a particular area.²⁴² Regulatory efficiency speaks to the concerns about subjecting regulated entities to duplicative or multiplicative regulation and enforcement.²⁴³ The problem with these two goals is that courts employ them to interpret ambiguous statutory interpretations in ways that conclude Congress intended preemption.²⁴⁴ Congress should consider whether and to what extent uniformity and regulatory efficiency advances the purposes of the FCRA. More specifically, Congress should identify and articulate in the statute what the preemption goals are: for example, to establish national fair credit reporting standards to advance the FCRA's stated purposes. If it concludes uniformity and regulatory efficiency help to advance the purposes of the FCRA, then Congress should craft clear preemption rules that carve out the relevant state law causes of action.

There is much to recommend uniformity as an important goal in regulating credit reporting. Congress should consider whether the relevant state law claims frustrate federal interests as well as, whether preserving the availability of the state law claim for private litigants will advance federal interests of the statute.²⁴⁵

²⁴⁰ Sharpe, *supra* note 209, at 168.

²⁴¹ *Id.* at 177-78.

²⁴² *Id.* at 168.

²⁴³ *Id.*

²⁴⁴ Stabile, *supra* note 209, at 22 ("Courts are then left to parrot the goal of uniformity in their decisions without having the ability to examine the goal in the context of the statute and the state law claim at issue.").

²⁴⁵ *Id.*

How to best implement those goals really is a decision about whether an agency or the courts should interpret the preemption rules. Congress should consider that its ability to control judicial interpretations of the preemption rules is minimal.²⁴⁶ Inability to police the judiciary leads to unintended consequences, such as three potential interpretations of the same preemption rules.

3. Considerations for Legislating Remedies

Considerations for legislating remedies include: (1) the range of remedies available to public enforcers, and whether there are gaps; (2) whether a particular remedy would further the purposes of the statute; and (3) whether the remedy, viewed against other available private remedies, motivates private litigators to enforce the law. Among the categories of potential remedies, this section will consider the relative utility of statutory damages, punitive damages, actual and compensatory damages, injunctive relief, and attorney's fees and costs in advancing FCRA's goal of accuracy in credit reporting.

Assuming a plaintiff can demonstrate actual damages, Congress should permit a prevailing plaintiff to recover those. It is more difficult to make a clear case for statutory damages. Statutory damages are damages whose amount or range is set by law, typically without regard for whether the plaintiff suffered actual harm. This gives consumers a procedural advantage because they need not prove actual damages to state a viable claim for relief. Many federal statutes, including the FCRA, offer statutory damages to successful plaintiffs.²⁴⁷

Three policies generally support statutory damages laws. First, they provide incentive to consumers to sue to enforce their rights even if they have a small amount

²⁴⁶ Sharpe, *supra* note 180, at 170.

²⁴⁷ 15 U.S.C. § 1681n(a). For willful failures to comply with the Act's disclosure requirements, plaintiffs may seek statutory damages between \$100 and \$1,000. If a person obtains a consumer report under false pretenses or knowingly without a permissible purpose, the plaintiff may seek actual damages or \$1,000, whichever is greater.

claim. The statutory damages encourage access to courts both individually, and where permitted, as aggregate plaintiffs. Arguably, statutory damages make the judicial process more efficient. Plaintiffs need not adduce evidence to prove the nature and extent of their harm, thereby expediting the litigation. Finally, they may also serve punitive and deterrent purposes.

Here again, where there is a robust public regulator empowered to bring civil enforcement actions and obtain civil fines and penalties either through settlement or litigation, one might consider eliminating statutory damages as long as plaintiffs have the ability to aggregate their small amount claims in a class actions. A bar on statutory damages discourages suits based on technical violations and opens the courtroom doors to those where a consumer is able to quantify the measure of harm she has suffered in monetary damages.

Potential FCRA plaintiffs often want to correct negative, inaccurate information on a credit report, but often cannot obtain that correction without litigation. In this way, it doesn't make sense that a plaintiff cannot obtain injunctive relief under the FCRA. The unavailability of injunctive relief for FCRA violations in some jurisdictions runs contrary to the statute's primary purpose—accuracy in credit reporting. Congress should amend the statute to permit injunctive relief so that it clearly provides for a type of relief that is core to the FCRA's purpose, namely the ability to eliminate inaccurate and harmful information on their credit reports. This would also open the door to class certification based on injunctive relief, and allow small amount claims to be aggregated. Consumers could then leverage the class action tool to adjudicate systemic inaccuracies in consumer credit reporting.

VI. CONCLUSION

Not long ago Judge Debevoise eloquently admonished Congress for structuring the FCRA's private right of action in ways that thwart the statute's purposes. Mr. Burrell's case is only one example of how FCRA has

failed to accomplish its policy goals largely due to under-enforcement. The reason for under-enforcement stems from limitations in the design and deployment of its public and private enforcement regimes. Weak, flawed enforcement regimes created a regulatory void in protecting the accuracy of information credit bureaus maintain for consumers.

Is the failure of FCRA enforcement attributable to inadvertent consequences of a well-intentioned Congress? Is the insulation of the regulated entities from liability attributable to the politics and pressures of the legislative process? Concrete answers to such questions may be out of reach. One can only hypothesize and speculate. But it is clear that the current enforcement regime is not working, not only to the detriment of consumers but also to the detriment of the FCRA's accuracy norm, which where advanced, benefits consumers and industry.

This Article aims to put a spotlight on the inadequacies of the FCRA enforcement regime by cataloging its flaws and explaining their consequences to demonstrate the imperative for reform divorced from the special interests of the regulated entities. Further, it charts a course for such structural reform by synthesizing some of the scholarship on private enforcement to extrapolate criteria Congress should consider to create an optimally effective FCRA enforcement regime.