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STUDENT ARTICLES

Who Bears the Burden of Proof Under the Fair Credit Reporting Act, 15 U.S.C. §1681e(b)? Consumers May Bear the Biggest Burden in This Climate of Heightened National Security

Jennifer Cuculich *

I. Introduction

The Fair Credit Reporting Act (“FCRA”) is intended to help consumers protect their privacy and reputation by preventing the dissemination of inaccurate information.¹ Specifically, 15 U.S.C. § 1681e(b) requires that a credit reporting agency follow “reasonable procedures” to ensure maximum accuracy in credit reports.² In the past two decades, the courts of appeals have been divided over who bears the burden of proof in actions brought under § 1681e(b): must a plaintiff show that the agency did not use reasonable procedures in maintaining a plaintiff’s credit file, or must the agency show that it did?

As a result of recent acts of terrorism, increased national security interests have further complicated the question. The recently passed USA PATRIOT Act contains amendments to the FCRA that allows the government greater access to private credit information.

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¹ See *Williams v. Equifax Credit Info. Servs.*, 892 F. Supp 951 (E.D. Mich. 1995); *In re Grand Jury Subpoena to Credit Bureau*, 594 F. Supp. 229 (M.D. Pa. 1984); *Roseman v. Retail Credit Co., Inc.*, 428 F. Supp. 643 (E.D. Pa. 1977).

² 15 U.S.C. § 1681e(b) (2001).

These amendments place a higher priority on national security than on individual privacy, and they threaten to chip away at individual privacy interests. As a result of the government's actions, there is a possibility that individual businesses, such as credit reporting agencies, will follow suit and also cut back on privacy interests. The potential effect on consumers is that their private credit information will be made available to more people. In light of this potential effect, when consumers bring actions against credit reporting agencies, the courts should recognize that while plaintiffs bear the burden of proof, showing that the agency kept an inaccurate report is enough to meet this burden.

Part II of this article will discuss the history of the FCRA and the provisions of the FCRA relating to consumer actions. Part III will review the most recent appellate cases from the Eleventh, Ninth, D.C. and Fourth circuits addressing the issue of who bears the burden of proof for § 1681e(b) claims. Part IV will discuss the reasoning employed by these courts and suggest other factors, such as the recent passage of the USA PATRIOT Act, that may affect the way courts analyze this issue. While the USA PATRIOT Act threatens individual privacy interests, the courts must in turn make efforts to preserve those interests. Therefore, Part V will propose that the courts adopt a consumer-friendly approach when deciding the burden of proof issue in light of the recent anti-terrorism legislation. While the courts must recognize that the plaintiff bears the burden of proof under § 1681e(b), they also must allow plaintiffs' claims to proceed, as the D.C. and Fourth circuit courts have done, when the claim involves "crucial" questions or damaging inconsistencies.

II. Background

In 1970, Congress enacted the FCRA³ in response to abuses in the consumer reporting industry.⁴ Employers had begun to place increased reliance on consumer reporting agencies to provide background checks on prospective employees.⁵ Congress found that agencies were frequently reporting inaccurate information that was adversely affecting individuals.⁶ As one member of the House noted

³ Fair Credit Reporting Act of 1970, Pub. L. 91-508, 84 Stat. 1128 (codified as amended at 15 U.S.C. §§ 1681-1681u. (2000)).

⁴ *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001).

⁵ *Id.*

⁶ *Id.*

that “with the trend toward . . . the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal ‘blips’ and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable.”⁷ Congress intended the FCRA to provide consumers with a remedy for the damage caused by inaccurate credit reports.⁸ Furthermore, individual privacy is a primary concern of § 1681e(b).⁹ As one court noted, however, Congress intended to prevent unreasonable and careless invasions of consumer privacy, but did not intend to prevent the dissemination of critical credit information.¹⁰

Congress adopted a variety of measures when it enacted the FCRA to ensure that credit reporting agencies report accurate information. Specifically, 15 U.S.C. § 1681e(b) provides that “[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”¹¹ The FCRA provides specific procedures a credit reporting agency must follow when accuracy is disputed.¹² For example, an agency must reinvestigate disputed information, delete all information that cannot be verified, and allow the consumer to file a statement regarding any disputed information that remains after reinvestigation.¹³ A consumer has a right to sue when an agency either intentionally¹⁴ or negligently¹⁵ fails to follow reasonable

⁷ *Id.* (citing 116 CONG. REC. 36570 (1970)).

⁸ See Amanda L. Fuchs, Comment, *The Absurdity of the FTC’s Interpretation of the Fair Credit Reporting Act’s Application to Workplace Investigations: Why Courts Should Look Instead to the Legislative History*, 96 NW. U. L. REV. 339, 342 (2001) (reviewing the legislative history of the Fair Credit Reporting Act).

⁹ See 15 U.S.C. § 1681(a) (2000) (finding that “there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”) (emphasis added).

¹⁰ *In re Subpoena Duces Tecum to Testify Before Grand Jury Directed to TRW, Inc.*, 460 F. Supp. 1007, 1009 (E.D. Mich. 1978).

¹¹ 15 U.S.C. § 1681e(b) (2000).

¹² 15 U.S.C. § 1681i (2000).

¹³ *Id.*

¹⁴ 15 U.S.C. § 1681n (2000) (providing that anyone who “willfully fails to comply” with reasonable procedures may be liable for actual damages, punitive damages and costs, including attorney’s fees).

procedures. The statute is silent, however, on whether the plaintiff bears the burden of proving that the agency did not follow reasonable procedures in procuring a credit report, or whether the agency has the burden of proving that it did.

III. Discussion

Inevitably, when a statute is silent in regard to an aspect of the legislation, different interpretations will arise. Accordingly, on the issue of who bears the burden of proof in showing reasonableness of procedure, the circuits are split. Both the Eleventh and Ninth circuits have implied that the burden is on the consumer reporting agency to show that it followed reasonable procedures. On the other hand, both the D.C. and Fourth circuits have clearly placed the burden on the plaintiff to show that the agency failed to follow reasonable procedures.

A. The Eleventh Circuit: *Cahlin v. General Motors Acceptance Corp.*

In *Cahlin*, a consumer brought an action against two credit reporting agencies, TRW, Inc. and The Credit Bureau Incorporated of Georgia ("CBI"), alleging a violation of § 1681e(b).¹⁶ Cahlin, the plaintiff, leased a car for a five-year term from General Motors Acceptance Corporation ("GMAC") on June 3, 1985.¹⁷ Although the written lease provided that Cahlin would be liable for any amounts owed as a result of early termination, Cahlin alleged that he received an oral promise that if he returned the car within ninety days he would be released from this obligation.¹⁸ Cahlin returned the car on August 27, 1985.¹⁹ In November and December of the same year, GMAC sent notices to Cahlin demanding \$3,842.44 on the lease and threatening legal action.²⁰ Cahlin settled the dispute in January of

¹⁵ 15 U.S.C. § 1681o (2000) (providing that any person who negligently fails to follow reasonable procedures may be liable for actual damages and the costs of the action, including attorney's fees).

¹⁶ *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1154 (11th Cir. 1991).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

1986 by promising to pay \$2,000 as full satisfaction for his outstanding debt.²¹ Cahlin paid the agreed amount by May 1, 1986 and received a general release from GMAC discharging him from his previous debt.²²

In August of 1985, GMAC began reporting to CBI that Cahlin's account was delinquent and that the account had been charged off its books as an active receivable.²³ Consequently, CBI gave Cahlin's GMAC account an "I9" rating, which signifies that the account has been charged off or is bad debt.²⁴ After Cahlin settled his account and received a release from GMAC, GMAC informed CBI that the loss had been paid in full and that Cahlin's account should be changed accordingly.²⁵ In response, CBI changed the balance on Cahlin's GMAC account to zero, but continued to keep the "I9" rating on the report.²⁶ In August of 1986, after reading a copy of his CBI credit report, Cahlin mailed a customer dispute form to CBI along with a copy of the release he had received from GMAC.²⁷ CBI's only response was to send Cahlin a copy of his credit report.²⁸

After receiving numerous complaints from Cahlin, GMAC sent a letter to CBI in October of 1986 asking the company to change Cahlin's account rating from an "I9" to an "I-1."²⁹ An "I-1" rating signifies that a debt has been paid within thirty days of billing.³⁰ In response, CBI changed the current status of Cahlin's GMAC account to an "I-1" rating, but relocated the "I9" rating to the previous credit history section of Cahlin's report.³¹

Finally, in October of 1987, Cahlin sent a letter to CBI asking them to remove the "I9" rating from the previous history section of

²¹ *Id.*

²² *Id.* at 1154-55.

²³ *Id.* at 1155.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

his GMAC account.³² After contacting GMAC, CBI deleted any reference to an "I9" rating from Cahlin's report and, by November of 1987, CBI ceased reporting any adverse information about Cahlin's GMAC account.³³ Nevertheless, Cahlin alleged that as a result of CBI's inaccurate credit reports he was denied credit on numerous occasions between October of 1986 and November of 1987.³⁴

Cahlin also alleged that TRW, another credit reporting agency, reported erroneous information about his GMAC account.³⁵ Prior to June of 1986, TRW reported Cahlin's GMAC account as a "loss charge off."³⁶ In June, GMAC instructed TRW to change Cahlin's account to a more favorable "paid charge off" status.³⁷ After complaints from Cahlin, GMAC further directed TRW to change Cahlin's account to a "Code 13," which signifies a paid account with a zero balance.³⁸ Finally, after receiving a letter from Cahlin, TRW changed Cahlin's account to reflect that the GMAC account was "paid satisfactory."³⁹

Cahlin alleged that his application for a residential mortgage loan was denied as a result of an inaccurate TRW report.⁴⁰ He did not produce any evidence to that effect, however, and the bank records subpoenaed by TRW did not indicate that the TRW credit report was a factor in denying his application.⁴¹ The district court granted summary judgment for TRW and CBI, holding that Cahlin failed to satisfy his threshold burden of showing that the credit agencies had reported any "inaccurate" information.⁴² On the contrary, the court found that both CBI and TRW had accurately reported Cahlin's credit information.⁴³ Cahlin appealed, and the Eleventh Circuit Court

³² *Cahlin*, 936 F.2d at 1155.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1156.

⁴¹ *Id.*

⁴² *Id.* at 1154.

⁴³ *Id.*

of Appeals affirmed.⁴⁴

On appeal, the Eleventh Circuit held that the FCRA implicitly requires a plaintiff to present evidence showing that a credit reporting agency prepared a report containing inaccurate information.⁴⁵ If the plaintiff cannot make out this *prima facie* case, there is no violation of § 1681e(b).⁴⁶ However, if a plaintiff meets this initial burden, the court must then inquire into the reasonableness of the agency's procedures.⁴⁷ The court further held that in order to escape liability, an agency must establish that the inaccurate report was generated by following reasonable procedures, thus shifting the burden to the credit reporting agency.⁴⁸ The court went on to discuss the meaning of "accuracy" in credit reporting and found that it should be construed in an "evenhanded manner" toward the interests of both consumers and creditors.⁴⁹

While the court refrained from deciding whether or not Cahlin's report was accurate, the court did find that Cahlin's claim was without merit.⁵⁰ Cahlin contended that his report should have been free of any adverse information.⁵¹ The court, however, found that a debt that was charged off by a creditor and later settled for less

⁴⁴ *Id.*

⁴⁵ *Id.* at 1156.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1157-58. The court noted that there are two different approaches to defining accuracy in credit reports. *Id.* at 1157. The first, which was adopted by the district court in *Cahlin*, allows an agency to satisfy its duty under the FCRA if it produces a report that is "technically accurate." *Id.* This means that the information is factually correct, even though it might be misleading or incomplete. *Id.* The second approach rejects this position and requires agencies to ensure "maximum possible accuracy." *Id.* This means that although a report may be factually correct, if it is incomplete or misleading, a claim will survive summary judgment. *Id.* In this case, the court did not feel the need to choose one approach over the other. *Id.* Cahlin alleged that CBI should have ceased reporting any adverse credit information. *Id.* at 1158. The court recognized that agencies have a duty to report all credit information, not just information that is beneficial to consumers. Thus, while agency procedures must be fair to the consumer, they must also be fair to creditors by reporting the whole picture. *Id.* The standard of accuracy must therefore be objective and "evenhanded" toward consumers and creditors. *Id.*

⁵⁰ *Id.* at 1159.

⁵¹ *Id.*

than the original amount due should be included on a credit report.⁵² This information is important to future creditors and it creates a more accurate report than one containing no adverse information.⁵³

B. The Ninth Circuit: *Guimond v. Trans Union Credit Reporting Agency*

In *Guimond*, a consumer brought an action under the FCRA alleging that Trans Union Credit Information Company ("Trans Union") negligently failed to correct inaccurate information in her credit report.⁵⁴ Guimond, the plaintiff, became aware of inaccuracies in her credit report and notified Trans Union of the inaccuracies in October of 1989.⁵⁵ Her credit report falsely stated that she was married, that she was also known as "Ruth Guimond," and that she had a credit card from Saks Fifth Avenue.⁵⁶ In response, Trans Union told Guimond that the inaccurate information had been removed from her file.⁵⁷ A few months later, however, Trans Union again published the false information.⁵⁸

Guimond requested the source of the erroneous information, but Trans Union told her that they did not know the source.⁵⁹ Trans Union eventually removed the false information from Guimond's file.⁶⁰ During this time Guimond was never denied credit because of the inaccuracies in her credit report.⁶¹

Guimond claimed that Trans Union violated, among other laws, § 1681e(b).⁶² The district court granted summary judgment for

⁵² *Cahlin*, 936 F.2d at 1158.

⁵³ *Id.* at 1159 n.19.

⁵⁴ *Guimond v. Trans Union Credit Reporting Agency*, 45 F.3d 1329, 1331 (9th Cir. 1995).

⁵⁵ *Id.*

⁵⁶ *Id.* at 1332.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* Guimond's complaint also alleged violations of 15 U.S.C. § 1681g(a)(2), 15 U.S.C. § 1681i(c), and California Civil Code § 1785.1 *et seq.* *Id.* The court reversed the grant of summary judgment on Guimond's 1681g(a)(2) and California

Trans Union, holding that, because Guimond was never denied credit, she did not suffer any actual damages.⁶³ Guimond appealed and the appellate court reviewed the granting of summary judgment *de novo*.⁶⁴ In reversing the district court, the Ninth Circuit held that a denial of credit is not a prerequisite for recovery under the FCRA.⁶⁵ Therefore, instead of focusing on whether Guimond was denied credit, the district court should have focused on whether Trans Union followed reasonable procedures in preparing her credit report.⁶⁶

Like the court in *Cahlin*, the Ninth Circuit held that in order to make out a *prima facie* case, a plaintiff need only show inaccuracies in his or her report.⁶⁷ The inquiry will then focus on whether the credit reporting agency followed reasonable procedures in preparing the report.⁶⁸ Thus, *Guimond* also seems to shift the burden to the agency to show that they followed reasonable procedures to ensure accuracy, rather than putting the burden on the consumer to show that the agency failed to use reasonable procedures.

C. The D.C. Circuit: *Stewart v. Credit Bureau, Inc.*

In *Stewart*, a consumer brought a claim under § 1681e(b) against Credit Bureau Inc. ("CBI").⁶⁹ Stewart, the plaintiff, owned a consulting business that helped individuals and small businesses obtain credit.⁷⁰ Stewart applied for CBI membership and two credit cards, which he intended to use for his business.⁷¹ A CBI membership would have allowed him to receive CBI's consumer credit reports so he could help his clients get credit.⁷² In December

Civil Code claims, but upheld the grant of summary judgment on the 1681i(c) claim. *Id.* at 1334, 1335, 1337.

⁶³ *Id.* at 1332.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1334.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 49 (D.C. Cir. 1984).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

1978, Stewart's credit card applications were denied; a few months later, CBI denied Stewart membership.⁷³ Stewart claimed that both denials were caused by inaccurate information in his CBI report.⁷⁴ After Stewart examined his credit file in person, CBI investigated the disputed entries.⁷⁵ The investigation revealed several errors in Stewart's credit report, and CBI subsequently made the appropriate corrections to Stewart's file.⁷⁶

CBI moved for summary judgment on the grounds that Stewart suffered no actual harm from CBI's inaccurate reporting.⁷⁷ The district court found otherwise and held that Stewart's allegations of damages raised a triable issue of fact.⁷⁸ Nonetheless, the court entered judgment for CBI *sua sponte*.⁷⁹ The court reasoned that Stewart could not prevail at trial because he intended to rely only on the inaccurate report, rather than carry his burden of showing that CBI failed to follow reasonable procedures.⁸⁰

On appeal, the D.C. Circuit held that a plaintiff cannot merely rest on an inaccuracy in a credit report and then shift the burden of proof to the defendant.⁸¹ The court found no indication in §1681e(b) that Congress meant to shift the burden of proof.⁸² The court noted that Congress demonstrated that it knew how to shift the burden of proof to the defendant because it explicitly did so in two other sections of the FCRA.⁸³ In addition, the court relied on the assumption, recognized by several other courts, that the plaintiff bears the burden of proving the reasonableness of procedures.⁸⁴

⁷³ *Stewart*, 734 F.2d at 49.

⁷⁴ *Id.* CBI reinvestigated four of the entries in Stewart's credit file: (1) a wage earner's plan; (2) an outstanding tax lien from Arlington County, Virginia; (3) late payments on a Hecht Company account; and (4) late payments on a loan from Virginia National Bank. *Id.* at 49-50.

⁷⁵ *Id.* at 49.

⁷⁶ *Id.* at 50.

⁷⁷ *Id.*

⁷⁸ *Id.* at 51.

⁷⁹ *Id.*

⁸⁰ *Id.* at 53.

⁸¹ *Id.* at 51.

⁸² *Id.*

⁸³ *Id.* at 51 n.5 (citing 15 U.S.C. §§1681d(c), 1681m(c)).

⁸⁴ *Id.* at 51 n.5 (citing *Morris v. Credit Bureau, Inc.*, 563 F. Supp. 962, 968

The court went on to note that credit reporting agencies should be judged according to what a reasonably prudent person would do under the circumstances.⁸⁵ Determining the reasonableness of conduct involves “weighing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.”⁸⁶ In applying this standard, the court held that a plaintiff need not introduce direct evidence of unreasonable procedures because, in some instances, inaccurate credit reports are themselves evidence of unreasonable procedures.⁸⁷ The court relied on two other cases where plaintiffs prevailed despite their failure to present direct evidence of the defendants’ reporting procedures.⁸⁸ In one case, the plaintiff showed evidence of inconsistent reports.⁸⁹ In another case, the plaintiff showed that the agency kept two separate files on him.⁹⁰ Based on this reasoning, the D.C. Circuit vacated the district court’s order of summary judgment because “a facial inconsistency between the wage earner entry and the rest of the file” created a duty for CBI to reinvestigate.⁹¹ The court reasoned that “a failure to investigate inconsistencies as fundamental as a falsely reported wage earner plan, or even less fundamental inaccuracies can support a claim of negligence.”⁹² Because the district court did not consider whether CBI fulfilled its duty to reinvestigate, summary judgment on the issue of reasonableness of procedure was inappropriate.⁹³

(1983); *Alexander v. Moore & Associates, Inc.*, 553 F. Supp. 948, 954 (1982)).

⁸⁵ *Id.* at 51.

⁸⁶ *Id.*

⁸⁷ *Id.* at 52.

⁸⁸ *Id.* at 52 (citing *Bryant v. TRW, Inc.*, 487 F. Supp. 1234 (E.D. Mich. 1980); *Morris v. Credit Bureau, Inc.*, 563 F. Supp. 962 (S.D. Ohio 1983)).

⁸⁹ *Id.* at 52 (citing *Bryant v. TRW, Inc.*, 487 F. Supp. 1234 (E.D. Mich. 1980)).

⁹⁰ *Id.* at 52 (citing *Morris v. Credit Bureau, Inc.*, 563 F. Supp. 962 (S.D. Ohio 1983)).

⁹¹ *Id.* at 53.

⁹² *Id.* at 52-53.

⁹³ *Id.* at 53.

D. The Fourth Circuit: *Dalton v. Capital Associated Industries, Inc.*

In *Dalton*, a job applicant sued a consumer reporting agency under § 1681e(b) for failing to follow reasonable procedures in reporting his criminal history to a prospective employer.⁹⁴ In 1999, Dalton interviewed with Sumitomo Electronic Lightwave Corp. for a position as Regional Sales Manager.⁹⁵ The employment application asked whether Dalton had been convicted of a felony in the past seven years.⁹⁶ Although Dalton was charged with second degree assault in Colorado, a felony, he ultimately pled guilty to third degree assault, a misdemeanor.⁹⁷ Accordingly, he truthfully stated that he had not been convicted of a felony.⁹⁸ Dalton was offered the job subject to the successful completion of education, employment, and criminal background checks.⁹⁹

Sumitomo employed Capital Associated Industries (“CAI”) to conduct a criminal background check on Dalton.¹⁰⁰ CAI, however, did not perform the criminal record check itself.¹⁰¹ It employed SafeHands, Inc. to perform the check.¹⁰² In turn, SafeHands engaged Guaranty Research Services, Inc. (“GRS”) to run a state-wide computer search of criminal records in Colorado.¹⁰³ GRS found that Dalton had a criminal record in Jefferson County, but the computer search did not reveal the specific charge.¹⁰⁴ An employee of GRS then called the county clerk’s office to inquire about the nature of the charge.¹⁰⁵ The clerk stated that Dalton had been convicted of third

⁹⁴ *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 412 (4th Cir. 2001).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 412-13.

¹⁰⁰ *Id.* at 413.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

degree assault.¹⁰⁶ The clerk also falsely told the employee that third degree assault consisted of a felony.¹⁰⁷ GRS reported to SafeHands that Dalton had been convicted of a felony, and the inaccurate report then made its way from SafeHands to CAI, and finally to Sumitomo.¹⁰⁸ At this point, neither CAI nor SafeHands took any independent steps to verify GRS's report.¹⁰⁹

Meanwhile, Sumitomo discovered that Dalton had significantly misstated periods of employment on his application.¹¹⁰ Based on the misstatements and CAI's criminal history report, Sumitomo decided to withdraw Dalton's employment offer.¹¹¹ When a Sumitomo representative called Dalton to inform him that the offer was withdrawn because of his criminal record, Dalton denied that he had been convicted of a felony.¹¹² The representative told Dalton that he would call CAI to check the accuracy of the report, and he later called Dalton to tell him that CAI was standing by the accuracy of its report.¹¹³ CAI did, however, begin to investigate whether Dalton had a felony conviction.¹¹⁴

The next day, CAI discovered the mistake and contacted Sumitomo to correct the report.¹¹⁵ CAI had called the clerk's office and, after speaking to two court clerks, discovered that third degree assault was a misdemeanor, not a felony.¹¹⁶ Sumitomo reevaluated Dalton's employment application, but because of Dalton's misstatements about his employment history, Sumitomo decided not to hire him.¹¹⁷

Dalton sued CAI under § 1681e(b), claiming damages for, among other things, emotional distress and damage to his

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 414.

¹¹⁷ *Id.*

reputation.¹¹⁸ The district court granted summary judgment for CAI based, in part, on its determination that CAI followed reasonable procedures.¹¹⁹ Dalton appealed, and the Fourth Circuit Court of Appeals reviewed the judgment *de novo*.¹²⁰

On appeal, the Fourth Circuit held that the plaintiff bears the burden of proving that a credit reporting agency failed to follow reasonable procedures.¹²¹ Like the court in *Stewart*, the court compared § 1681e(b) with two other sections of the FCRA in which Congress explicitly placed the burden on the consumer reporting agency.¹²² Relying on the same reasoning as *Stewart*, the court found that Congress knew how to shift the burden to the defendant.¹²³ The burden remained on the plaintiff, however, because Congress had not done so in § 1681e(b).¹²⁴ The court refrained from commenting on whether an inaccuracy may be so egregious that it creates a presumption that the agency's actions were unreasonable.¹²⁵

Applying this reasoning, the court vacated the order of summary judgment because a reasonable jury could conclude that it was unreasonable to rely on a clerk's opinion regarding such a "crucial question."¹²⁶ In addition, a jury could conclude "that CAI should have had procedures in place to instruct its subvendors on the appropriate sources for reliable information about a person's criminal record."¹²⁷

IV. Analysis

In *Guimond*, the Ninth Circuit properly recognized that the FCRA is a consumer-oriented statute and that it should therefore be construed in a light most favorable to the consumer.¹²⁸ As one

¹¹⁸ *Dalton*, 257 F.3d at 418.

¹¹⁹ *Id.* at 417.

¹²⁰ *Id.* at 414.

¹²¹ *Id.* at 416.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 417.

¹²⁷ *Id.*

¹²⁸ *Guimond*, 45 F.3d at 1333 (quoting *Kates v. Croker Nat'l Bank*, 776 F.2d

commentator noted, “where the duty to be enforced is that of maintaining ‘reasonable procedures,’ the allocation of the burden of proof will probably determine the outcome of the case.”¹²⁹ For a plaintiff, this standard is exceedingly difficult to meet.¹³⁰ The majority of consumers can not afford to pay for the extensive discovery that would be necessary to prove that a company was systematically negligent.¹³¹

However difficult it may be for a plaintiff to prevail in these cases, the courts cannot disregard the logical interpretation of the statute. The traditional rule, followed by courts when a statute is silent, is that the plaintiff bears the burden of proof.¹³² In addition, the D.C. and Fourth circuits properly recognized that Congress knew how to shift the burden, if that was their intent. For example, 15 U.S.C. § 1681m(c) states that “[n]o person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.”¹³³ Clearly, in this section, Congress shifted the burden to the credit reporting agency. No similar language exists in § 1681e(b). Thus, the D.C. and Fourth circuits properly found that the plaintiff bears the burden of proof in § 1681e(b) claims.

The logical interpretation of the statute, however, may not do an adequate job of protecting consumers. The results of one survey indicates that nearly one-half of credit reports contain inaccurate information and that nearly twenty percent contain a major inaccuracy – one that could adversely affect a consumer’s eligibility

1396, 1397 (9th Cir. 1985)).

¹²⁹ Ira D. Moskatel, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act*, 47 S. CAL. L. REV. 1070, 1105 (1974).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *Edison v. Dept. of the Army*, 672 F.2d 840, 842 (11th Cir. 1982) (applying the traditional rule to the accuracy of records portions of the Privacy Act, 5 U.S.C. §§ 552a(e)(5), (s)(1)(C), (g)(1)(D)); *Caiazza v. Volkswagenwerk A.G.*, 647 F.2d 241, 253 (C.A.N.Y. 1981) (noting that the traditional rule is set forth in the Restatement (Second) of Torts at § 433(B)(2)); *State of Idaho v. Searcy*, 798 P.2d 914, 924 (Idaho 1990) (recognizing the traditional rule in the criminal law context).

¹³³ 15 U.S.C. § 1681m(c) (2000).

for credit.¹³⁴ In addition, more than eighty percent of Americans are either “very concerned” or “somewhat concerned” about the privacy issues in regard to the personal information contained in these reports.¹³⁵

As one critic of the FCRA noted: “[m]ore drastic, comprehensive solutions are necessary.”¹³⁶ One significant flaw in the FCRA allows credit reporting agencies to release information to “those it believes intend to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished. . . or otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer,”¹³⁷ or “for employment, insurance, or government benefits issued on the basis of financial status.”¹³⁸ This broad definition means that almost anyone may be eligible to receive the information collected by credit agencies.¹³⁹

In addition, recent legislation threatens to further weaken the FCRA. On October 26, 2001, President Bush signed into law the USA PATRIOT Act, which is intended to attack terrorism through enhanced security and surveillance procedures, among other things.¹⁴⁰ Title III of the USA PATRIOT Act targets money laundering, in part, by amending the FCRA.¹⁴¹ The amendments

¹³⁴ David Rameden, *When the Database is Wrong. . . Do Consumers Have any Effective Remedies Against Credit Reporting Agencies or Information Providers?*, 100 COM. L.J. 390, 393-34 (1995) (citing *Once Over; Credit Reports: Getting It Half-Right*, CONSUMER REP., July 1991, at 453).

¹³⁵ Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 532 (1998) (citing DAVID H. FLAHERTY, *PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES* 78 (1989)).

¹³⁶ Sandra Byrd Peterson, *Your Life As an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?*, 48 FED. COMM. L. J. 163, 184 (1995).

¹³⁷ *Id.* at 181 (citing 15 U.S.C. § 1681(b)(3)).

¹³⁸ *Id.*

¹³⁹ *Id.* at 181.

¹⁴⁰ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act].

¹⁴¹ USA PATRIOT Act, Title III, § 358(g)(1)(B) (2001) (codified at 15 U.S.C. § 1681v (2002)).

permit law enforcement to use credit information for conducting intelligence or counterintelligence activities.¹⁴² Consumer reporting agencies must furnish consumer reports and any other information in a consumer's file to an authorized government agency upon written certification that the information is necessary for the agency to perform its duties.¹⁴³ Furthermore, the amendments allow investigators prompt access to credit histories without requiring them to notify unsuspecting consumers.¹⁴⁴ As Kenneth W. Dam, the Deputy Secretary of the Department of the Treasury, indicated in his testimony before the Senate Banking Committee, the money laundering provisions "highlight the tension between the need to share information and the legitimate need for financial privacy."¹⁴⁵ He further explained that the need to share financial information must be "balanced against our fundamental notions of privacy," and that this is the challenge facing the government in implementing anti-terrorism legislation.¹⁴⁶

In light of these recent changes to the FCRA and the climate of increased national security, it is important to remember that individual privacy is a fundamental value in American society. More national security plans are already in the works that will continue to threaten individual privacy, including the FCRA. For example, federal aviation authorities and technology companies will soon begin testing a new air security screening system designed to instantly collect every passenger's travel history, living arrangements, and large amounts of other personal information.¹⁴⁷ The government's plan calls for a computer network linking every reservation system in the United States to private and government databases.¹⁴⁸ The purpose of the network is to profile passenger activity and find "obscure clues" about potential terrorist threats

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Anti-Terrorism Money Laundering Enforcement: Hearing Before the Senate Banking Comm.*, 107th Cong. (2002) (statement of Kenneth W. Dam, Deputy Secretary, Treasury Department), available at 2002 WL 2010117.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Robert O'Harrow, Jr., *Computer Security to Profile Passengers; System Could Cull Data, Find Possible Threats Before Flights*, SUN-SENTINEL, Feb. 1, 2002, at 1A.

¹⁴⁸ *Id.*

before a flight takes off.¹⁴⁹

Aviation industry officials have already begun discussions with legislators about cutting back on some of the privacy protections in the FCRA in order to allow security officials to use more passenger credit information.¹⁵⁰ Civil liberties activists have expressed concerns about the system, believing it to be a huge surveillance system that will erode individual privacy protections.¹⁵¹ As one activist stated, “[i]t really is a profound step for the government to be conducting background checks on a large percentage of Americans. We’ve never done that before. It’s frightening.”¹⁵² Another columnist wrote that this type of “Big Brother” system may only make Osama bin Laden’s prediction, that “freedom and human rights in America are doomed,” come true.¹⁵³

In passing the FCRA, the federal government gave individuals control over their personal information and forced corporate America to follow suit.¹⁵⁴ Now that a national security crisis is at hand, the government is again making changes regarding individual privacy, but in the opposite direction.¹⁵⁵ There is a risk that when the government begins sharing more credit information, businesses will be under less pressure from the government to guard consumer privacy.¹⁵⁶ Because Washington has removed many restrictions on how it collects and uses information, it will have little incentive to enforce privacy laws against commercial entities.¹⁵⁷ Thus, consumers should remain vigilant, monitoring how corporations work with government and noting whether corporations

¹⁴⁹ Harrow, *supra* note 147, at 1A.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Attack on Terrorism; Privacy Issues are Raised*, CINCINNATI POST, Feb. 1, 2002, at 1A (quoting Barry Steinhardt, Associate Director of the ACLU).

¹⁵³ *An All-Seeing Eye? Proposed Airport Security System Would be Invasive, Fraught with Privacy Risks and, Probably, Ineffective*, THE PLAIN DEALER, Feb. 4, 2002, at B6.

¹⁵⁴ Heather Green, *A Defining Moment for Info Privacy; The Government’s War on Terrorism Necessarily Means More Data-Sharing Among Agencies. But Corporations Must Be More Protective*, BUSINESSWEEK ONLINE, Nov. 6, 2001, available at 2001 WL 25755518.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

take advantage of lower privacy standards.¹⁵⁸

V. Proposal

One of the principal tools consumers possess to protect their privacy is the threat of litigation. When credit reporting agencies are faced with the prospect of costly litigation, they have an incentive to comply with consumer protection laws.¹⁵⁹ The courts, however, should recognize the difficulties a plaintiff has in bringing a claim under the FCRA, and apply the law accordingly.

Three large credit bureaus dominate the market: TRW, Equifax, and Trans Union.¹⁶⁰ They each maintain approximately 150 million credit files, and together they control about ninety-nine percent of the market.¹⁶¹ These agencies also have sole or better access to critical information because of their role as information gatherers – they have the files and the personnel who regularly make records.¹⁶² Clearly, when plaintiffs bring suit under the FCRA they face a large opponent with nearly endless financial resources and access to all of the information a plaintiff needs to bring a successful claim. The courts should recognize this imbalance of power and allow claims under § 1681e(b) to go forward if the plaintiff makes out a *prima facie* case by producing an inaccurate report. The inaccuracy should, however, be a true inaccuracy rather than merely adverse, but true, information. Particularly when inconsistencies relate to criminal records or important financial information, as they did in *Dalton* and *Stewart*, courts should allow cases to proceed upon a showing of an inaccuracy. Let the plaintiff carry the burden of proof, but let it be a light burden. Credit reporting agencies can then rebut the *prima facie* case easily, if they acted properly, by producing records and testimony from employees.

When individual liberties, such as privacy, take a back seat to national security, the courts must take extra steps to protect those liberties. Although the courts do not have the power to change the language of the statute, they can apply the statute liberally and in a way that protects individual privacy. In addition, Congress must

¹⁵⁸ *Id.*

¹⁵⁹ Rameden, *supra* note 134, at 435.

¹⁶⁰ *Id.* at 392-93.

¹⁶¹ *Id.* at 393.

¹⁶² Moskatel, *supra* note 129, at 1108.

recognize that although some civil liberties may need to be curtailed for national security purposes, the most important tool in protecting consumer privacy is the consumer. Therefore, Congress must not take away the tools that consumers need to bring successful claims against credit reporting agencies when their privacy rights are violated. Likewise, the courts must give consumers a fair chance to litigate their claims.

VI. Conclusion

The D.C. and Fourth circuits properly held that the plaintiff bears the burden of proof in § 1681e(b) claims under the FCRA. The language of the statute supports this finding. The courts should follow the reasoning of the D.C. and Fourth circuits, but allow plaintiffs to make their *prima facie* case by showing inaccuracies. However, recent anti-terrorism legislation puts national security ahead of individual privacy, and courts must now make every effort to protect consumer and individual privacy. When the government begins sharing credit information to protect national security, businesses will likely be under pressure to aid in this information sharing. Consumer reporting agencies will be asked to put privacy interests aside in the interest of national security. However, when government begins restricting individual privacy protections, we risk losing sight of the values that are at the core of our society. The government, courts, and corporate America should tread carefully and take every necessary step to protect consumer privacy.