NATIONAL CONSUMER LAW CENTER'S REPORT

AUTOMATED INJUSTICE:

HOW A MECHANIZED DISPUTE SYSTEM FRUSTRATES CONSUMERS SEEKING TO FIX ERRORS IN THEIR CREDIT REPORTS

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NATIONAL CONSUMER LAW CENTER®

Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports

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Copies of this report are available by downloading from NCLC's web site at www.consumerlaw.org.

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EXECUTIVE SUMMARY

Inaccuracies and errors plague the credit reporting systems. Estimates of serious errors range from 3% to 25%. Even using a low-end estimate, which is from the credit reporting industry and included only a narrow subset of problems, ***6 million Americans*** face serious errors in their reports that could result in a denial of credit. Typical errors include:

- Credit bureaus mixing the files and identities of consumers.
- Creditors causing mistakes by attributing a debt to the wrong consumer or incorrectly recording payment histories.
- The fallout caused by identity theft.

Nearly 40 years ago, Congress enacted the Fair Credit Reporting Act to protect consumers from errors in credit reporting. One of the most important safeguards in the FCRA is the requirement that credit bureaus conduct a reasonable investigation when a consumer disputes an item in his or her credit report.

Despite its importance, the FCRA dispute process has become a travesty of justice. The major credit bureaus (Equifax, Experian, and TransUnion) conduct investigations in an automated and perfunctory manner. The bureaus:

- Translate the detailed written disputes submitted by desperate consumers into two or three digit codes.
- Fail to send supporting documentation to creditors and other information providers (furnishers) as required by the FCRA.
- Limit the role of their employees who handle disputes, or of the foreign workers employed by their offshore vendors, to little more than selecting these two or three digit codes. Workers do not examine documents, contact consumers

by phone or email, or exercise any form of human discretion in resolving a dispute.

The conduct of some furnishers is no better. The FCRA also requires information furnishers to participate in dispute resolution by themselves conducting an investigation. Like the credit bureaus, some furnishers also conduct meaningless, non-substantive investigations. Their “investigative” activity consists of nothing more comparing the notice of dispute with the recorded information that is itself the very subject of the dispute.

The credit bureaus then accept whatever the furnishers decide in resolving the dispute. The bureaus merely “parrot” the furnishers’ results, without conducting any independent review, with the ultimate effect that no one ever investigates the substance or merits of the consumer’s complaint.

Why does this happen? Credit bureaus have little economic incentive to conduct proper disputes or improve their investigations. Consumers are not the paying customers for credit bureaus – furnishers are the ones who pay the bureaus’ bills. Thus, consumer disputes represent an expense to the bureaus, which minimize the resources devoted to them by using automation that produces formalistic results. In fact, one credit bureau has reduced the amount it pays to its vendor that handles disputes to a mere ***$0.57*** per dispute letter.

I. INTRODUCTION

Credit reports play a critical role in the economic health and well-being of consumers and their families. A good credit history (and its corollary, a good credit score) enables consumers to obtain credit, and to have that credit be fairly priced. Credit reports are also used by other important decisionmakers, such as employers, landlords, utility providers, and insurers.

Thus, a consumer's credit report can have a huge impact on a consumer's life. A good credit report allows a consumer to own a home, buy a car, obtain insurance for both, get a fairly priced credit card, and perhaps even secure a job. Conversely, a bad credit report will deny consumers those same things, or force them to pay thousands more for credit and insurance. It may even cost the consumer an employment opportunity or result in termination. It is no exaggeration to say that a credit history can make or break a consumer's finances.

> *Kenneth Baker*[1]
>
> Kenneth Baker had a single financial objective from the early part of 2005 until March 2006 – he wanted to move his family into a new home. The family home in Loudoun County, Virginia was too cramped for his wife, daughter, and wife's children. In order to move, Kenneth needed approval for a mortgage. It shouldn't have been too hard – after all, Kenneth had always paid his bills on time.
>
> Unfortunately for Kenneth, his credit history had become "mixed" with that of another "Kenneth Baker" – a Kenneth Baker who was not so diligent about paying his bills. This other man had racked up numerous delinquencies, charge-offs, collections and judgments against him. These black marks showed up on Kenneth's credit report, making it impossible for him to get a mortgage.
>
> Kenneth made enormous efforts to fix these errors and get a mortgage. He sent multiple disputes to the credit bureaus. He hired lawyers to write dispute letters to the bureaus. His letters explained how the other man's negative accounts had gotten mixed into his credit report, how he needed the problem fixed to get a mortgage, and even how the bureaus procedures had caused similar problems in other cases that resulted in successful lawsuits against the bureaus.
>
> Kenneth applied unsuccessfully every month to get a mortgage, sometimes applying more than once in a month. Every time he tried, Kenneth had to explain to a mortgage broker how some other man's negative accounts had gotten mixed into his credit history. Every time he had to explain this, Kenneth Baker became embarrassed and anxious. The constant rejections humiliated Kenneth, and he soon became depressed.
>
> On March 24, 2006, Kenneth Baker committed suicide. In his last dispute letter to Experian, he wrote of how his battle to fix his credit report had "destroyed his life." In his suicide note, Kenneth referred to his ordeal with the credit bureaus. In this case, inaccurate credit reporting literally cost a man his life.

[1] Complaint, Estate of Baker v. Experian Info. Solutions, Civ. Ac. 3:07-cv-00470 (Aug. 10, 2007).

II. BACKGROUND: CREDIT REPORTS AND THE FAIR CREDIT REPORTING ACT

A. WHAT'S A CREDIT REPORT?

A credit report (also called a credit history) is a record of how a consumer has borrowed and repaid debts. Almost every adult American has a credit history with the three major national credit bureaus: Experian, Equifax, and TransUnion.

A credit report contains the history and status of many of a consumer's credit accounts. It has basic personal information about a consumer--Social Security number, birth date, current and former addresses, and employers. The report also lists basic information about a consumer's credit accounts, including the date the consumer opened the account, the type of account (such as real estate, revolving (credit card), or installment); whether the account is currently open or has been closed; the monthly payment; the maximum credit limit; the latest activity on the account; the current balance; and any amounts past due.

Each account includes a code that explains whether the account is current, thirty days past due, sixty days past due, or ninety days past due, or if the account involves a repossession, charge off, or other collection activity. The report also includes the addresses and telephone numbers of the creditors.

The report will list any accounts that have been turned over to a collection agency. In addition, a credit report will include certain public records information, such as court judgments (and sometimes mere lawsuits), garnishments, tax liens, foreclosures, and bankruptcies.

B. DISPUTE RIGHTS UNDER THE FCRA

In 1970, Congress created the Fair Credit Reporting Act (FCRA) to protect consumers when dealing with credit bureaus. The FCRA limits who can see a consumer's credit report, mandates how long negative information can remain on a report, and contains a number of identity theft protections. The credit bureaus, which are called "consumer reporting agencies" under the FCRA, are required to follow "reasonable procedures" to ensure the "maximum possible accuracy" of credit reports.

One of the most critical FCRA protections is the consumer's right to dispute errors in his or her credit report. Under the FCRA, both the credit bureaus and the information provider have responsibilities to investigate disputes and correct inaccurate or incomplete information. The provider of information is often referred to as the "furnisher." Furnishers include banks, credit card companies, auto lenders, collection agencies or other businesses.

If the consumer sends a dispute to a credit bureau, the bureau must investigate the items in question, usually within 30 days. The bureau can reject the dispute if it determines the dispute to be frivolous or irrelevant. The credit bureau must conduct a "reasonable" investigation (sometimes called a "reinvestigation," which is the term used in the FCRA) that includes reviewing and considering all relevant information submitted by the consumer. Within five days of receiving the dispute, the bureau must also notify the furnisher of the dispute, and the notice must include "all relevant information" provided by the consumer about the dispute.

After the furnisher receives notice of a dispute from the credit bureau, the furnisher has its own duties under the FCRA. The furnisher must conduct an investigation, review all relevant information provided by the credit bureau, and report the results to the bureau. If the furnisher finds the disputed information to be inaccurate, it must notify all three of the national bureaus so that they can correct this information in the consumer's credit report file.

When the investigation is complete, the credit bureau must give the consumer the written results and a free copy of the credit report if the dispute results in a change. If information is corrected or deleted, the credit bureau cannot put back the disputed information in the consumer's credit report unless the furnisher verifies that it is accurate and complete. The credit bureau also must send the consumer a written notice that includes the name, address, and phone number of the furnisher.

For tips on sending a credit reporting dispute, see Part V.A of this Report.

C. CREDIT REPORTS ARE FULL OF ERRORS

Despite the importance of accurate credit reports and the purpose of the FCRA to promote accuracy, errors are unfortunately quite common in the credit reporting system. Study after study has documented significant error rates in credit reports. An on-line survey by Zogby Interactive found that 37% of consumers who ordered their credit report discovered an error, and 50% of those were not easily able to correct the error.[2] A study by the Consumer Federation of America and National Credit Reporting Association documented numerous serious errors in credit reports.[3] One indication of the magnitude of such errors is the fact that 29% of credit files had a difference of 50 points or more between the highest and lowest scores from the three national credit bureaus.[4]

Studies from U.S PIRG and Consumers Union have found errors in 25% of credit reports serious enough to cause a denial of credit.[5] Even the trade association for the credit bureaus – the Consumer Data Industry Association (CDIA) - has admitted that, out

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[2] Zogby Interactive, *Most Americans Fear Identity Theft*, Zogby's American Consumer, April 2007, at 3.
[3] Consumer Federation of America and National Credit Reporting Association, *Credit Score Accuracy and Implications for Consumers,* December 17, 2002, *available at* www.consumerfed.org/pdfs/121702CFA_NCRA_Credit_Score_Report_Final.pdf ["(CFA-NCRA study"].
[4] *Id.* at 20.
[5] Nat'l Ass'n of State PIRGs, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports,* at 11 (2004); Consumers Union, *What Are They Saying About Me? The Results of a Review of 161 Credit Reports from the Three Major Credit Bureaus* (Apr. 29, 1991).

of 57.4 million consumers who ordered their own credit reports, 12.5 million (or 21.8%) filed a dispute.[6]

The FTC is currently undertaking a comprehensive study of errors in credit reports using a consultant to help study participants order and review their credit reports. In the pilot phase of the study, 53% (16 out of 30) of consumers found an error in their credit reports. Sixteen percent of the consumers found errors that either would have likely had a material effect on their credit score (3 out of 30), or the effect was uncertain (2 out of 30).[7] The study may have undercounted the error rate because it was skewed toward consumers with high credit scores, who the study indicated "not surprisingly" were less likely to have major significant errors in their credit reports.[8]

The credit reporting industry has attempted to rebut charges of systemic inaccuracies in credit reports with their own studies, claiming that fewer than 3% of credit reports are inaccurate.[9] However, the industry reached this statistic by counting as "inaccurate" only those credit reports in which the consumers fulfilled all four of the following criteria: (1) were denied credit; (2) requested a copy of their credit report; (3) filed a dispute; and (4) the dispute resulted in a reversal of the original decision to deny credit. This study did not include inaccuracies in the credit reports of consumers who did not apply for or were denied credit, had not filed a dispute, or who did not seek a reversal of the original denial of credit. This could be a significant number of consumers for many reasons, such as the fact that some lenders do not deny credit but instead simply charge more if the consumer has an impaired credit report, and the barriers faced by many consumers who do not file disputes even when they know of blatant errors.

Indeed, many consumers with errors in their reports do not send disputes because of barriers such as lack of time or resources, educational barriers, and not knowing their rights. In the FTC study discussed above, only one of the consumers who definitely had a major error in his/her credit report was successfully able to dispute it, despite the assistance of the FTC's consultant. Another consumer disputed on-line and the credit bureau did not respond. The third consumer explained that she did not file a dispute because "she was a single mother with twins and could not muster the time to file a dispute." The consultant mused that "[w]e expected that participants would be motivated to have any errors in their credit reports corrected promptly. This did not generally occur."[10]

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[6] Federal Trade Commission and Federal Reserve Board, *Report to Congress on the Fair Credit Reporting Act Dispute Process* (Aug. 2006), at 12, *available at* www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf. [hereinafter "FTC/FRB FCRA Dispute Process Report"].

[7] Federal Trade Commission, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (December 2006), Appendix at 15, *available at* http://www.ftc.gov/reports/FACTACT/FACT_Act_Report_2006_Exhibits_1-12.pdf [hereinafter "FTC Pilot Study on Accuracy"].

[8] *Id.* at 15-16.

[9] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2004), at 25, *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf [hereinafter "FTC 2004 FACTA Report"] (citing an Arthur Andersen study commissioned by the credit bureaus).

[10] FTC Pilot Study on Accuracy, Appendix at 17.

Even using the industry's low estimate of a 3% serious error rate, there are over 200 million consumers in this country with a credit report on record at the credit bureaus.[11] Thus, 3% of 200 million files would mean that inaccurate credit reports are affecting the economic well-being of ***6 million Americans***. One of the primary purposes of the FCRA is to give these consumers the right to have the errors investigated and fixed.

D. FREQUENT TYPES OF CREDIT REPORTING ERRORS

There are many types of errors in credit reports; we focus on a few of the most egregious.

Mixed files

Mixed or mismerged files occur when credit information relating to one consumer is placed in the file of another, thus creating a false description of both consumers' credit histories. Mismerging occurs most often when two or more consumers have similar names, Social Security Numbers (SSNs), or other identifiers (for example, when information relating to John J. Jones is put in John G. Jones' file).

Mixed or mismerged files are a frequent problem. One study found that 44% of credit reporting complaints to the FTC involved mismerged files. Of these complaints, 64% had total strangers' files mixed in, while 36% involved information belonging to relatives or former spouses.[12] Another study found that one in ten files contained at least one, and as many as three, additional credit reports. It was very common for the additional reports to contain a mixture of credit information, some of which belonged to the subject of the report requested and some which did not.[13]

Mixed files also result in debt collection harassment and lawsuits against innocent consumers. One of the first steps a collection attorney will take when he or she receives an assigned file is to request a skip trace from one of the national credit bureaus. These reports are often the broadest matched files provided by the bureaus. It is common for collection attorneys to receive an incorrectly matched report and to sue the wrong consumer.[14]

Mixed files occur largely because the credit bureaus' computers do not use sufficiently rigorous criteria to match consumer data precisely, even when such unique identifiers as SSNs are present. For example, the credit bureaus will include information

[11] FTC/FRB FCRA Dispute Process Report at 3.
[12] U.S. Public Interest Research Group, *Credit Bureaus: Public Enemy #1 at the FTC*, October 1993. In this sample, U.S. PIRG analyzed 140 complaints to the FTC.
[13] CFA-NCRA Study at 10.
[14] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing before the House Committee on Financial Services*, 110th Congr. (2007) (statement of Leonard A. Bennett), at 10, available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/osbennett061907.pdf. [hereinafter "Leonard Bennett Testimony"]

in a consumer's file even when the SSNs do not match, but other information appears to match.[15] Thus, they have been known to mismerge files when the consumers' names are similar and they share seven of nine digits in their SSN.[16]

> *Angela Williams*[17]
>
> Angela Williams, a medical transcriptionist from Orlando, Florida, had a bad credit report. Her Equifax report included at least 25 accounts showing negative information. The problem was that none of these accounts belonged Angela Williams. Instead, they belong to Angelina Williams, a woman whose only connection with the medical transcriptionist was a similar name and a Social Security number that was almost the same - the last two digits were reversed.
>
> Angela Williams spent a total of 13 years trying to get her credit report fixed. She sent dispute after to dispute to Equifax. Occasionally, Equifax would delete one of false accounts from Angela's credit report, only to have the account show up again later. Even after being notified of this problem through Angela's disputes, new accounts from the other woman would appear in Angela's report.
>
> Worse yet, creditors and debt collectors who were pursuing the other woman would order reports from Equifax and get Angela's information. Soon they started wrongfully pursing Angela for the other woman's debts.
>
> These repeated errors over a 13 year period took an enormous toll on Angela Williams. Her credit score dropped into the 500s – well below the subprime cutoff. She was denied credit repeatedly and even told to leave one store after an employee viewed her credit report. The ordeal caused Angela tremendous stress and frustration. Finally, she sought the assistance of a lawyer and filed a lawsuit against Equifax.
>
> Equifax fought this lawsuit long and hard, despite glaring evidence that it had mixed up Angela William's credit report with that of the other woman. In November 2007, a jury found in favor of Angela Williams, and entered a verdict against Equifax for $219,000 in actual damages and $2.7 million in punitive damages.

Mixed files could be prevented by requiring the credit bureaus to use strict matching criteria when placing information into a consumer's credit report. The most critical reform would be to require an exact match of Social Security numbers. The credit bureaus could reduce mixed file problems by merely requiring an eight of nine SSN match and a flag if that match isn't perfect. However, the credit bureaus have chosen to be excessively and unreasonably over-inclusive because, as the FTC noted in a 2004 report mandated by the Fair and Accurate Credit Transactions Act of 2003: "lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty. This preference could give the credit bureaus an incentive to design algorithms that are tolerant of mixed files."[18] Indeed, an erroneously low credit score may even provide the furnisher with more profit,

[15] FTC 2004 FACTA Report at 40.
[16] *See, e.g.*, Apodaca v. Discover Fin. Servs. 417 F.Supp.2d 1220 (D.N.M. 2006).
[17] *Consumer Victory: Equifax Must Pay $2.9 million for Mixing Up Credit Files*, The Consumer Advocate, Vol. 14, No. 1, National Association of Consumer Advocates (Jan.-Mar. 2008) at 14; *Consumer Wins Fight For Credit Report Accuracy*, Privacy Times, Dec. 6, 2007.
[18] FTC 2004 FACTA Report at 47.

because the consumer will be charged a higher rate, a practice known as "risk-based pricing."

The credit bureaus have been aware of mixed file errors for decades.[19] In the early to mid-1990s, the FTC reached consent orders with the credit bureaus requiring them to improve their procedures to prevent mixed files.[20] However, over a decade later, mixed files remain a significant problem. Despite the recognition of the continuing nature of mixed file issues in its 2004 report, the FTC has not required the credit bureaus to improve their matching criteria.

Identity Theft

Identity theft is often called the "fastest growing crime" in this country, with an estimated eight million consumers victimized by some form of identify theft every year.[21] Identity theft itself presents a serious source of inaccuracies in the credit reporting system. The identity thief, however, is not the only culprit. Credit bureaus and furnishers bear a share of the blame as well.

The credit bureaus' loose matching procedures, discussed above, contribute to identity theft problems. For example, if a thief has only adopted the victim's first name and Social Security number but not his or her last name or address, the algorithm used by credit bureaus to "merge" information often will incorporate the thief's information into the victim's file at the time the bureau compiles the report. Once the fraudulent debt is reported, often after default and non-payment, and especially when collectors begin attempting skip trace searches, the account ends up merged into the victim's file even though many of the identifiers do not match. Accordingly, the "identity theft" is really characterized as a hybrid of a mixed file problem.

The Litchfields[22]

Susan and David M. Litchfield of Norwell, Massachusetts, battled the credit bureaus for six years to erase numerous debts on their record that were incurred by a David J. Leighton of Tampa. The Litchfields even obtained a copy of one credit card agreement they had allegedly signed, which upon review showed Leighton's signature, along with David M. Litchfield's Social Security number neatly penned in.

Even with this evidence, the credit bureaus did not fix the errors. The Litchfields sent disputes to all three bureaus telling them of the apparent fraud, to no avail. They disputed more than a dozen items on the report, including a Tampa child support order for $19,060 on their Experian report.

The bureaus' nonresponsive was costly to the Litchfields, who were rejected for a student loan for their daughter, had their credit card interest rates raised to penalty levels, and were forced to pay more for a

[19] For an example of a mixed file case dating from the late 1970s, *see* Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509 (5th Cir. 1982).
[20] FTC v. TRW, Inc., 784 F. Supp. 361 (N.D. Tex. 1991), *amended by* (N.D. Tex. Jan. 14, 1993); In the Matter of Equifax Credit Information Services, Inc., 61 Fed. Reg. 15484 (Apr. 8, 1996) (consent order).
[21] Synovate, Federal Trade Commission – Identity Theft Survey Report, Nov. 2007, at 3, *available at* http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf .

home equity loan from the bank where Susan Litchfield had done business her entire life. "I just sat here and cried," she said.

Finally it took the intervention of the Boston Globe for TransUnion to agree to work with the Litchfields. What happens to identity theft victims who don't have the assistance of a major metropolitan newspaper?

Furnisher errors

Furnishers can often be the source of errors in credit reports. Furnisher inaccuracies primarily fall into two categories types. First, the furnisher might report the consumer's account with an incorrect payment history, current payment status, or balance. The error might be due to a misapplied payment or data entry error. Sometimes these errors occur because the creditor has not complied with industry reporting standards, such as the Metro 2 format.

George Saenz[23]

George Saenz's credit report became another victim of the broken American health care system. In 2001, he incurred a $512 medical bill that he couldn't pay. It went into collections and was sold to NCO, a large debt collector. NCO reported the debt to the credit bureaus.

NCO contacted Saenz, and in August 2003, accepted a compromise payment of $333 in full satisfaction of the outstanding debt. Justifiably thinking that he had cleared the debt, Saenz sent a dispute to TransUnion informing the bureau that he had paid off the NCO account.

TransUnion turned around and referred the dispute to NCO. Despite the fact that Saenz had just paid off the debt, NCO's automated systems responded to TransUnion that the debt was unpaid.

Saenz sent a second dispute on September 30, 2003. This time he included documentary evidence that the dispute had been paid, including a letter from NCO offering to settle the debt for $333, a receipt for a $333 money order payable to NCO, and a certified mail receipt.

TransUnion sent a second automated dispute form to NCO. However, TransUnion did not provide NCO with copies of the documents sent by Saenz, nor did it ask NCO about the authenticity of the documents. In fact, TransUnion didn't even ask NCO whether NCO had received the $333 payment.

NCO's automated system again erroneously verified that Saenz had not paid off the debt. Frustrated, Saenz filed a lawsuit against NCO and TransUnion. In January 2007, three and a half years after Saenz paid off the debt, and only after a federal lawsuit was filed, did TransUnion remove the debt from his credit report.

The second type of dispute involves furnishers who have attributed a credit account to a consumer who does not owe the debt, often called an "ownership dispute." This type of dispute often involves a spouse or other authorized user who is not contractually liable for a debt. Other times, the consumer may have been the victim of identity theft. According to credit reporting industry statistics, these "ownership"

[22] Beth Healey, *Credit Agencies Lag on Errors, Fraud*, Boston Globe, Dec. 28, 2006.
[23] Saenz v. TransUnion, LLC, 2007 WL 2401745 (D. Or. Aug. 15, 2007).

disputes are among the most common, as the bureaus use the dispute code "consumer states account is not his/hers" over 30% of the time.

Any error sent by the furnisher in its computer file automatically appears in the consumer's credit report, even if the information patently contradicts information appearing in other parts of the credit report. The national credit bureaus unfortunately fail to exercise virtually any quality control over the information initially provided to them by furnishers. The credit bureaus blindly rely on furnishers and provide no oversight of the quality of the information being reported. This unquestioning acceptance and re-publication of furnisher information invites abuse. This is especially true when it comes to debt collectors and debt buyers, who present their own special types of errors.

> *Charles King*[24]
>
> Charles King's ex-girlfriend did a number on him. She opened up at least one, if not more, credit card accounts in his name, charged them up, and stuck him with the bill. After charging off the account as delinquent, First Consumers National Bank sold an account in King's name to Asset Acceptance, a large debt buyer. As usual for debt buyers, Asset Acceptance did not have any of the original account documents from First Consumers.
>
> The debt showed up on King's credit report under Asset Acceptance's name. King justifiably disputed this information to the credit bureaus. After all, he was the victim of identity theft. He had not opened the account or used the credit card.
>
> The credit bureaus referred the dispute to Asset Acceptance. In turn, all that Asset Acceptance did was to merely compare the data in its files – the same files that had produced the disputed information - with the identical information that the bureaus were naturally then reporting. Asset Acceptance did not request the original documents from First Consumers - documents that might have shown the signature on the credit card account did not match King's signature.
>
> Instead, Asset Acceptance's usual procedure in an identity theft investigation was to ask the consumer to send it a fraud affidavit – and Asset did not even make this request in King's case at all. How did Asset Acceptance conduct proper investigations for identity theft without looking at the signature on the original credit card application to see if it was forged or not?

Re-aging of obsolete debts

A type of abuse by debt collectors that results in inaccurate reporting is the "re-aging" of obsolete debts. The FCRA requires most consumer debts to be deleted from a credit report after seven years from the date of charge-off or 180 days after the delinquency.[25] "Re-aging" occurs when debt buyers purposefully misrepresent the critical date of delinquency, which is the trigger date from which the seven years is counted. Debt buyers report a date of delinquency that falls within the seven-year period,

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[24] King v. Asset Acceptance, 452 F.Supp.2d 1272 (N.D. Ga. 2006).
[25] 15 U.S.C. § 1681c(a).

thus resurrecting long dormant and nearly worthless debts with the simple act of false credit reporting.

This problem has grown particularly prevalent and profitable in recent years with the emergence of a multi-billion dollar distressed debt industry that buys, sells, and re-buys large portfolios of defaulted and time-barred debt for pennies on the dollar and then duns vulnerable consumers for inflated sums. In 2000, the FTC imposed a $2 million civil penalty against one debt buyer, Performance Capital Management, for repeated instances of re-aging debts as well as conducting inadequate perfunctory investigations.[26]

The credit bureaus play a role in re-aging abuse as well, failing to control properly for debt buyers who are effectively gaming their systems. The Seventh Circuit expressed its concern over Equifax's procedures concerning the "Date of Last Activity" field, which is the date used by Equifax to calculate the seven year expiration period. The Seventh Circuit noted that Equifax's procedures for this date field could "effectively allow Equifax the opportunity to keep delinquent accounts in the credit file past the seven and one-half year limitation of" the FCRA.[27]

Steven Rosenberg[28]

Sometime in the early to mid 1990s, Steven Rosenberg had received a phone call from a debt collector about a debt he owed to Fleet Bank. Rosenberg couldn't recall any debt he owed Fleet, and told the debt collector so. The debt collector responded that the debt arose from an account Rosenberg had with NatWest Bank in the 1970s (which Fleet acquired). Rosenberg had closed his account with NatWest in the 1980s, and denied he owed any money when he stopped banking there.

About ten years later, in April 2003, Rosenberg received a letter from Cavalry Investments, a buyer of bad debts, attempting to collect a debt it had bought from Fleet Bank. Again, Rosenberg denied he owed a debt to Fleet. More importantly, he discovered that Cavalry had reported the debt to the credit bureaus with an "opening date" of December 2001.

At about the same time, Rosenberg had been attempting to refinance his mortgage. The lender approved his loan, on the condition that he pay off the debt to Cavalry. Rosenberg refused to pay -- he believed he did not owe the debt. He retained a lawyer, who sent a dispute to Cavalry indicating that the alleged debt, even if Rosenberg owed it, was at least a dozen years old. Rosenberg also sent a dispute to Equifax. Equifax in turn sent the dispute to Cavalry, requesting that Cavalry confirm the "date of last activity" and "opening date" of the account.

Cavalry "verified" the report. Fortunately for Rosenberg, Cavalry failed to provide the requested dates, and thus the account was deleted. However, the harm from the illegally reported debt – a debt that, even if Rosenberg owed it, was from the 1980s and thus about 20 years old– was done. Interest rates had risen by then.

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[26] U.S. v. Performance Capital Management (Bankr. C.D. Cal 2000) (consent decree), *available at* http://www.ftc.gov/os/2000/08/performconsent.htm.
[27] Gillespie v. Equifax Information Services, 484 F.3d 938 (7th Cir. 2007).
[28] Rosenberg v. Calvary Investments, L.L.C., 2005 WL 2490353 (D. Conn. Sept. 30, 2005).

III. YOU CALL THIS AN INVESTIGATION?

The FCRA does not impose strict liability for inaccuracies. Instead, it requires the credit bureaus to "follow reasonable procedures to assure maximum possible accuracy." That is the first level of protection for accuracy in credit reporting. Unfortunately, Part II of this report shows that the credit bureaus do not always meet their obligations for this level of protection.

For those consumers for whom this first level of protection fails- whether it be 3% or 25% of the U.S. adult population- Congress enacted a second level of protection: the dispute process. The dispute process is the safety net when something goes wrong in the processing of billions of pieces of data for hundreds of millions of files.

The dispute process is critical to ensuring the accuracy of credit reporting, and to protecting the rights of the millions of consumers whose livelihoods, housing, insurance, and access to credit depend on accurate reporting. Congress's intent in enacting the FCRA's dispute process and its societal importance were plainly stated by Senator William Proxmire when the FCRA was first introduced in the U.S. Senate:

> It would be unrealistic to expect credit reporting agencies to be absolutely correct on every single case. But it seems to me that consumers affected by an adverse rating do have a right to present their side of the story and to have inaccurate information expunged from their file. Considering the growing importance of credit in our economy, the right to fair credit reporting is becoming more and more essential. We certainly would not tolerate a Government agency depriving a citizen of his livelihood or freedom on the basis of unsubstantiated gossip without an opportunity to present his case. And yet this is entirely possible on the part of a credit reporting agency.

115 Cong. Rec. 2412 (1969).

Thus, the dispute process is supposed to be the safety net for consumers plagued by inaccurate credit reporting. Unfortunately, the industry has created gaping holes in that net. The credit reporting dispute system in its current form is fundamentally flawed. The credit bureaus have created an automated and perfunctory process that is a mockery of how a real dispute process should function. This automated dispute system involves credit bureaus converting detailed consumer disputes into cryptic two or three digit codes. The bureaus forward these cryptic codes to the furnishers but do not forward the underlying documentation sent to them by consumers.

Furnishers have a role in this automated injustice. Their investigations of disputes sometimes involve merely verifying that the information matches their own computer records, without undertaking a meaningful examination of the underlying facts. The bureaus accept whatever the furnishers tell them without conducting an independent review. The continued result of this lackadaisical investigation system is that consumers find it extremely difficult, frustrating, and expensive to dispute errors.

A. HOW AN INVESTIGATION SHOULD WORK

Most people have a general expectation of what an "investigation" of a credit card or loan dispute should look like. An investigation should involve reviewing documents, researching facts, interviewing witnesses, or comparing handwriting. For example, consider the deposition testimony of a bank employee who once worked as a fraud investigator for Zales Jewelers. This employee described how her fraud investigations for Zales included: [29]

- gathering original documents, including the credit application, the sales tickets, and any statements from the store personnel that were in written form;
- gathering copies of identification and police reports;
- examining the signature of the purchaser on the sales ticket and account application;
- interviewing store personnel, including the store manager, where possible, and the sales associate who had handled the actual transaction;
- preparing statements to be signed by store personnel or taking notes of interviews;
- interviewing the fraud victim because "often they would have additional information that would help us in locating a suspect or determining how the fraud or forgery had occurred."

This description probably matches with most consumers' understanding of what should happen in an investigation. Unfortunately, these steps, or anything resembling a real inquiry, rarely occur in a credit reporting dispute.

B. HOW IT REALLY WORKS: THE E-OSCAR SYSTEM

In contrast to the meaningful and substantial investigation described above, credit bureaus have developed a highly automated, computer-driven system that precludes any real investigation. This system converts the often-detailed and painstakingly written dispute letters into nothing more than a two or three digit code, sometimes with a few lines of narrative.

The credit reporting industry uses a standardized form to communicate disputes to furnishers, called a Consumer Dispute Verification form (CDV). An automated version of the form, communicated entirely electronically, is known as Automated Consumer Dispute Verification (ACDV) form. The credit bureaus initiate a request for an investigation with the furnisher by sending an ACDV through an automated on-line processing system called "e-OSCAR" (Online Solution for Complete and Accurate Reporting). In 2006, the industry reported that 83% of disputes were processed using e-

[29] Deposition of Elizabeth Aadland, Smith v. Citifinancial Retail Services, No. 3:06-cv-02966 (N.D. Cal. March 23, 2007).

OSCAR. Furthermore, each of the three national credit bureaus had announced plans to require that all disputes be processed using e-OSCAR.[30]

An ACDV simply consists of a few items: identifying information about the consumer in the credit bureau's file; one or two codes summarizing the consumer's dispute; and, in some cases, a one-or-two-line free-form narrative field that supplements the dispute codes. The credit bureau employee selects a specific dispute code from among twenty-six offered by the e-OSCAR system, such as "Not his/hers" and "Claims account closed." These codes are often contained in a dropdown "pick list."[31]

This automated system is heavily dependent upon these standardized dispute codes. Yet these codes are entirely inadequate in many instances to properly convey information about a dispute. As many as 80% of consumer disputes are written.[32] These written disputes often consist of a detailed letter with supporting documentation, painstakingly written by concerned and even desperate consumers. All of these documents, including a consumer's careful description of a specific dispute, fashioned to make detection and correction easy, are reduced to a two or three digit code that the bureau employee who glances at the material believes best describes the dispute.

The code is sent to the furnisher without supporting documentation provided by the consumer - documents such as account applications, billing statements, letters, and payoff statements that can show overwhelming and even conclusive proof. These critical documents are left out of the investigation process, which itself may violate the FCRA as discussed below in Part III.F.

Even worse, the credit bureaus reduced the number of dispute codes from 100 choices under their prior system, to 26 under e-Oscar.[33] Most shockingly, of these 26 codes, the credit bureaus use the same four or five codes for the vast majority of all disputes. According to the testimony provided in congressional hearings, credit bureaus used the following codes in the following percentages of disputes:[34]

Not his/hers	30.5%
Disputes present/previous Account Status/History	21.2%
Claims Inaccurate Information. Did not provide specific dispute	16.8%
Disputes amounts	8.8%
Claims account closed by consumer	7.0%
Total	84.3%

Once the dispute is purportedly investigated, the credit bureaus then send generic and uninformative letters stating that an investigation has been made, without including

[30] FTC/FRB FCRA Dispute Process report at 16.
[31] Leonard Bennett Testimony at 21.
[32] *See* Deposition of Eileen Little, Evantash v. G.E. Capital Mortgage, Civ. Action No. 02-CV-1188 (E.D. Pa. Jan. 25, 2003).
[33] Leonard Bennett Testimony at 28.
[34] *Id.*

any details as to whom they have contacted and what information was obtained or relied upon for a final determination. As the Seventh Circuit Court of Appeals has noted, the ACDV process is often "cryptic" and "meaningless":

> It seems that Experian has a systemic problem in its limited categorization of the inquiries it receives and its cryptic notices and responses. For example, there is the meaningless communication [plaintiff] received from Experian in response to her notice of dispute: "Using the information provided the following item was not found: Grossinger City Toyota." Another example is the opaque notice of dispute sent by Experian to U.S. Bank: "Claims Company Will Change or Delete." Moreover, in what appears to be an unresponsive form letter rather than the report of an adequate investigation into her claim, [plaintiff] was notified that the "Paid/Was a repossession" notation would remain in her report and the only change would be the addition of: "Account closed at consumer's request."[35]

When is a "Repossession" Not a Repossession?[36]

Rosemary Krajewski did nothing more than any mother would have done – she helped her ex-husband and father of her children get a car in 2004 by co-signing the loan and she did not object when her ex-husband let their adult son Joseph use the car. She drove the car only once, and it was stored at her ex-husband's home.

In April 2006, Joseph was arrested in the car and the police towed it to an impoundment lot. As a result, the lender on the car loan – American Honda Finance – repossessed the car based on fine print in the loan agreement. American Honda reported the repossession to the credit bureaus but failed to report that the repossession was based on a police seizure and that neither Krajewski nor her ex-husband had failed to make any of the payments due under the loan.

Despite this heavy-handed treatment, Krajewski even tried to do the right thing by taking a loan from a finance company to pay off American Honda. Because of the black mark on her credit report, however, she was unable to get the financing.

Krajewski tried to tell her side of the story by sending a dispute to TransUnion in October 2006 stating that American Honda's report of a repossession on her credit report was incorrect because she had never missed a payment on the car loan, the car was improperly repossessed, and there was no default on the loan. But TransUnion did not listen.

Instead, TransUnion sent American Honda an ACDV that unhelpfully explained "[c]laims company will change. Verify all account information." The ACDV did not ask American Honda to verify payment history in response to Krajewski's assertion that she had not paid late on the account. The ACDV did not mention that Krajewski claimed the repossession report was incorrect because it was really a police seizure caused by her son.

American Honda, of course, merely compared the information on the ACDV to its own computer records

[35] Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F.3d 603, 610-611 (7th Cir. 2005).

and verified all information as accurate. Krajewski filed a second dispute in January 2007, with the same result.

So despite the fact that she never missed a payment on the Honda loan, almost never drove the car, didn't even garage the car at her home, and the "repossession" was the result of her adult son being arrested in the car, Krajewski was forced to file a lawsuit to remove the erroneous information on her credit report that she was the subject of a repossession and thus not creditworthy. Krajewski did nothing more than help her ex-husband (and American Honda) by co-signing to loan to make sure it was paid – which it was – and her reward was a ruined credit record that she could not get fixed without a lawsuit.

C. OF CLERKS AND AUTOMATONS

The role of the credit bureau employees allegedly assigned to "investigate" credit reporting disputes is extremely limited. Both the internal handbooks of the credit bureaus and evidence in FCRA lawsuits indicate that the primary job of these employees, or in some cases outsourced vendors, is no more than selecting the appropriate dispute codes sent to the furnisher.

For example, TransUnion's dispute processing manual instructs its employees or vendors in relevant part:[37]

1. Identify the Line item. ("[I]dentify the tradeline.")
2. Open the Disputes Screen.
3. Add Claim Code(s). ("Based on the information the consumer provides, select a Claim Code from the Claims drop-down list and chose Add.")
4. Add Consumer Comment. ("Add a Consumer Comment if the consumer provides additional details about the dispute that is not addressed by the current Claim Codes.")[38]
5. Select an Address. ("If the subscriber/data furnisher has more than one address….The CDV will be sent to the displayed address.")
6. Finish opening the Dispute. ("Choose 'Done.'")

What is of course missing from this procedure is the exercise of any discretion by the bureau employee or outsource vendor. TransUnion's procedures were further elaborated upon in this deposition of an employee who performed dispute processing before her job was outsourced to a vendor in India: [39]

> Q. [If the] consumer says, 'I dispute this credit card account, here's the account number, it belongs to my husband, not to me, what would you

[36] Krajewski v. American Honda Finance Corp., 557 F.Supp.2d 596, 614 (E.D. Pa. 2008).
[37] "Consumer Disputes," TransUnion CRS Manual, Sept. 28, 2004, at 1-4, as cited in Leonard Bennett Testimony at 24-25.
[38] This Consumer Comment field, also called the "FCRA Relevant Information" field, is used infrequently, as discussed in Part III.F.
[39] Deposition of Selena Bazemore, Mullins v. TransUnion, Civ. Ac. No. 3:05cv888, Sept. 21, 2006, as cited in Leonard Bennett Testimony at 25-26.

have done if you were complying with TransUnion's procedures in August '05?
A. I would dispute the account with the appropriate claim code.
Q. How would you do that?
A. In the computer. [. . .] I would click on the account and select the appropriate claim code. Once you hit okay, it says open, which means the dispute on that account has been opened.
Q. After you put the dispute code and click on the dispute, do you have any other role in the investigation or dispute process for that account?
A. No.
Q. It just gets sent onto the creditor, and your job as to that dispute is done, right?
A. Correct.
Q. It would be fair to say that if you were complying with TransUnion's policies, you're not as an investigator or as a dispute processor making any judgment calls or exercising any discretion about whether a consumer really owns the account? [. . .] You're not exercising that discretion?
A. No. [. . .]
Q. How does TransUnion instruct its employees to process the dispute?
A. In the system.
Q. By taking the consumer's dispute, summarizing it into a claim or dispute code, inputting that into the system and sending that code to the creditor?
A. Correct.
Q. Is there any other part of an investigation besides that that TransUnion has instructed its employees is required?
A. No.

Equifax's procedures are substantially similar. In a March 2007 deposition, Equifax's Vice President of Global Consumer Services described that bureau's "reinvestigation" process accordingly: [40]

Q: What knowledge do you have as to the mechanics of how a DDC Filipino employee would process an Equifax dispute? [. . .]
A: The electronic image would be displayed on their screen. They would have an ACIS [Automated Consumer Interview System] screen that they would use. They would then look at the electronic image. They would read off the identifying information, enter [. . .] that ID information into the system, access that credit report. At that point, they'd be able to determine if they were looking at the correct file. If they were, they'd go further. They'd read the letter, they gain an understanding of the issues at hand, and they'd look at the credit report to see if the credit report at that time reflects that. If it does, they would send those particular items to the

[40] Deposition of Gary Poch, Faile v. Equifax, Civ. Ac. No. 3:06cv617, March 13, 2007, as cited in Leonard Bennett Testimony at 22-23.

data furnisher or furnishers. They would request that an investigation be started.

[. . . .]

Q: Right. But they're not -- they're not going to handle whatever response the creditor may provide?

A: That's correct.

Q: Do DDC employees have telephones on their desk?

A: I do not believe so.

Q: As part of their compliance with Equifax's procedures, do DDC's employees telephone consumers as part of conducting a reinvestigation?

A: They do not.

Q: Do they telephone creditors, the furnishers, as part of conducting a reinvestigation?

A: They do not.

Q: Do they telephone anybody from outside DDC or Equifax as part of conducting a reinvestigation of a consumer dispute?

A: They do not.

Q: What about e-mailing any of those non-Equifax, non-DDC people, creditor, consumer, or third party?

A: They should not be -- they do not e-mail them.

Q: And what about fax machines?

A: [. . .] They do not have fax machines either.

Q: Under what circumstances will a DDC employee forward the consumer's actual dispute letter or documents the consumer provided to the furnisher, the creditor, as part of a reinvestigation?

A: A mechanism does not exist to forward the actual documents.

As this deposition shows, the only human intervention by the credit bureaus' employees is to determine the appropriate two-or-three-digit code to enter in a computer message to the creditor. No independent discretion is exercised. No information is "considered" in the investigation. The credit bureau's employees or vendors only action is to transfer the consumer's written dispute, of whatever detail, into a dispute code. In fact, other than the unusual and rare "VIP" disputes handled by the credit bureau attorneys or legal support, there is not even human contact between the furnisher and the creditor source.

Experian's procedures are no more rigorous than those of TransUnion or Equifax. Its employee testified: [41]

Q. After you receive a dispute such as Exhibit 1 [a multipage dispute letter with nearly 60 pages of supporting documentation], if you were following Experian's mandate or requirement, you would plug the

[41] Deposition of Brenda Hahlen, Beck v. Experian, Civ. Ac. No. 1:05CV347 (E.D. Va.), June 29, 2005, as cited in Leonard Bennett Testimony at 26.

information into the computer, the name, address and social, and pull up the file on the screen, correct?
A. Yes.
Q. You would then review to learn what items were being disputed, is that correct?
A. Yes.
Q. What is the next step that you would follow if you were obeying Experian?
A. I would process the items. [. . .] I highlight on the [tradeline] item, and I enter the option. [. . .]
Q. What options do you have to choose from?
A. I would choose the one 'the consumer states the item is not theirs due to fraud.'
Q. So there is a list of multiple choice options that you would click on?
A. Yes. [. . .]
Q. And can you list some of the other multiple choice codes you could click on?
A. [After estimating that there were as many as 15 dispute codes] There's one for 'not mine, for mixed file.'

What these depositions and internal credit bureau documents show is that their employees are no more than data entry clerks in the dispute and investigation process. None of the credit bureaus permit these clerks to consider and exercise discretion over a consumer's dispute. When an Experian credit bureau witness was asked during another deposition, "What does Experian intend for its employees to do in order for them to obtain and review copies of the underlying documents on the dispute – from the creditor on the disputed account?," the employee testified, "It's not Experian's policy to require or suggest that its agent ask for any underlying documents. Experian doesn't train its employees to do handwriting analysis or various other investigative-type things that would be required of reviewing a credit application."[42]

Internet disputes involve even more automation, as there is usually no involvement of the credit bureau's personnel in the dispute process. The internet dispute forms provide a list of on-line check-boxes to select as the basis for the dispute. The check-box selected by the consumer is matched to one of the pick-list ACDV dispute codes and automatically sent to the furnisher without any human intervention.

[42][42] Deposition of Kimberly Hughes, Beck v. Experian, Civ. Ac. No. 1:05CV347 (E.D. Va.), June 30, 2005, as cited in Leonard Bennett Testimony at 26-27.

D. FURNISHERS' INADEQUATE INVESTIGATION

As if the automated and perfunctory nature of the e-OSCAR system were not bad enough, furnishers contribute to the problem by conducting inadequate investigations. Often, furnishers will merely verify the existence of disputed information, instead of actually investigating the dispute. They will not actually research the underlying dispute, review documents, or speak to consumers about the dispute. Instead, these furnishers simply confirm that the information in the ACDV matches their computer records, and then verify the disputed information to the credit bureaus.

Linda Johnson[43]

The seminal FCRA decision establishing the legal duties of a furnisher in an FCRA dispute involves the credit card lender MBNA. Until its acquisition by Bank of America, MBNA was one of the top ten credit card lenders in the country. In Johnson v. MBNA, the company wrongfully attempted to hold Linda Johnson liable for the credit card debt of her ex-husband by reporting the debt on her credit report. Johnson had never signed up to be responsible as a joint accountholder on her ex-husband's account. Instead, her ex-husband had merely authorized her to use his card when they were married.

Johnson sent dispute after dispute to the credit bureaus trying to get her ex-husband's delinquent MBNA account off her credit report. Frustrated, she finally sued MBNA and the credit bureaus. During the course of the litigation, MBNA's employees testified that the company's FCRA investigation process consisted of merely confirming the name and address of consumers in the MBNA computers and noting from the applicable codes that the account actually belonged to the consumer. The employees revealed that they *never* consulted underlying documents such as account applications to determine accuracy of disputed information.

More appalling was the fact that MBNA argued these perfunctory checks for data conformity were all that the FCRA required of furnishers in an investigation. MBNA claimed that it was not required to review the ex-husband's original account application, which would have shown whether Johnson had really signed on the dotted line or merely been added as an "authorized user." In fact, MBNA revealed it didn't even keep the original account application after 2 years. Query how MBNA would have investigated an identity theft case if it refused to review the original signed application or had even discarded it?

Fortunately, the Fourth Circuit disagreed with MBNA. The court held:[44]

> The key term at issue here, "investigation," is defined as "[a] detailed inquiry or systematic examination." … Thus, the plain meaning of "investigation" clearly requires some degree of careful inquiry by creditors.... It would make little sense to conclude that, in creating a system intended to give consumers a means to dispute-and, ultimately, correct-inaccurate information on their credit reports, Congress used the term "investigation" to include superficial, unreasonable inquiries by creditors. .... We therefore hold that [the FCRA] requires creditors, after receiving notice of a consumer dispute from a credit reporting agency, to conduct a reasonable investigation of their records to determine whether the disputed information can be verified.

[43] Johnson v. MBNA, 357 F.3d 426 (4th Cir. 2004).
[44] *Id.* at 430-431 (citations omitted).

Other lawsuits reveal that MBNA is not alone in conducting superficial investigations. Other furnishers with similarly perfunctory FCRA investigative procedures include:

- **Capital One –** Capital One is one of the top 10 credit card lenders in the country. Its employee Pamela Tuskey described how all three of the national credit bureaus instructed Capital One personnel to simply verify information and to "make our system look like your system." The credit bureaus even discouraged the Capital One personnel from actively researching by pulling statements or similar activities.[45]

- **Debt Collectors/Buyers –** The *King v. Asset Acceptance* case in Part II.D, describes how this debt buyer "investigates" FCRA disputes by merely comparing the account information in ACDV with the information in Asset's files. According to the information revealed in the *King* case, Asset does not even obtain account documents from the original creditor.[46]

  Asset Acceptance is not alone among debt buyers. The FTC took enforcement action against another debt buyer, Performance Capital Management (PCM), alleging that it failed to conduct "investigations" within the meaning of the FCRA because: [47]

  > "When PCM receives consumer dispute verification notices, it is the practice of PCM to compare the name, address, and information in PCM's computer database with the information provided on each consumer dispute verification form. Where the two match, PCM reports that it has verified as accurate the information in its files. The actual records of the original creditor are not reviewed, nor is the matter referred to the original creditor for the original creditor to verify the accuracy of the information.

- **Mortgage Bankers** - Trade groups for certain furnishers/creditors have asserted the same argument as MBNA – that if a credit report reflects what is in the furnisher's records, it should be considered "accurate," no matter whether the furnisher's records are objectively accurate as a matter or reality. For example, the Mortgage Bankers Association has urged regulators to define accuracy as "accurate reporting of the status of the account as reflected in the furnisher's records."[48]

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[45] Deposition of Pamela Tuskey, Carol Fleischer v. TransUnion, Case No. CV 02-71301 (E.D. Mich.).
[46] King v. Asset Acceptance, 452 F.Supp.2d 1272 (N.D. Ga. 2006).
[47] Complaint, U.S. v. Performance Capital Management (Bankr. C.D. Cal. 2000), *available at* http://www.ftc.gov/os/2000/08/performcomp.htm.
[48] *Comments of Mortgage Bankers Association re: Interagency Advanced Notice of Proposed Rulemaking: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act*, May 22, 2006, at 4.

Some furnishers are even worse. Apparently, they do not even bother to make sure they have reviewed *all* their records when they take the perfunctory step of checking that the information in their database matches the information in the ACDV.

The Robertsons[49]

Danny and Gay Robertson opened a J.C. Penney credit card account in 1978. Many years later, the Robertsons' account ended up at GE Money Bank, with a balance of $222.22. In October 2004, GE called the Robertsons to collect the balance. The Robertsons paid off the balance over the phone using their debit card. GE even gave the Robertson's a confirmation number, and its own internal records showed that this payment was made.

However, GE failed to post the Robertson's payment to their account. GE attempted to collect the balance on the account several more times. Each time, the Robertsons informed GE that they had paid off the account by debit card.

GE eventually charged the account off as bad debt and assigned the account to a debt collector. The debt collector reported the account to the credit bureaus as "in collections." When the Robertsons realized this account was showing up negatively on their credit reports, they sent detailed dispute letters to TransUnion, Equifax, and GE.

The Robertson's dispute letters to the three bureaus stated clearly that they had paid off the account. TransUnion sent an ACDV to GE on September 29, 2005. GE sent a response back *on the very same day* verifying that the account had been charged off as bad debt, despite information in its own records that a payment had been made.

Equifax sent GE an ACDV on October 4, 2005. Again, GE verified the account as charged off, this time waiting a day to do so. GE did not conduct any investigation into its own records except to verify identity information.

The use of automation by the credit bureaus contributes to the problem of furnishers conducting superficial investigations. The ACDV codes fail to provide a meaningful description of the dispute and underlying documentation - furnishers have even complained that the dispute codes are "vague and overbroad."[50] The e-OSCAR system makes it all too easy for a furnisher to simply check a box indicating that the disputed information has been verified, an exercise that aids and abets perfunctory investigation.

E. PARROTING: THE CREDITOR AS GOD

After the furnisher responds to an FCRA dispute, the credit bureaus main response is to "parrot" what the furnishers report to them. They will accept the results of the furnisher's "investigation" even when a simple check would reveal inconsistent information. In other words, the credit bureaus' policies are that what the furnisher says is gospel and even court records cannot contradict that.

[49] Robertson v. J.C. Penney Co., 2007 WL 623397 (S.D. Miss. Mar. 4, 2008).
[50] FTC/FRB FCRA Dispute Process Report at 17.

For example, the case of *Allen v. Experian Information Systems* involved a Sears account that was being reported on the consumer's credit report as being "included in bankruptcy" past the limitations period for that information. The consumer's bankruptcy had occurred in 1993, which was reflected in the section of the consumer's report that listed public records information. Yet the Sears account was reported as being part of a bankruptcy that occurred in 1997. During a deposition, the consumer's attorney asked Experian employee Kathy Centanni why Experian did not address the consumer's dispute by cross-checking Experian's own records or checking the records of the United States Bankruptcy Court as to the correct date of the bankruptcy. Ms. Centanni answered:[51]

> …the consumer is not disputing the bankruptcy. If they were disputing the bankruptcy as such, we would dispute the public record.
>
> The consumer is disputing the information being reported by a creditor, and it's our responsibility to go back to that creditor for them to research it.

In other words, Experian's policy was to defer to what the furnisher responded, even when court records and its own files contradicted that response.

Indeed, in case after case, the credit bureaus have refused to conduct their own investigation and instead simply "parroted" the furnisher. Recent examples include:

- Cairns v. GMAC Mortg. Corp., 2007 WL 735564 (D. Ariz. March 5, 2007). Equifax argued that "by contacting GMAC regarding Mr. Cairns' dispute, it had complied with the statutory obligations regarding reinvestigation."
- Murphy v. Midland Credit Mgmt., 456 F.Supp.2d 1082 (E.D. Mo. 2006). The court rejected Experian's argument that an investigation solely consisting of ACDVs without seeking additional documentation was reasonable as a matter of law.
- Saenz v. TransUnion, LLC, 2007 WL 2401745, *7 (D. Or. Aug. 15, 2007). In this case, the court noted: "TransUnion argues that use of ACDV procedures is necessarily reasonable [in an investigation] …. TransUnion buttresses its arguments with the assertion that creditors are better situated that reporting agencies to determine the accuracy of disputed information. TransUnion's argument rests upon a significant mischaracterization of its duties under the FCRA."

Another excerpt of the deposition of TransUnion's employee who performed dispute processing before such tasks were outsourced to a vendor using workers in India revealed how the credit bureaus entirely defer to the furnisher in disputes:

> Q. What if the creditor and the consumer strongly disagree about whether a debt is owed, consumer says that the debt's not owed, the creditor says yes, it is, what does TransUnion do to determine who's correct?

[51] Deposition of Kathy Centanni, Allen v. Experian Information Solutions, Civ. No. 04-817 (S.D. Ill. Dec. 6, 2005).

A. It's up to the creditor to make the decision.[52]

Thus, if the creditor instructs the credit bureau to retain the information as reported, there is almost nothing the consumer can do to override that instruction.

While the credit bureaus claim that they will review the documents the consumer provides to determine if they are "acceptable" to allow a correction outside the ACDV process, this is actually a very narrow category of documents. Essentially, for a consumer's dispute of a credit account, the only "acceptable" documents for TransUnion are written letterhead communications from the creditor itself instructing TransUnion to delete or correct the reported account.[53] Further, the creditor letter would have to be more recent than the last date the creditor had otherwise "verified" the account.
CSC Credit Services, which is an Equifax affiliate, has explicitly stated its policy of not considering any payoff letter from a creditor over 90 days old.[54]

June Betts[55]

In 1998, a Cadillac was abandoned at the side of the road. Law enforcement officials had the vehicle towed, and it was sold at auction. The auction proceeds didn't cover the towing company's fee, so the difference was assigned to Topco, a debt collector.

Topco found a vehicle seller's report on file with the Washington State Department of Licensing with the name of June Baker as the buyer. June Baker was June Betts's maiden name, and the report had her address on it, but Betts claimed she never owned the Cadillac. Despite her protestations, in January 2001, Topco sued Betts in King County District Court. Betts won that lawsuit, and the court issued a judgment finding her not liable for the towing fee.

Topco also reported the towing debt on Betts's credit report. On February 13, 2001, Betts sent a notice to Equifax disputing the debt. Equifax sent a CDV to Topco, which simply updated Betts's address and confirmed the debt. Betts's made a second dispute, and Topco received another CDV on March 20, 2001. Topco again verified the debt. This time, Topco even increased the amount it claimed was owed, from $488 to $829. Equifax simply listed this new information, accepting Topco's decision. This was despite the fact that Betts had won Topco's lawsuit against her, and she had a court judgment holding that she was not responsible for the debt.

F. "ALL RELEVANT INFORMATION"

As part of a credit reporting investigation, the FCRA contains an explicit and key requirement that the credit bureau include in the notice of dispute to the furnisher "all

[52] Deposition of Selena Bazemore, Mullins v. TransUnion, Civ. Ac. No. 3:05cv888, Sept. 21, 2006, as cited in Leonard Bennett Testimony at 25-26.
[53] "Documents Acceptable for Maintenance," TransUnion CRS Manual, Sept. 28, 2004, at 1-4, as cited in Leonard Bennett Testimony at 25.
[54] McKinley v. CSC Credit Serv., 2007 WL 1412555 (D. Minn. May 10, 2007).
[55] Betts v. Equifax Credit Information Services, 245 F. Supp. 2d 1130 (W.D. Wa. 2003).

relevant information" provided by the consumer.[56] However, as discussed in Part III.B, when a consumer sends a dispute to the credit bureau, the bureau will reduce the dispute, no matter how detailed, substantive or documented, to one of the handful of two or three digit dispute codes used by the e-OSCAR system. The bureau will not send the furnisher any of the supporting documentation provided by the consumer, such as account applications, billing statements, letters, and payoff statements – documents that could show overwhelming and even conclusive proof of the consumer's dispute.[57] The bureaus' refusal to forward all relevant documents and details of the dispute appears to be in clear conflict with the dictates of the FCRA.

Not only have consumers and their attorneys complained of this failure to forward documents, this has also been a matter in contention between the FTC and the credit bureaus. Yet unfortunately, the FTC and Federal Reserve Board have decided not to universally condemn the bureaus' failure to provide furnishers with the supporting documentation submitted by consumers. Instead, the FTC and Fed have stated that "[b]y itself, however, this does not mean that [credit bureaus] fail to convey 'all relevant information' to furnishers," but that "in certain situations, the failure to convey the actual documents may lead to incorrect outcomes."[58] And despite even this concession that the failure to forward documents may lead to incorrect outcomes in some cases, the FTC and Fed apparently have not taken any action to require the credit bureaus to improve their procedures.

The credit bureaus claim that forwarding documents through e-OSCAR is "questionable," a difficult claim to believe given how easily documents can now be transmitted electronically. First, all three national bureaus scan and archive the consumer's dispute and documents. There is no greater storage space required. There is also no technological obstacle to forwarding the dispute and documents electronically. Equifax and TransUnion already do so to India and the Philippines. Sending them concurrently to domestic furnishers would not require any more resources.

The credit bureaus' response to criticism over their failure to forward documentation is to rely on a field in the ACDV form that permits a "free text" comment to be entered by the credit bureau clerk, which is called the "FCRA Relevant Information field." This box is limited to one line and a fixed number of characters. The credit bureaus' procedures manuals offer almost no instructions for their clerks as to what information should be placed in this one-line text field.[59] As a result, only a minority of ACDVs sent by the bureaus actually contain such a field. The credit bureaus have admitted that this field is used in only 30% of disputes processed through e-Oscar.[60] TransUnion's employee has testified that it is used less than 10% of the time and even

[56] 15 U.S.C. § 1681i(a)(2).
[57] FTC/FRB FCRA Dispute Process Report at 18.
[58] FTC/FRB FCRA Dispute Process Report at 33-34.
[59] Leonard Bennett Testimony at 21.
[60] FTC/FRB Report at 17.

then only if the consumer's dispute is not in a regularly selected category.[61] In other words, if the employee is able to categorize the dispute into one of the two or three digit codes, the text field is apparently not used to convey additional information that might help resolve the dispute.

Michael Karmolinski[62]

The case of Michael Karmolinski demonstrates how inadequate the "FCRA Relevant Information" field can be in informing the furnisher of a dispute, as compared to the consumer's actual notice letter and supporting documentation.

In March 2001, then-19 year old Karmolinski opened a credit card account with Associates Credit Card, a lender later acquired by Citibank. He lost his job, and fell behind on paying a $1,000 debt. Associates charged off the debt and sent it to Enterprise Recovery Systems (ERS), a debt collector, in December 2001. Karmolinski made arrangements to pay off the debt, with a final payment of $508 in June of 2002.

Karmolinski paid off the debt, but Citibank reported to the credit bureaus that Karmolinski still owed a past due balance on the account. As a result, Karmolinski was unable to guarantee his wife's car loan, and was denied other credit. He contacted ERS, which gave him a letter dated May 2003 stating that he paid off the Associates account in June 2002.

After pulling his credit report in April 2004 and seeing that Citibank was still reporting a past due balance, Karmolinski sent disputes to TransUnion in April 2004 and September 2004. With the first dispute, he included a copy of the check paying off the account. With the second dispute, he included the May 2003 letter from ERS. Neither document was sent to Citibank.

Instead, TransUnion sent to ACDVs to Citibank asking it to verify various information such as account balance and original loan amount. TransUnion never mentioned that Karmolinski had asserted the account was paid off and had documentation in support of his assertion. In fact, TransUnion told Karmolinski that it could not accept the May 2003 ERS letter, because it was over a year old and not from Citibank, despite the fact that ERS had been working on behalf of Associates/Citibank. Instead, the September 2004 ACDV merely stated in the free form box "[c]laims company will change. Verify all account information" – a very unhelpful explanation and certainly not "all relevant information" about the dispute in comparison to the actual payoff letter from ERS.

Of course, Citibank verified the past due balance on the account in response to both ACDVs. Karmolinski filed a lawsuit when he received notice of the second verification on October 6, 2004. A few weeks later, the delinquent account was deleted from his credit report.

The credit bureaus' failure to forward the consumer's documentation has a real and significant impact on consumers. Often, it strips them of their rights to force furnishers to conduct the very investigation on which the bureaus defer. Several federal courts have dismissed consumer claims against furnishers because of the generality of the

[61] Deposition of Eileen Little, Mullins v. TransUnion, Civ. Ac. No. 3:05cv888, Sept. 21, 2006, as cited in Leonard Bennett Testimony at 28.
[62] Karmolinski v. Equifax Information Serv., 2007 WL 2492383 (D. Or. August 28, 2007).

bureaus' ACDVs and failure to forward the actual dispute and documents. For example, the Seventh Circuit held in one case:

> Credit Control's investigation in this case was reasonable given the scant information it received regarding the nature of Westra's dispute. Credit Control received a CDV from TransUnion indicating that Westra was disputing the charge on the basis that the account did not belong to him. The CDV did not provide any information about possible fraud or identity theft or include any of the documentation provided to TransUnion by Westra. Credit Control verified Westra's name, address, and date of birth and sent the CDV back to TransUnion. Had TransUnion given Credit Control notice that the nature of the dispute concerned fraud, then perhaps a more thorough investigation would have been warranted.[63]

G. BURDEN OF PROOF

The result of the broken credit reporting system is that the burden of proof has effectively shifted from the creditor or debt collector to the consumer. Creditors and collectors are allowed to take action against consumers without being required to justify their contentions. Consumers now have the burden to prove a negative - that they do not owe a debt – and are rebuffed when they attempt to do so. When they fail because they deck is stacked against them, the creditor or collector will continue to report the consumers as liable. In fact, in litigating the Johnson v. MBNA case discussed in Part III.D, Ms. Johnson's attorney learned from MBNA's account records that the consumer was expressly told, "It is not our burden to prove you owe the debt. It's your burden to prove you do not."[64]

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

For consumers to get errors in their credit reports fixed, they must dispute multiple times and in some cases retain a lawyer to file a lawsuit. Consumers who do not have the time, educational skills, and resource to send multiple disputes, like the single mother of twins in the FTC study, are simply out of luck – plagued by a Scarlet "F" of credit that they did not cause but cannot get fixed. And even those who manage to send multiple disputes cannot always get justice without being able to find an attorney experienced in litigating credit reporting disputes.

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[63] Westra v. Credit Control of Pinellas, 409 F.3d 825 (7th Cir. 2005); Malm v. Household Bank, N.A., 2004 U.S. Dist. LEXIS 12981 (D. Minn. July 7, 2004).
[64] Leonard Bennett Testimony at 14.

Victoria Apodaca[65]

Victoria Apodaca was a schoolteacher in New Mexico trying to buy a house. To her horror, she discovered her Equifax credit report stated she had filed for bankruptcy and had several accounts that were reported as past due. Apparently, Apodaca's credit files had become mixed in with that of Victoria Lopez Apodaca, because they had the same last and first name, seven of the nine digits in their Social Security numbers matched, and they both resided in the state of New Mexico.

Apodaca sent her first dispute to Equifax in June 2003, without satisfaction. She continued to contact Equifax, including sending another dispute on August 12, 2003, which included the bankruptcy petition of Lopez Apodaca and pointing out the different Social Security numbers between the two. Apodaca also mentioned that these errors were preventing her from purchasing a home that she was supposed close on August 15. She noted that she had sent in other written disputes with copies of her driver's license number and paystubs. Even with this clear documentation, Equifax did not fix Apodaca's credit report.

Apodaca sent another dispute in October 2003, again with copies of her driver's license and Social Security card. This dispute also pointed out several accounts that were not hers, including a GMAC and Discover Financial Account. Apodaca sent a final dispute on April 2004, again including a copy of Lopez Apodaca's bankruptcy petition and stating that the GMAC and Discover accounts were not hers. The bankruptcy and GMAC account was finally deleted, but not the Discover account. Frustrated, Apodaca resorted to filing a lawsuit. Only then did Equifax delete the Discover account.

During the lawsuit, Equifax claimed that its policy was to delete information from a credit report if the consumer provides "acceptable" documentation. The bureau apparently did not consider copies of the actual petition filed by Lopez Apodaca in a United States Bankruptcy Court to be "acceptable".

Instead, Equifax contracted with a company called Choicepoint to review the bankruptcy court records, and sent a CDV with the code "Not his or hers, please provide complete ID." Equifax did not send Apodaca's dispute or the copies of the bankruptcy documents. Choicepoint reviewed the bankruptcy court's records, but failed to notice the difference in Social Security numbers. As a result, Choicepoint verified the bankruptcy information on Apodaca's report as correct.

The fact that Choicepoint did not notice the difference in Social Security numbers was the direct result of the automated CDV system and Equifax's failure to provide Apodaca's dispute to its vendor. As the court noted, "if Equifax had forwarded copies of all the information supplied by Plaintiff to a competent investigator or public-records vendor instead of simply reducing all of that information to a three-digit code on its standardized CDV form, it is reasonable to infer that the mixed-file situation could have been corrected more promptly."

[65] Apodaca v. Discover Fin. Servs. 417 F.Supp.2d 1220 (D.N.M. 2006).

IV. THE ECONOMICS OF CREDIT REPORTING

A. WHO IS THE CUSTOMER

While critically important to consumers and the national economy, the credit reporting industry is unlike most other industries in some fundamental respects. It is essential to understand that the paying clients of the credit reporting industry are not consumers, but the creditors who furnish or use the information contained in the credit bureaus' databases. Despite the growing profits in credit monitoring services, the credit bureaus make most of their money from furnishers. For example, discovery in lawsuits uncovered the fact that TransUnion had received over $6 million per year from MBNA alone.[66]

Moreover, consumers have no say in whether their information is included in the credit bureaus' databases. Most Americans cannot avoid having a credit history. Unless they are very wealthy, consumers need to borrow money if they want to buy a house or attend college. Credit reports are also used in other essential aspects of life, such as insurance and employment. Thus, unlike almost all other business relationships, consumers who are unhappy with the actions of a credit bureau cannot vote with their feet – they cannot remove the information or take their business elsewhere.

Creditors, in contrast, do have the ability to switch between credit bureaus if they wish. Furthermore, vigorous investigation of consumer disputes is likely to drive creditors away. The creditor who reports a delinquent account to the credit bureaus does so in the hope of collecting that debt. Credit bureaus have no interest in deferring to a consumer involuntarily captured in a relationship with the bureau, when doing so could cause its paying customer to lose collection opportunities and profits. Both furnishers and credit bureaus also benefit from a system that allows them to spend only seconds on a dispute rather than the time (even if minimal) required to actually resolve it.

Thus, traditional competitive market forces provide little incentive for credit bureaus to incur the costs of instituting new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Only the FCRA itself compels such behavior.

However, the risk of an occasional FCRA lawsuit appears not to have overcome these economic incentives. The result is persistent inaccuracies in credit reports, which harm both consumers and creditors. Until the failure to conduct a real investigation becomes more expensive than the savings from these cost reducing measures, the current system will remain broken. Furthermore, any protections for identity theft victims cannot be effective in the absence of a real investigation.

[66] Leonard Bennett Testimony at 30.

B. FAR AND AWAY

Another factor in the inadequacy of credit reporting investigations is that two of the three national credit bureaus have outsourced these tasks to vendors who use workers in foreign countries. While there are many policy issues concerning the offshoring of jobs that are beyond the scope of this report, an important concern from a credit reporting perspective is that a worker in another country is not as likely to understand the American credit system. In addition, foreign companies may be governed by a different set of privacy rules than U.S. law provides.

Of the three national credit bureaus, only Experian processes consumer disputes domestically. TransUnion receives disputes at its consumer relations facility near Philadelphia, scans the dispute into an electronic image and then transmits the image to Intelenet, its subcontractor located in Mumbai, India.[67] Intelenet in Mumbai can connect directly to TransUnion's CRONUS database, retrieve a consumer's credit file and initiate the ACDV exchange.

Equifax uses a number of outsource vendors for its dispute processing. Consumer disputes are imaged by Innasource, based in Atlanta.[68] A record of the dispute is logged into the consumer's file, and the dispute is then electronically transmitted to Jamaica, the Philippines, or Costa Rica.[69] The foreign contractor accesses Equifax's database, retrieves the consumer's credit file and initiates the ACDV exchange as applicable. The results of the ACDV exchange are then automatically reflected back into the consumer's credit files.[70]

C. QUOTAS

As discussed in Part IV.A, there is little economic incentive to conduct true investigations, because they do not produce revenue. Real investigations would cost the credit bureaus and furnishers real money. For the credit bureaus, this is money spent on people who are not their real customers. For furnishers, this is an investigation that could undermine their debt collection efforts.

Thus, until recently with the move of E-Oscar into a for-profit entity, the investigation function has been seen only as a cost burden, to be minimized and reduced as much as possible. As part of this cost reduction, litigation discovery has revealed quota systems used by the credit bureaus to force employees to process disputes rapidly and without meaningful inquiry. For example, Experian uses a system to measure the number of "converted units" produced by each employee.[71] Each task is assigned a different value. To meet Experian's minimum standards for a pay incentive if processing

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[67] Leonard Bennett testimony at 22.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Deposition of Kimberly Hughes, Beck v. Experian, Civ. Ac. No. 1:05CV347 (E.D. Va.), June 30, 2005, as cited in Leonard Bennett Testimony at 31.

the most difficult of disputes -- fraud and identity theft claims -- the employee would have to perform at least 98.25 disputes per day, or 13.1 per hour.[72] The quota minimum at TransUnion before it outsourced its investigation functions was between 10 to 14 dispute letters per hour.[73] In other lawsuits, credit bureau employees have testified that employees are required to process one dispute every four or six minutes in order to meet quotas.[74]

In fact, more recent litigation discovery has shown that the credit bureaus have driven costs even lower. Before mid-2004, when Equifax still handled some disputes in-house, its average cost per dispute was $4.67.[75] By late 2004 and into 2005, Equifax was using an outsource vendor called ACS in Montego Bay, Jamaica. Its ACS investigations cost Equifax only $1.08.[76] Now, after the move to DDC in the Philippines, Equifax pays only $.57 per consumer dispute letter, regardless of how many items or accounts are at issue.[77] These dramatic reductions in cost per dispute described above have all come during a period of rising identity theft and fraud disputes.

TransUnion has a different contractual relationship with its outsource vendor. It pays the Indian company a flat $8.00 per man-hour the vendor incurs, but it maintains rigorous production standards the vendor must meet.[78]

To add insult to injury, the credit bureaus have found another way to reduce their cost burdens for investigations – by charging furnishers for investigations and actually making a profit from them. For example, Equifax pays its outsource vendor in the Philippines up to $.57 to process <u>each consumer dispute letter</u> it receives. But through e-Oscar system, the bureaus charge no less than $.25 to each furnisher <u>for each ACDV dispute form sent</u> electronically.[79] Thus, if a consumer disputes five inaccurate accounts after a file is mixed or an identity stolen, Equifax would pay its vendor a fraction of the gross amount (e.g. $1.25) it charges its creditor customers through E-Oscar. In fact, the more automated disputes it sends out, the more money it generates.

This is as much "cost" information as consumers have yet discovered. In fact, in two recent cases, the credit bureaus claimed not to maintain budgets, projections or gross cost estimates for their investigation functions,[80] a claim that is fairly incredible.

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[72] *Id.*
[73] *See* Deposition of Eileen Little, Evantash v. G.E. Capital Mortgage, Civ. Action No. 02-CV-1188 (E.D. Pa. Jan. 25, 2003).
[74] *See* Cushman v. TransUnion Corp., 115 F.3d 220, 224-25 (3d Cir. 1997). *See also* Deposition of Regina Sorenson, Fleischer v. TransUnion, Civ. Action No. 02-71301 (E.D. Mich. Jan 9, 2002).
[75] Leonard Bennett Testimony at 30.
[76] Deposition of Gary Poch, Faile v. Equifax, Civ. Ac. No. 3:06cv617, March 13, 2007.
[77] *Id.*
[78] Leonard Bennett Testimony at 30.
[79] *Id.* at 4.
[80] Beck v. Experian, Civ. Ac. No. 1:05CV347 (E.D. Va.), and Faile v. Equifax, Civ. Ac. No. 3:06cv617.

"VIP" Files

The problems with superficial and perfunctory investigation of credit reporting disputes may not affect certain people, such an identified celebrity, regulator or government official. Each of the three national credit bureaus maintains a list of consumers they identify as "VIP" files. A TransUnion employee testified in a deposition:[81]

> Q. And some references have been made in prior cases to maybe a VIP category. Is there such a category? [. . .] For example, if a lawyer makes a dispute, it's handled by your department?
> A. That is correct.
> Q. If a politician or [a person] known to be a politician makes a dispute, are those the types of disputes you might handle?
> A. Yes.
> Q. And celebrities as well?
> A. Yes.

For obvious reasons, these files, which also include credit bureau employees, receive special treatment. They are handled by high level employees. In fact, for Equifax and TransUnion, a significant difference is that they are handled by a credit bureau employee actually located in the United States.

D. CREDIT REPAIR ORGANIZATIONS

Credit bureaus may attempt to justify the perfunctory FCRA investigation process as a response to frivolous disputes generated by credit repair organizations. Some of these organizations do deceptively market false promises to obtain the removal of otherwise accurate credit data. The Consumer Data Industry Association has estimated that 30% of the credit bureau disputes involve credit repair organizations.[82]

However, trivializing all consumer disputes in the name of coping with credit repair disputes is throwing the baby out with the bathwater. Credit bureaus must assume that, as FTC guidance states, a consumer's dispute is bona fide, unless there is evidence to the contrary. The short-shrifting of legitimate substantive disputes may actually encourage more consumers to turn to credit repair organizations in their desperation.

Moreover, credit bureaus have already developed methods to spot credit repair disputes.[83] Credit repair disputes are often generic in nature, making a claim such as "This account is inaccurate" with nothing more, and thus easily separated from most legitimate disputes. Another hallmark of credit repair disputes is that they will dispute all negative information in a credit report without specific allegations concerning any of the

[81] Deposition of Shontese Norwood, Mullins v. TransUnion, Civ. Ac. No. 3:05cv888, Sept. 21, 2006, as cited in Leonard Bennett Testimony at 5.
[82] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing before the House Committee on Financial Services*, 110th Congr. (2007) (statement of Stuart K. Pratt, President, CDIA), at 20, *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/ospratt061907.pdf.
[83] Some of these methods are described in Klotz v. Trans Union, LLC, 246 F.R.D. 208, 211 (E.D. Pa. 2007).

individual items. Other signs are disputes made using a common format, mass mailings with the same envelopes or postage, or disputes in which the consumer has included the cover letter and instructions from the credit repair organization.

A dispute bearing such hallmarks and unsupported by specific allegations or evidence, without more, is not entitled to an in-depth, meaningful investigation under the FCRA. In fact, the FCRA already permits a credit bureau to refuse to investigate disputed information if the bureau "reasonably determines" a dispute is frivolous or irrelevant.

The problem of frivolous credit repair disputes does not justify the credit bureaus' failure to put appropriate resources into resolving legitimate disputes. Consumers whose disputes do not show the hallmarks of a credit repair dispute are entitled to a meaningful investigation, not a farce.

V. TIPS & RESOURCES

A. HOW TO DISPUTE ERRORS IN A CREDIT REPORT

While this report shows that the investigations conducted by the credit bureaus in response to disputes will usually be perfunctory, it is still important for consumers to dispute errors in their credit reports and to follow up with more disputes.

First, the furnisher may be willing to fix the error, either because the furnisher actually does find an error or to maintain good customer relations. Second, if the furnisher does not respond, the credit bureau is legally required to delete the disputed information from the consumer's credit report. Third, if the error is not corrected, the consumer has a potential legal claim under the FCRA – but ONLY if the consumer has sent a dispute to the credit bureau.

The following are some tips on sending a dispute to credit bureau. Even if the disputes themselves do not get results, these tips will ensure that the consumer preserves his or her legal claim under the FCRA.

1. Request a Investigation in Writing, Return Receipt Requested (Don't Use the Credit Bureau's Web Site)

Although not required by the FCRA, it is safest to request an investigation in writing (keeping copies of all correspondence), or to follow up a telephone request with a written confirmation. Telephone disputes do not create an adequate record in the event a consumer needs to follow up a failed dispute with litigation. In addition, the consumer will not be able to provide documentary support of the dispute by telephone. Furthermore, although the FCRA requires national credit bureaus to maintain a toll-free number for consumers, telephone access to the credit bureaus is not always consistent.

It is even advisable to send the request by certified mail, return receipt requested. Even though the consumer retains a mailing presumption, this may still leave her with a marginal claim. If the credit bureau can claim that it never received the dispute, it will argue that it merely made a mistake, rather that be forced to defend a claim that its procedures themselves are inadequate. Avoid using the internet to forward disputes, for some of the same reasons.

2. Don't Be Limited by Credit Bureau Request Forms

When consumers request copies of their credit reports from the national credit bureaus (Experian, TransUnion, and Equifax), they will receive a dispute form that they are encouraged to use. These forms attempt to pigeon hole the dispute into one of several general types, and do not facilitate a detailed consumer dispute. These forms provide a list of "check box" dispute choices, and appear to discourage a more substantive dispute. Consumers using such forms for a dispute should supplement the forms with additional written details and documentary support. Internet disputes confine consumers to a similar list of check boxes, and thus should be avoided.

3. The Consumer Should Keep a File of All Communications

A request for investigation may be just the beginning of a protracted battle with the credit bureau that may ignore correspondence or fail to follow up as promised. Thus it is good practice for the consumer to establish a file of all correspondence sent to and received from the credit bureau, and to have proof that the credit bureau has received the consumer's correspondence. Similarly, the consumer should keep dated notes of all telephone calls.

4. Also Notify the Furnisher of the Dispute

Consumers at the same time should directly notify the creditor or other furnisher of the disputed information. The critical notice of dispute is directed to the credit bureau, which triggers the right to an investigation that the consumer can enforce. The bureau will then ask the furnisher to investigate. But also sending a detailed notice to the furnisher will forestall any arguments by the furnisher that the notice from the credit bureau was not adequate for it to conduct a reasonable investigation.

5. Send a Dispute at Least to All Three Major Bureaus

It is usually not enough to dispute an error at one credit bureau. Instead, the consumer should request a credit report from at least Experian, TransUnion, and Equifax, and dispute errors individually with each of the three companies. A furnisher supplying incorrect information to one of these agencies will often supply the same incorrect information to the other two. Moreover, correcting a consumer's file with one of these three does not lead to correction at the other two.

A more compelling need to contact more than one credit bureau can arise when the consumer is informed by a creditor (or other person) that adverse action was based on a credit report received from a credit bureau which is not one of the "Big Three," such as a reseller. While it is important to dispute the accuracy of information with the reseller who supplied it to the creditor, and while special rules require resellers to handle or forward the dispute, a consumer should also consider going straight to the "Big Three."

6. Be Careful How an Account Number Is Described

The dispute notice should adequately identify the consumer, fully identify the account or other item being disputed, and explain why it is disputed. Otherwise, the credit bureaus may take consumer disputes literally, and do nothing more than what is expressly requested.

If the consumer states, "I have never had a MBNA credit card, so delete MBNA account #1234," the credit bureau will only delete an account with that number, and not other accounts the consumer may have with MBNA. This is a common problem because many furnishers change account numbers after an initial dispute is made. Correcting just the old account will not affect these new accounts. Other times, the account number the consumer sees in a periodic statement is different than the number used in the consumer's file at the credit bureau (or by a debt collector to which the debt is transferred).

To prevent these problems, an investigation request should describe the full range of accounts the dispute covers. For example, "I have never had a MBNA credit card. Any MBNA account in my credit file is not mine and should be deleted. This includes account number 1234, as well as any other account you may be reporting, as well as any account that may be reported by any debt collector who is reporting a debt originating from a MBNA account." For First USA accounts, which became Bank One and then Chase accounts, a consumer could state, "I am disputing the First USA account #2345. It may also be reported as a Bank One or a JPMorgan Chase account."

7. Sign the Dispute under Oath

Signing the dispute letter under oath will convert the dispute into an affidavit, with several resulting benefits. This should provide greater credibility to the consumer's complaint, especially in contrast to the automated, unsworn response of a furnisher. This also advances a claim against the credit bureau that it failed to forward "all relevant information" to the information furnisher. Furnishers may have policies that give greater weight to consumer affidavits and thereby more readily accept the consumer's version of the dispute and resolve it in their favor. But be careful; if there is a questionable statement in the affidavit, the consumer may be challenged later if there is litigation given that statement was sworn to under oath.

8. Include All Documentary Evidence and Suggest Investigative Steps the Credit Bureau Should Take

A consumer's request for investigation should include all documentary evidence and other information that supports the dispute. If the creditor has provided a letter or statement confirming its understanding that the reported information was inaccurate, the letter should be provided with the dispute to the credit bureau.

While it is certainly not a requirement, a consumer may choose to suggest what the credit bureau could do to best accomplish the investigation. In a dispute over ownership of an account, a consumer should request that the credit bureau obtain a copy of the underlying application or contract from the furnisher, and should provide several handwriting samples, such as copies of cancelled checks, a driver's license or backs of credit cards that include her signature.

The credit bureaus may claim that it would be unreasonable to expect them to pay for a handwriting analysis. To avoid this, the consumer could offer to pay this expense. Consumers can also provide the name and contact information of third-party witnesses who support their disputes. For example, if a consumer has been in direct contact with a furnisher representative who was helpful and agreed with her position, the dispute letter could provide the name and address of that person, and a request that the credit bureau manually send the dispute directly to that person, rather than through an electronic message. If the dispute concerns a public record, a request for investigation could include the name and telephone number of the court clerk. If there was prior litigation involved, the dispute letter could include the name and telephone number of the attorney who previously represented the creditor.

9. Include Information Questioning the Furnisher's Accuracy in Other Contexts

A dispute letter should also include any available information questioning the accuracy of the furnisher's information in other contexts, in order to rebut any claim that the furnisher's reporting could be considered presumptively accurate. There are no limitations as to the nature of such additional information: copies of relevant court opinions against the furnisher in credit reporting contexts, or similar complaints by other consumers against that furnisher. A consumer could even include press clippings that referenced a particular furnisher.

10. Hire a Lawyer

If the consumer has been unable obtain a satisfactory result after sending multiple disputes to the bureaus, he or she may have to think about hiring a lawyer. It is best to hire a lawyer experienced in handling FCRA cases on behalf of consumers. The FCRA is a complicated statute full of pitfalls for inexperienced practitioners. For example, some of the requirements of the FCRA do not permit the consumer to seek redress in court for their violation. A common rookie mistake is to sue under one of these provisions. Listings of consumer lawyers handling FCRA cases can be found at the following websites:

National Association of Consumer Advocates: www.naca.net
My Fair Credit: www.myfaircredit.com

B. RESOURCES

1. Books

The following publications include additional information about the FCRA dispute process, other important rights under the FCRA, and FCRA litigation.

National Consumer Law Center, *Fair Credit Reporting Act* (6th ed. 2006 and Supp.)

Evan Hendricks, *Credit Scores & Credit Reports: How the System Really Works, What You Can Do* (Privacy Times 2007)

Mari Frank, *From Victim to Victor: A Step By Step Guide for Ending the Nightmare of Identity Theft* (Porpoise Press, Inc. 2005)

2. *Useful Websites*

Resources

My Fair Credit: www.myfaircredit.com
Privacy Times: www.privacytimes.com
FTC Identity Theft site: www.consumer.gov/idtheft
Identity Theft Resource Center: www.idtheftcenter.org
Identity Theft Prevention and Survival: www.identitytheft.org

Consumer Advocacy Organizations

National Consumer Law Center: www.consumerlaw.org
National Association of Consumer Advocates: www.naca.net
Consumers Union: www.consumersunion.org
Consumer Federation of America: www.consumerfed.org
U.S. Public Interest Research Group: www.uspirg.org
Electronic Privacy Information Center: www.epic.org
Privacy Rights Clearinghouse: www.privacyrights.org
Americans for Fairness in Lending: www.affil.org (check out their "How to File a Complaint" page).

Government Websites

Federal Trade Commission: www.ftc.gov
State Attorneys General: www.naag.org/ag/full_ag_table.php

Credit Bureau and Other Industry Sites

Free Annual Credit Report Centralized Source: www.annualcreditreport.com
Equifax: www.equifax.com
Experian: www.experian.com
TransUnion: www.transunion.com
Fair Isaac: www.myfico.com (consumer site)
www.fairisaac.com
Choicepoint: www.choicetrust.com (consumer site)
www.choicepoint.com
Consumer Data Industry Association (CDIA) www.cdiaonline.com

C. REFORM RECOMMENDATIONS

1. The Regulators Must Act

As discussed throughout this report, many of the problems and deficiencies in the FCRA dispute and investigation process may already violate the current law. In fact, many of the consumer cases described in this report resulted in successful lawsuits or legal settlements under the FCRA. Yet the credit bureaus have not fundamentally reformed their dispute and investigation procedures, preferring to fight individual consumers in court, and paying the occasional judgment against them.

In addition, some of the provisions of the FCRA cannot be enforced by consumers harmed by their violation, including the all-important accuracy requirements for furnishers. That requirement can only be enforced by federal regulators, including the FTC and banking regulators.

Despite the problems illustrated in this report, which have been documented in congressional testimony and letters to regulators, the FTC has only brought a handful of cases during this decade against the Big Three credit bureaus. More importantly, none of these cases involved the accuracy of information or their failure to conduct meaningful investigations.

The banking regulators are even worse. We do not know of any FCRA enforcement actions that federal banking regulators have taken against banks. If there have been any such actions, they have not been publicized. The banking regulators are the sole entities capable of enforcing the accuracy requirements of the FCRA against bank furnishers, which include almost all of the major credit card lenders. They have abdicated this responsibility, leaving consumers unprotected against inaccurate and even deliberate misreporting by banks.

The FTC and bank regulators must act to:

- Take regulatory and enforcement action against the credit bureaus' blatant noncompliance with the FCRA dispute and investigation requirements. This includes:
    - Requiring the credit bureau to meaningfully review and evaluate both the consumer's dispute (including supporting documentation) and any the response from the furnisher, rather than merely parroting it.
    - Requiring credit bureaus to send to the furnisher all documents submitted by the consumer in an FCRA dispute pursuant to the FCRA's requirement that "all relevant information" be forwarded.
    - Developing an appeal procedure that the consumer can invoke, including a telephone conference with a bureau employee who has the consumer's dispute and all the documentation provided by the furnisher and the consumer.

- Require credit bureaus to improve their reporting systems by:
  - Promulgating technical specifications for the standardized reporting format (called Metro 2) that allow credit bureaus to track transferred accounts, prevent duplicate accounts, and prevent reinsertion by furnishers of deleted incorrect items.
  - Require the credit bureaus to use the full identifying information of consumers when matching information to a file, including all nine digits of the consumer's Social Security number.

- Taking regulatory and enforcement actions against furnishers for their failure to conduct proper investigations, and require them to make a substantive determination of the validity of the specific dispute at issue. This includes:
  - Requiring furnishers to investigate the specific dispute raised by the consumer rather than merely verifying that the disputed information itself appears in their own records. The furnisher's investigation must involve reviewing the actual documents provided by the consumer, and reviewing documents in its own possession or in the possession of an earlier holder of the debt. It may include requiring furnishers to contact third parties.
  - Requiring furnishers to rebut the consumer's specific dispute by providing to the consumer and the credit bureau documentation that shows that the information furnished is correct. Furnishers should not be allowed simply to tell the credit bureau that the consumer is wrong and the original information was correct. Instead, the furnisher should be required to give the consumer and the credit bureau the underlying information - copies of documents with original signatures to rebut a forgery claim, for example, or copies of the payment record to demonstrate that the claimed balance is correct.
  - Taking action against debt collectors who re-age information so that it stays on consumers' credit reports past the statutorily permitted seven years.

- Require furnishers to improve the accuracy of their reporting by:
  - Requiring furnishers to retain specific operative records for any account for which they are reporting to a credit bureau. For example, credit card furnishers should be required to retain original account applications, original contract or agreements, any billing statements, and any records of disputes.
  - Requiring debt collectors and debt buyer to obtain the original records needed to verify a debt from the creditor and to review them before furnishing information to a CRA. For example, in a credit card case, the debt buyer must be required to obtain and review the consumer's account application, original agreement, history of periodic statements, and any record showing whether any of the debt was disputed with the creditor. If the consumer disputes the debt and the debt buyer does not have adequate original documentation, the account must be deleted from the consumer's file.

2. Congressional Action

The number one right that consumers lack under the FCRA is the ability to ask a judge to tell credit bureaus and furnishers: "fix that report." With one minor exception, the FCRA only allows injured consumers to get money for damages that they suffered, and a penalty if the violation was willful. The vast majority of courts have held that courts do not have the power to issue an injunction under the FCRA, *i.e.* to order the credit bureaus to do or not do something. The FCRA is an anomaly in this respect, as a Supreme Court decision provides the basis for injunctive relief for most other laws.[84]

Consider a consumer who has filed dispute after dispute with the credit bureaus, who has supplied evidence of fraud or mistake, and who has sued to protect her rights under the FCRA. If she can show that the credit bureaus or furnishers were unreasonable in their investigations, she might be able to get actual damages if she can prove the error caused a denial of credit after the dispute or is in a jurisdiction that permits intangible damages. If she can show the credit bureaus or furnishers knew they were violating the law or acted with reckless disregard, she can seek statutory or punitive damages. But she cannot seek the one thing she really wants, the remedy that started her down this arduous path in the first place - an order telling the credit bureaus and furnisher to correct the error. Providing courts with explicit authority to issue injunctive relief would further the purpose of the FCRA to "assure maximum possible accuracy."

Congress must also act to fix the broken credit reporting and dispute system, especially if the regulators do not act. If the regulators do not act, Congress should amend the FCRA to statutorily impose the essential requirements discussed in Part V.C.1 above on credit bureaus and furnishers.

[84] Califano v. Yamasaki, 442 U.S. 682 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.").