



Understanding the
**FAIR CREDIT
REPORTING ACT**

Inform...
te only information that is in...

ADDRESS / ADRESSE

ot, Concession, Township
sion, canton

village, R.F.

DATE

\$

100 DOLLARS

Secur

The Fair Credit Reporting Act (FCRA) is a widely used statute governing the collection, maintenance, and disclosure of consumers' personal information. In addition to regulating consumer reporting agencies, the statute imposes a number of obligations on parties that supply consumer information to these agencies or use consumer reports. With FCRA litigation on the rise nationwide, it is more important than ever for counsel to be familiar with the FCRA and its implications.



MEIR FEDER
PARTNER
JONES DAY

Meir heads the firm's Issues & Appeals Practice in New York. He has argued appeals in the US Supreme Court and in eight federal circuits, and has briefed and argued state court appeals and dispositive motions at the trial level. Meir has extensive experience with the FCRA as well as in many other practice areas, and he has argued some of the leading FCRA cases, such as *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876 (9th Cir. 2010).



RAJEEV MUTTREJA
ASSOCIATE
JONES DAY

Rajeev is a member of the firm's Issues & Appeals Practice in New York. He has argued before the Sixth, Seventh, and Ninth Circuits, and has drafted briefs in the US Supreme Court, many other appellate courts, and trial courts across the country. Rajeev has served as lead defense counsel in more than two dozen cases arising under the FCRA.

Congress enacted the Fair Credit Reporting Act (FCRA) in 1970 to promote the accuracy, fairness, and privacy of information in the files of consumer reporting agencies (CRAs) while also satisfying the important commercial need for consumer reports (15 U.S.C. § 1681; see *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001)). The FCRA has been amended numerous times, most significantly in 1996 and 2003, and generally regulates:

- How CRAs must maintain their files on consumers.
- How parties may furnish information about consumers to CRAs.
- How consumers may dispute information in their consumer reports.
- When a party may request and use a consumer report.

The FCRA is most often associated with reports on a consumer's credit history, commonly known as credit reports, but covers other types of reports as well. Consumer reports typically include an individual's credit history and payment patterns, demographic and identifying information, and public records information, such as arrests, judgments, and bankruptcies. Parties can use this information, for example, when making decisions on applications for credit cards, mortgages, apartments, and employment to predict the risk that a consumer might not satisfy a future debt or obligation.

The Federal Trade Commission and Consumer Financial Protection Bureau share enforcement authority under the FCRA, and both have issued related regulations and informal guidance. Yet private consumer lawsuits seeking to recover actual or statutory damages for violations of the FCRA far outnumber agency actions. Moreover, plaintiffs' counsel increasingly are aggregating consumer claims for class action litigation (see *Box, Special Considerations for FCRA Class Actions*).

This article provides an overview of key issues that counsel should consider when litigating private consumer lawsuits under the FCRA. In particular, it addresses:

- The scope of the FCRA and the entities covered by it.
- Preemption of state-law claims.
- The required mental state for civil liability under the FCRA.
- Damages and remedies available for FCRA violations.
- The FCRA provisions that most often form the basis for consumer claims.
- Common defenses to FCRA claims.

STATUTORY SCOPE

The FCRA defines a consumer report as any written or oral communication that meets all of the following conditions:

- It is prepared by a CRA.
- It bears on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.
- It is used or collected, at least in part, to establish a consumer's eligibility for:
 - credit or insurance for personal, family, or household purposes;
 - employment purposes; or

- any other purpose authorized by Section 1681b of the FCRA (see below *Issuing or Obtaining a Consumer Report for an Impermissible Purpose*).

(15 U.S.C. § 1681a(d)(1); see *Yang v. Gov't Emps. Ins. Co.*, 146 F.3d 1320, 1323 (11th Cir. 1998); *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 (5th Cir. 1989) (noting that a communication can be a consumer report under the FCRA if it contains information that was collected or expected to be used for a listed purpose under the statute, even if not actually used for that purpose).)

The FCRA's definition of a consumer report excludes:

- Reports that concern a consumer's eligibility for commercial, rather than personal, credit (see *Ippolito v. WNS, Inc.*, 864 F.2d 440, 452 (7th Cir. 1988)).
- Reports about a consumer's transactions or experiences with the person or organization making the report, such as retail stores, hospitals, present or former employers, banks, mortgage servicing companies, or credit unions (15 U.S.C. § 1681a(d)(2)(A)(i); see, for example, *Owner-Operator Indep. Drivers Ass'n v. USIS Commercial Servs., Inc.*, 537 F.3d 1184, 1190-92 (10th Cir. 2008)).
- Certain communications between corporate affiliates (15 U.S.C. § 1681a(d)(2)(A)(ii)-(iii); see, for example, *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081, 1084 (9th Cir. 2005)).
- Decisions on potential extensions of credit (15 U.S.C. § 1681a(d)(2)(B)-(C)).
- Reports that are disclosed to only the consumer, rather than a third party (see *Wantz v. Experian Info. Sols.*, 386 F.3d 829, 834 (7th Cir. 2004), abrogated on other grounds by *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Pettway v. Equifax Info. Servs., LLC*, 2010 WL 653708, at *7 (S.D. Ala. Feb. 17, 2010)).

Disclosures of basic identifying or demographic information, such as a consumer's name or address, typically are not considered consumer reports. However, communications about a person's income, employment, or medical history have been held to qualify as consumer reports because they bear on a consumer's personal characteristics. (See *Rowe v. UniCare Life & Health Ins. Co.*, 2010 WL 86391, at *3 (N.D. Ill. Jan. 5, 2010).)

REGULATED ENTITIES

In regulating consumer reports, the FCRA imposes duties on:

- CRAs, which prepare consumer reports and maintain the reported information.
- Furnishers, which provide information about their experiences with consumers to CRAs.
- Third parties that request and use consumer reports.

CRAs

A CRA is an organization that regularly assembles or evaluates consumer credit information or other consumer information (typically from a variety of sources, including credit card companies, banks, and public records), to prepare and provide consumer reports to third party users (15 U.S.C. § 1681a(f); see, for example, *Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1097 (5th Cir. 1992)).

Under the FCRA, CRAs must:

- Maintain reasonable procedures to ensure:
 - the accuracy of their consumer reports; and
 - that the consumer reports are provided only for permissible purposes (see *Box, Permissible Purposes: Reasonable Procedures and Certifications*).
- Reasonably investigate consumers' disputes of reported information.

The largest CRAs include Equifax Information Services, LLC, Experian Information Solutions, Inc., and TransUnion LLC, which each maintain vast repositories of consumer credit information. However, the definition of CRA also reaches smaller organizations that provide credit screenings and reports for use by employers, landlords, banks, mortgage companies, retail stores, casinos, and insurance companies, among others.

INFORMATION FURNISHERS

A furnisher provides information to CRAs for inclusion in consumer reports. Under the FCRA, furnishers must:

- Provide accurate and complete information to the CRAs.
- Investigate consumers' disputes of the accuracy of furnished information.

(15 U.S.C. § 1681s-2.)

The term furnisher is not defined in the statute, but is generally understood to include organizations that provide information about their customers to CRAs. Examples of furnishers include banks, credit card issuers, mortgage lenders, collection agencies, and auto finance lenders.

USERS OF CONSUMER REPORTS

Under the FCRA, third-party users of consumer reports must:

- Have a permissible purpose to obtain the consumer report (see below *Issuing or Obtaining a Consumer Report for an Impermissible Purpose*).
- Make certifications to the CRA on their intended use of consumer reports (see *Box, Permissible Purposes: Reasonable Procedures and Certifications*).
- Notify consumers when adverse actions are taken, or certain other decisions are made, based on a consumer report (15 U.S.C. § 1681m).
- Follow specific policies and procedures related to identity theft (15 U.S.C. § 1681c-1).
- Adequately resolve discrepancies related to a consumer's address (15 U.S.C. § 1681c(h)).

Apart from these requirements, the FCRA imposes additional obligations on creditors that use consumer reports in connection with an application for, or a grant of, an extension or a provision of credit to the consumer. These creditors must provide consumers with a risk-based pricing notice if both of the following apply:

- The credit's material terms are materially less favorable than the most favorable terms available to a substantial proportion of consumers.
- The credit's terms are based in whole or in part on the consumer report.

(15 U.S.C. § 1681m(h).)



Search [Consumer Regulations Governing Debt Collection](#) for information on the federal consumer laws that govern debt collection activities, including how the FCRA applies to debt collectors.

PREEMPTION OF STATE-LAW CLAIMS

When alleging FCRA violations, consumers often also bring claims under various state laws in the same action. However, the FCRA preempts certain state statutes and common law, including:

- **Inconsistent state laws.** The FCRA preempts state statutes, regulations, and common law that purport to govern the collection, distribution, or use of any consumer information, or to prevent or mitigate identity theft, where the state law is inconsistent with the FCRA. These state laws are preempted to the extent of the inconsistency (15 U.S.C. § 1681t(a)). This occurs, for example, when complying with the state law would violate the FCRA (see, for example, *Davenport v. Farmers Ins. Grp.*, 378 F.3d 839, 843 (8th Cir. 2004)).
- **Defamation, privacy, and negligence claims.** The FCRA specifically bars defamation, invasion of privacy, and negligence claims that concern the reporting of information from being brought against any CRA, any user of a consumer report, or any furnisher of reported information, except for false information furnished with malice or willfully intended to injure the consumer (15 U.S.C. § 1681h(e); see, for example, *Thornton v. Equifax, Inc.*, 619 F.2d 700, 703 (8th Cir. 1980)). For a state-law claim to stand under this provision, a defendant's misconduct must be truly malicious and not simply careless (see *Ross v. FDIC*, 625 F.3d 808, 817 (4th Cir. 2010)).

The FCRA also preempts any law or regulation addressing the series of subjects listed in Section 1681t(b), including any subject matter relating to, for example, the responsibilities of furnishers or persons who take adverse actions against consumers (15 U.S.C. § 1681t(b)(1)(F)).



Search [Federal Preemption Issues in Banking](#) for information on the federal preemption doctrine under US banking law, including more on conflicts between the FCRA and state law.

CULPABLE MENTAL STATES UNDER THE FCRA

The FCRA is not a strict liability statute. An inaccurate consumer report therefore does not automatically result in liability. Instead, the FCRA imposes civil liability for negligent and willful failures to comply with its requirements (15 U.S.C. §§ 1681n, 1681o).

NEGLIGENT VIOLATIONS

Negligence liability typically turns on whether the defendant acted reasonably (see below *Common Claims Under the FCRA*). To prove a claim for negligent failure to comply with the FCRA, a consumer must show a causal relationship between the defendant's FCRA violation and the claimed harm, such as a loss of credit. Absent this causal relationship, there can be no liability. (See, for example, *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001); *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160-61 (11th Cir. 1991).)

For example, it is not enough for a consumer to show that his consumer report is inaccurate and that he was denied credit. Instead, the consumer must also prove that the inaccuracy, rather than other aspects of the report, or other factors altogether, caused the alleged harm. (See, for example, *Pettus v. TRW Consumer Credit Serv.*, 879 F. Supp. 695, 698 (W.D. Tex. 1994).)

Causation has two components:

- The violation must be the factual cause of the plaintiff's injury. Some courts have held that the violation must have been the but-for cause of the plaintiff's injury (see, for example, *Matise v. Trans Union Corp.*, 1998 WL 872511, at *7 (N.D. Tex. Nov. 30, 1998) (requiring a plaintiff to show that the inaccurate information contained in a CRA-defendant's report, "rather than other lines in the [defendant's] report or a report from a different CRA, caused his injury"). Others have held that the violation must have been a "substantial factor" in causing the injury (see, for example, *Enwonwu v. Trans Union, LLC*, 364 F. Supp. 2d 1361, 1366 (N.D. Ga. 2005)).
- The violation must be the proximate cause of the plaintiff's injury (see, for example, *Reeves v. Equifax Info. Servs., LLC*, 2010 WL 2036661, at *6 (S.D. Miss. May 20, 2010)). This means the connection between the violation and the alleged injury cannot be too remote or indirect.

WILLFUL VIOLATIONS

To establish a willful violation of the FCRA, a consumer must demonstrate that the defendant either knowingly or recklessly violated the statute. This scienter requirement involves two inquiries:

- **Is there an objectively reasonable interpretation of the statute under which the defendant's conduct could be considered lawful?** There is no willful violation of the FCRA if, at the time of the defendant's actions, his conduct could reasonably have been thought lawful. This objective inquiry is made by the court rather than the jury. The defendant's subjective intent is irrelevant. (See *Safeco*, 551 U.S. at 70 & n.20.)
- **If the defendant's conduct was objectively unreasonable under the statute, how unreasonable was it?** For the defendant's conduct to have been reckless, the risk of violating the FCRA must have been substantially greater than the risk associated with a merely careless reading of the statute (see *Safeco*, 551 U.S. at 69). A jury often must decide this question based, in part, on the facts surrounding the defendant's

particular interpretation of the statute (see *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 251 (3d Cir. 2012)). The US Supreme Court in *Safeco* suggested (but did not hold) that a defendant's good-faith reliance on legal advice could be relevant to this inquiry (*Safeco*, 551 U.S. at 70 n.20).

The objective nature of the first part of the *Safeco* test lends itself well to a motion to dismiss or a motion for summary judgment because a defendant can argue as a matter of law that his alleged conduct did not violate any clearly established FCRA requirement or prohibition (for more on strategies to defend against FCRA claims, see below *Common Defenses to FCRA Claims*).

DAMAGES AND REMEDIES

When claiming negligence liability, consumers may seek their actual damages arising from an FCRA violation (15 U.S.C. § 1681o(a)(1)-(2)). Consumers alleging a willful failure to comply with an FCRA requirement may seek:

- Either:
 - actual damages (15 U.S.C. § 1681n(a)(1)(A)); or
 - statutory damages of \$100 to \$1,000 (15 U.S.C. § 1681n(a)(1)(A)).
- Punitive damages (15 U.S.C. § 1681n(a)(2)).

Whether claiming a negligent or willful violation, a plaintiff may recover costs and reasonable attorneys' fees (15 U.S.C. §§ 1681n(a)(3), 1681o(a)(2)).

Actual damages can include damages for emotional distress, even if the plaintiff suffered no economic damages (see, for example, *Cortez v. Trans Union, LLC*, 617 F.3d 688, 719 (3d Cir. 2010); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995)). Courts generally require compelling proof of a plaintiff's emotional damages (see, for example, *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 502-03 (4th Cir. 2007); *Ruffin-Thompkins v. Experian Info. Sols., Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (holding that conclusory statements of emotional harm were insufficient)).

Damages for alleged lost opportunities, such as those that might have happened had a loan been approved, typically are not available because they are too speculative (see, for example, *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 475 (2d Cir. 1995); *Lee v. Sec. Check, LLC*, 2010 WL 3075673, at *13 (M.D. Fla. Aug. 5, 2010)). Additionally, business-related damages are not

It is not enough for a consumer to show that his consumer report is inaccurate and that he was denied credit. Instead, the consumer must also prove that the inaccuracy, rather than other aspects of the report, or other factors altogether, caused the alleged harm.

recoverable (see, for example, *Tilley v. Global Payments, Inc.*, 603 F. Supp. 2d 1314, 1328-29 (D. Kan. 2009)).

Also, courts generally have held that injunctive relief is not available to private litigants under the FCRA, although there is limited older authority that reaches a contrary conclusion (see, for example, *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) (summarizing older authority and finding no private right to injunctive relief); *White v. First Am. Registry, Inc.*, 378 F. Supp. 2d 419, 421-24 (S.D.N.Y. 2005) (following *Washington*); *Howard v. Blueridge Bank*, 371 F. Supp. 2d 1139, 1145-46 (N.D. Cal. 2005) (same)).

COMMON CLAIMS UNDER THE FCRA

Although the FCRA imposes a variety of requirements, plaintiffs most frequently raise claims alleging that a defendant violated the FCRA by negligently or willfully:

- Failing to follow reasonable procedures for ensuring the accuracy of consumer information.
- Failing to properly investigate or reinvestigate a consumer's dispute.
- Issuing or obtaining a consumer report for an impermissible purpose.

Courts have consistently held that to prevail on a reasonable procedures or reinvestigation claim, a consumer must demonstrate that the reported consumer information is inaccurate (see, for example, *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 65-67 (1st Cir. 2008) (collecting cases)). Courts generally have agreed that the question of accuracy may be addressed at summary judgment, but they have adopted different definitions of accuracy (see, for example, *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009) (a consumer report is inaccurate if it is factually accurate but misleading, for example, because it omits certain information); *Spence v. TRW, Inc.*, 92 F.3d 380, 382 (6th Cir. 1996) (a consumer report's accuracy depends solely on the correctness of the information reported)).

Notably, the FCRA does not provide for a private right of action for alleged violations of a party's duties when using a consumer report (which are different from a party's duties when requesting a consumer report under Section 1681b) (see 15 U.S.C. § 1681m(h)(8)). Instead, only the federal government can enforce those duties (see, for example, *Perry v. First Nat'l Bank*, 459 F.3d 816, 819-23 (7th Cir. 2006)). In these actions, the user cannot be held liable if he shows by a preponderance of the evidence that he maintained reasonable procedures to assure compliance with the FCRA at the time of the alleged violation (15 U.S.C. § 1681m(c)).

FAILURE TO FOLLOW REASONABLE PROCEDURES

The FCRA requires CRAs to follow reasonable procedures to assure maximum possible accuracy when preparing consumer reports (15 U.S.C. § 1681e(b); see *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982) (noting that Section 1681e(b) imposes a duty of reasonable care on CRAs)). Therefore, a CRA will not be liable if, for example, it accurately reports information from a reliable source, but that source provided inaccurate information (15 U.S.C. § 1681e(b); see, for example, *Henson v. CSC Credit Servs.*, 29 F.3d 280, 285 (7th Cir.

1994); *Burke v. Experian Info. Sols., Inc.*, 2011 WL 1085874, at *5 (E.D. Va. Mar. 18, 2011); *Stewart v. Abso, Inc.*, 2010 WL 3853114, at *11 (W.D. Ky. Sept. 28, 2010)).

To establish liability under Section 1681e(b), a plaintiff must show that:

- His consumer report contained inaccurate information.
- The CRA provided his consumer report to a third party.
- The inaccuracy was due to the defendant's unreasonable procedures.
- He suffered injury.
- His injury was caused by the inclusion of the inaccurate entry.

(See *Cortez*, 617 F.3d at 708; *Wantz*, 386 F.3d at 834.) One possible exception to this list may apply to cases in the Ninth Circuit, which has suggested that Section 1681e(b) liability does not require provision of a consumer report to a third party (see *Guimond*, 45 F.3d at 1333).

The circuit courts disagree on who bears the burden of proving the reasonableness of the CRA's procedures. The Ninth and Eleventh Circuits have suggested that the CRA bears the burden of showing that it acted reasonably (see *Guimond*, 45 F.3d at 1333 (noting that a CRA "can escape liability if it establishes that an inaccurate report was generated despite the agency's following reasonable procedures"); *Cahlin*, 936 F.2d at 1156 (same)).

By contrast, the Fourth and DC Circuits have held that the plaintiff bears the burden of showing that the defendant's procedures were unreasonable (see *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 416 (4th Cir. 2001); *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 & n.5 (D.C. Cir. 1984)). These courts have noted that Congress explicitly shifted the burden of proof from a plaintiff to a CRA elsewhere in the FCRA. By not also doing so in Section 1681e(b), Congress intended that the default burden would apply to claims under that provision. (See *Stewart*, 734 F.3d at 51 n.5 (citing 15 U.S.C. §§ 1681d(c), 1681m(c)).)

FAILURE TO INVESTIGATE OR REINVESTIGATE

If a consumer believes that information on his consumer report is inaccurate, he can dispute the inaccuracy with the CRA or directly with the furnisher. The consumer's filing of a dispute with the CRA triggers "reinvestigation" duties for the CRA and investigation duties for the furnisher. Filing a dispute with the furnisher, by contrast, triggers only the furnisher's duties. These duties call for a reasonable examination of the consumer dispute by the CRA and the furnisher (see 15 U.S.C. §§ 1681i(a)(1)(A), 1681s-2(b)). Notably, one circuit court has held that a claim concerning reinvestigation applies to information contained in a consumer's file at a CRA, even if the CRA did not provide the information to a third party (although, without this disclosure, a consumer likely will have trouble proving damages) (see *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1333 (11th Cir. 2015)).

CRA Liability for Failing to Reinvestigate

Consumers commonly dispute the accuracy of information in their consumer reports with the CRA that prepared the report. Within 30 days after receiving notice of a dispute, subject to an extension of 15 days if the consumer supplies additional

Permissible Purposes: Reasonable Procedures and Certifications

CRA must observe reasonable procedures to limit the issuance of consumer reports to permissible purposes. These procedures can include:

- Requiring that a party requesting a consumer report certify the purposes for which it is seeking the information.
- Making a reasonable effort to verify the user's identity and certified purposes.
- Declining to provide a consumer report if the CRA has reasonable grounds to believe the report will not be used for a permissible purpose.

(15 U.S.C. § 1681e(a).)

Most courts have held a CRA's reliance on a party's blanket certification that reports are being requested for a permissible purpose to be reasonable as a matter of law, particularly when the CRA has no reason to doubt the

requesting party's purposes (see, for example, *Hernandez v. Lamboy Furniture, Inc.*, 2008 WL 4061344, at *9-10 (E.D. Pa. Sept. 2, 2008); *Enoch v. Dahle/Meyer Imports, L.L.C.*, 2007 WL 4106264, at *5 (D. Utah Nov. 16, 2007); *Dobson v. Holloway*, 828 F. Supp. 975, 977 (M.D. Ga. 1993); *Davis v. Asset Servs.*, 46 F. Supp. 2d 503, 508 (M.D. La. 1998); *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 71 (S.D.N.Y. 1982)). No court has held that blanket certifications are impermissible, and that a CRA must individually review every request for a consumer report.

Some courts, however, have held that whether the use of a blanket certification is a "reasonable procedure" in certain circumstances is a question of fact (see, for example, *Pintos v. Pac. Creditors Ass'n*, 565 F.3d 1106, 1114 (9th Cir. 2009), amended and superseded on other grounds by 605 F.3d 665 (9th Cir. 2010); *Sheldon v. Experian Info. Sols., Inc.*, 2010 WL 3768362, at *5 (E.D. Pa. Sept. 28, 2010)).

information, the CRA must conduct and complete a reasonable reinvestigation to determine whether the disputed information is inaccurate (15 U.S.C. § 1681i(a)(1)(A)).

A reasonable reinvestigation calls for "reasonable diligence" by the CRA (*Dennis v. BEH-1*, 520 F.3d 1066, 1071 (9th Cir. 2008)). This typically requires asking the furnisher whether the reported information should be modified or deleted based on the consumer's dispute. There ordinarily is no need for the CRA to require original documentation from the furnisher, and it is typically reasonable for the agency to rely on the furnisher's verification or modification of the reported information. (See, for example, Fed. Trade Comm'n, 40 Years of Experience with the Fair Credit Reporting Act, at 76 (July 2011).) But if the CRA knows or should know that the furnisher is unreliable, and if verifying the reported information would not be too costly, then a "reasonable reinvestigation" may in some circumstances require verifying the accuracy of the furnisher's information (*Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3d Cir. 1997)).

However, a CRA is not required to resolve a legal dispute between a furnisher and a consumer by, for example, determining which side has the better interpretation of a contract governing a reported debt (see, for example, *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (observing that a "CRA is not required as part of its reinvestigation duties to provide a legal opinion on the merits"); *DeAndrade*, 523 F.3d at 68; *Krajewski v. Am. Honda Fin. Corp.*, 557 F. Supp. 2d 596, 616-17 (E.D. Pa. 2008)).

If the CRA reasonably determines that a consumer's dispute is frivolous or irrelevant, the agency may terminate the reinvestigation (15 U.S.C. § 1681i(a)(3)(A)). This can occur if, for example, the consumer does not give the agency a reason to believe that the reported information is inaccurate, or

the consumer's dispute duplicates a previous dispute (see, for example, *Ruffin-Thompkins*, 422 F.3d at 608-09). After terminating the reinvestigation, the agency must notify the consumer within five business days (15 U.S.C. § 1681i(a)(3)(B)).

After a consumer dispute is raised, the CRA must:

- **Provide prompt notice to furnishers.** Within five business days of receiving notice of a dispute, the CRA must notify the furnisher of the dispute and provide all relevant information regarding the dispute that the agency received (15 U.S.C. § 1681i(a)(2)(A)). However, this does not require the CRA to transmit the consumer's statements on the dispute, if the CRA provides an accurate and reasonable summary of the dispute (see, for example, *Paul v. Experian Info. Sols., Inc.*, 793 F. Supp. 2d 1098, 1103 (D. Minn. 2011); *Boothe v. TRW Credit Data*, 768 F. Supp. 434, 438-39 (S.D.N.Y. 1991)). The furnisher must then reasonably investigate the matter and report the results of the investigation to the CRA (15 U.S.C. § 1681s-2(b)).
- **Modify or delete inaccurate or unverifiable information.** The CRA must promptly modify or delete the disputed information as appropriate and notify the furnisher of any changes, if the agency either:
 - determines that the disputed information is inaccurate or incomplete; or
 - cannot verify the information within the timeframe for completing the reinvestigation.

(15 U.S.C. § 1681i(a)(5)(A).) If the agency deletes any information, it cannot later reinsert the information unless the furnisher certifies that the information is accurate. If the furnisher provides this certification, the CRA must notify the consumer within five business days after the reinsertion (15 U.S.C. § 1681i(a)(5)(B)).

- **Provide its reinvestigation findings to the consumer.** After completing or terminating a reinvestigation, the CRA must notify the consumer of the results within five business days (15 U.S.C. § 1681i(a)(3)(B), (a)(6)). The CRA should provide, among other things, a revised consumer report and, on the consumer's request, a statement describing the procedures it used to reinvestigate the allegedly inaccurate information (15 U.S.C. § 1681i(a)(6)(B)).

If the reinvestigation does not resolve the dispute to the consumer's satisfaction, the consumer may file a brief statement about the dispute that must appear on all consumer reports listing the information, unless the CRA has reasonable grounds to believe the statement is frivolous or irrelevant (15 U.S.C. § 1681i(b)-(c)).

Furnisher Liability for Failing to Investigate

If a consumer disputes the accuracy of information in his consumer report directly with a furnisher, the furnisher must conduct and complete an investigation within 30 days (15 U.S.C. § 1681s-2(a)(8)). If the furnisher determines that the reported information is inaccurate, it must promptly correct the information with all CRAs to which it furnished the information (15 U.S.C. § 1681s-2(a)(2)). As discussed above, a furnisher also must investigate disputed information after receiving notice from a CRA that a consumer filed a dispute with the agency (15 U.S.C. § 1681s-2(b)).

Although the FCRA does not specify the duty of care a furnisher must use in its investigation, courts have held that the investigation must be reasonable (see, for example, *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004)). It can be unreasonable, for example, for a furnisher not to consult the underlying documents when verifying that information is accurately reported.

A consumer may sue a furnisher over the accuracy of information only after the consumer has formally disputed the information with the CRA, which triggers the furnisher's investigation duties (15 U.S.C. § 1681s-2(c)). Before a consumer files a dispute with the CRA, only the federal and state governments may sue the furnisher (15 U.S.C. § 1681s-2(a), (e)); see, for example, *Seamans v. Temple Univ.*, 744 F.3d 853, 864 (3d Cir. 2014); *Nelson v. Chase Manhattan Mortg. Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002)).

ISSUING OR OBTAINING A CONSUMER REPORT FOR AN IMPERMISSIBLE PURPOSE

A consumer may sue a CRA or user for negligently or willfully issuing or obtaining a consumer report for an impermissible purpose (15 U.S.C. § 1681b). Commonly litigated purposes include:

- Firm offers of credit or insurance.
- Employment matters.
- Credit transactions.
- Other legitimate business needs.

Except for consumer reports issued for employment purposes, consumer consent is not a prerequisite to a permissible purpose (15 U.S.C. §§ 1681b(b), 1681a(h); see, for example, *Hinton v. Trans Union, LLC*, 2009 WL 2461439, at *6 (E.D. Va. Aug. 11, 2009)).

Instead, requesting a report with a consumer's consent qualifies as its own permissible purpose, distinct from the others listed in the FCRA (see 15 U.S.C. § 1681b(a)(2)).

CRAs are not required to police how a user ultimately uses the consumer report, but they must maintain reasonable procedures to limit improper disclosures (see *Box, Permissible Purposes: Reasonable Procedures and Certifications*).

Firm Offers

CRAs may disclose consumer credit information in connection with the extension of a firm offer of credit or insurance that is not initiated by the consumer if both:

- The consumer has been pre-screened.
- The offer meets the criteria set forth at Section 1681a(l). (15 U.S.C. § 1681b(c).)

Plaintiffs commonly allege that a defendant, often a credit card company, made a firm offer merely as a pretext for obtaining the plaintiff's consumer report. However, courts typically consider these offers to be legitimate firm offers if the creditor will extend credit if the consumer meets the specified pre-selection criteria (see, for example, *Gelman v. State Farm Mut. Auto. Ins. Co.*, 583 F.3d 187, 194-95 (3d Cir. 2009); *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1097-98 (8th Cir. 2008)).

Although the FCRA does not expressly require firm offers to exceed a certain amount of credit, a firm offer must provide sufficient value to be a legitimate credit product, not just a guise for solicitation (see *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 728 (7th Cir. 2004)).

Employment Matters

With the consumer's consent, a CRA may provide a consumer report for certain employment purposes, including evaluating the consumer for employment, promotion, reassignment, or retention. The user, typically an employer or a background check provider, must certify to the CRA that:

- It has informed the consumer that a consumer report will be obtained in connection with the employment matter.
- The consumer has provided written authorization for the disclosure of the report.
- A copy of the report will be given to the consumer if any adverse action is taken in reliance on the report.

(See 15 U.S.C. §§ 1681b(a)(3)(B), (b), 1681a(h); see, for example, *Miller v. Johnson & Johnson*, 80 F. Supp. 3d 1284, 1295-96 (M.D. Fla. 2015) (holding that an employer violated the FCRA by failing to provide the plaintiff with pre-adverse action notice before rescinding an employment offer).)

Subject to a limited exception, the initial notice to a consumer must be:

- Clear and conspicuous.
- In writing.
- In a document that consists solely of the notice.
- Delivered before the consumer's report "is procured." (15 U.S.C. § 1681b(b)(2)(A).)

Courts have looked to the Uniform Commercial Code and the Truth in Lending Act for guidance when determining what constitutes a “clear and conspicuous” notice (see, for example, *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 730-31 (7th Cir. 2004)).

Some courts have held that the notice may not include any material other than the formal request for the consumer’s consent (see, for example, *Milbourne v. JRK Residential Am., LLC*, 92 F. Supp. 3d 425, 433 (E.D. Va. 2015)). Other courts have permitted the document to contain other material so long as the notice remains clear and conspicuous (see, for example, *Burghy v. Dayton Racquet Club, Inc.*, 695 F. Supp. 2d 689, 698-700 (S.D. Ohio 2010)).



Search [Fair Credit Reporting Act \(FCRA\) Adverse Action Notification Letter](#) for a sample letter to send to job applicants not selected for a position because of information contained in their consumer reports, with explanatory notes and drafting tips.

Search [Fair Credit Reporting Act \(FCRA\) Disclosure and Authorization for Background Checks](#) for a sample background check consent form serving as a disclosure and authorization that an employer can provide to job applicants and employees before seeking a consumer report, with explanatory notes and drafting tips.

Credit Transactions

A CRA may issue a consumer report to a party that, the agency has reason to believe, intends to use the information in connection with:

- The extension of credit to the consumer.
- Review or collection of the consumer’s credit account.

(15 U.S.C. § 1681b(a)(3)(A); see, for example, *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 34 (3d Cir. 2011) (holding that a debt collector obtained the plaintiff’s credit information for a permissible purpose under the FCRA where the plaintiff’s accumulation of credit card debt caused the debt collector to access the plaintiff’s credit report and collect on the debt).)

In these cases, some courts have held that the consumer report must be used in connection with either:

- A transaction or debt that the consumer sought out or initiated.
- A debt that has been confirmed by a court.

(See, for example, *Pintos*, 605 F.3d at 674-75; *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1048 (7th Cir. 2005).)

However, other judges have argued that this purpose also may apply to reports used in connection with involuntarily incurred debts (see *Pintos*, 605 F.3d at 670-72 (Kozinski, J., dissenting from denial of rehearing *en banc*)).

Other Legitimate Business Needs

The catchall provision contained in Section 1681b(a)(3)(F) contemplates disclosing a consumer report where the user articulates a legitimate business need for the information in connection with either:

- A business transaction that is initiated by the consumer, such as a transaction relating to credit, insurance eligibility, employment, or licensing.
- A review of a consumer’s account to determine whether the consumer continues to meet the terms of the account.

(See *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149-51 (3d Cir. 1986); *Scott v. Real Estate Fin. Grp.*, 956 F. Supp. 375, 382 (E.D.N.Y. 1997).) Courts have construed this provision narrowly to require the request for a consumer’s report to be, “as a practical matter,” “part of the transaction” the consumer initiated (*Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808, 819 (W.D. Ky. 2003)).

A CRA may permissibly provide information about a consumer’s spouse if the information bears on the consumer’s creditworthiness or credit standing, such as where:

- The spouse will use the account or be contractually liable for the account.
- The applicant relies on the spouse’s income or is acting as the spouse’s agent.

(See, for example, *Short v. Allstate Credit Bureau*, 370 F. Supp. 2d 1173, 1179-80 (M.D. Ala. 2005).)

COMMON DEFENSES TO FCRA CLAIMS

A defendant in an FCRA action may assert defenses based on statutory requirements that a plaintiff must satisfy to establish liability. For example, a defendant can point to the failure of proof relating to:

- Accuracy.
- Reasonableness.
- Causation.

Courts have looked to the Uniform Commercial Code and the Truth in Lending Act for guidance when determining what constitutes a “clear and conspicuous” notice.

Special Considerations for FCRA Class Actions

Consumers commonly bring FCRA claims as class actions under FRCP 23(b)(3). Putative class representatives often pursue only willful violations of the FCRA to recover statutory damages. This tactic avoids the need for individualized assessments of damages, which often prompt commonality and typicality challenges to class certification.

By seeking only statutory damages, however, class representatives might be exposed to an argument that they lack an actual injury and therefore lack Article III standing. The Supreme Court's decision in *Spokeo* may bear significantly on this issue (see *Actual Injury and Constitutional Standing*).



Search **Class Action Toolkit** for a collection of resources designed to assist counsel with class action procedure, requirements, and practice in federal court.

These defenses also may serve as grounds for dismissal under Federal Rule of Civil Procedure (FRCP) 12(b)(6) or a motion for summary judgment under FRCP 56.

In addition to attacks on failures of proof, common defenses include:

- Expiration of the statute of limitations.
- Lack of actual injury and constitutional standing.

STATUTE OF LIMITATIONS

A plaintiff must bring an FCRA claim within the earlier of either:

- Two years after the plaintiff discovers the violation.
- Five years after the violation occurred.

(15 U.S.C. § 1681p.) Republication of information in a consumer report does not constitute a new violation giving rise to a new cause of action (see, for example, *Bermudez v. Equifax Info. Servs., LLC*, 2008 WL 5235161, at *2 (M.D. Fla. Dec. 15, 2008)).

The shorter two-year limitations period begins to run when the plaintiff discovers the facts giving rise to a claim, rather than when he discovers that those facts constitute a legal violation (see *Mack v. Equable Ascent Fin., L.L.C.*, 748 F.3d 663, 665-66 (5th Cir. 2014)). The limitations period will run once a plaintiff has even inquiry notice of the violation, meaning that the plaintiff has information of sufficient specificity from which he could have learned of the violation (see *Willey v. J.P. Morgan Chase, N.A.*, 2009 WL 1938987, at *5-7 (S.D.N.Y. July 7, 2009)).

Although events outside the statute of limitations cannot form the basis of a plaintiff's claim, those events still can be relevant and used, for example, to demonstrate negligence or willfulness (see *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 671 (C.D. Cal. 2000)).

ACTUAL INJURY AND CONSTITUTIONAL STANDING

The FCRA explicitly requires a plaintiff claiming negligence liability to establish that he suffered an actual injury (15 U.S.C. § 1681o(a)(1); see, for example, *Crabill*, 259 F.3d at 665).

The FCRA permits a plaintiff claiming willfulness liability to seek only statutory damages (15 U.S.C. § 1681n(a)(1)). The federal circuit courts are split on whether this type of plaintiff must additionally prove an actual injury, and on what constitutes such an injury, to establish Article III standing (compare *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412-14 (9th Cir. 2014) (no injury required) and *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009) (same) with *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) (requiring actual injury for Article III standing in an ERISA case) and *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (same)).

The Supreme Court granted *certiorari* on this question in *Spokeo, Inc. v. Robins*. At issue in *Spokeo* is whether a plaintiff has Article III standing where he can demonstrate a willful statutory violation under the FCRA but has not suffered a concrete injury. (No. 13-1339, 2014 WL 1802228, at *1 (U.S. May 1, 2014).) The Supreme Court's decision could have a significant impact on the defenses available in FCRA litigation where the plaintiff has not suffered a tangible injury or incurred any damages.

