

FORCING THE CHOICE BETWEEN COMMERCE AND CONSUMERS: APPLICATION OF THE FCRA¹ TO IDENTITY THEFT

But he that filches from me my good name, robs me of that
which not enriches him, but makes me poor indeed.²

With all due respect to Mr. Shakespeare, in the current age of computers and credit, a thief who filches one's good name may in fact be well enriched. The most recent statistics from the Federal Trade Commission and the General Accounting Office attribute more than \$400 million annually in credit card losses to identity theft.³ There can be little doubt, then, that filchers and identity thieves have made a lucrative practice of stealing the good names of others.

Shakespeare is correct, however, in saying that such theft makes the victim poor indeed. Victims of identity theft spend thousands of dollars and incalculable hours repairing credit reports, working with various law enforcement agencies, and dealing with angry creditors. Coupled with this loss, victims often experience emotional and physical distress related to the intense and intimate nature of identity theft and the resulting financial harm.

While recent federal legislation provides recovery against the thief for such damages,⁴ recovery is often impractical given the nature of the crime, the extent of the damages involved and the source of recovery (i.e., from a thief). Further, given the continuing nature of the thief's act—the fouled credit report is available for distribution for seven years⁵—the damage may continue for years after capture and prosecution, leaving the victim to fend off angry creditors even after limited restitution is made.

1. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1994) (amended 1996 & 2001).

2. WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3 (7th ed.1958).

3. Gen. Accounting Office, *Identity Fraud—Information on Prevalence, Cost, and Internet Impact is Limited*, GAO Rep. No. GGD-98-100BR, available at <http://www.gao.gov/> (last visited Oct. 29, 2001).

4. 18 U.S.C. § 1028 (1994 & Supp. V 1999); *id.* § 3663A.

5. 15 U.S.C. § 1681c(a).

This Comment focuses on the latter fact, ignoring altogether the practicalities of recovery from the thief. It focuses primarily on reducing the continuing effects of identity theft on victims and discusses the federal framework regulating the use and dissemination of credit reports. It demonstrates the limitations of this framework as applied to identity theft and argues that the burden of restitution should be placed on those in the best position to avoid the loss. As exemplified by the case of *Andrews v. Trans Union Corp, Inc.*,⁶ the end result of the framework as currently applied merely proves Mr. Shakespeare's words: identity theft ultimately leaves victims poorer indeed. Part I discusses the nature and growth of identity theft as a crime. Part II discusses the structure and function of the amended Fair Credit Reporting Act. Part III looks at the questionable role of the amended Fair Credit Reporting Act in providing relief for victims of identity theft, as applied in the *Andrews* case, and concludes that the Act may provide adequate relief if properly applied.

I. THE NATURE OF THE CRIME

In the most general sense, identity theft involves the co-opting of a victim's identity and established credit history.⁷ Once assumed, the thief may use the identity in a number of ways; either to directly bilk the victim's existing bank accounts or, more commonly, to establish new credit-based accounts in the victim's name.⁸ Once established, the thief discreetly drains the new accounts, sometimes keeping payments current for a time so the lending institution is not alerted.⁹ The process continues until either the thief is caught or the credit history has been so abused that no new accounts are supported.¹⁰ The latter credit-based scam is the more prevalent form of identity theft, and is the subject of this Comment.

Once completed, the credit-based scam leaves the defrauded lenders looking to the victim for restitution,¹¹ and puts the victim in the difficult position of proving that she is not the true owner of the fraudulent accounts. An effective thief compounds this difficulty by setting the

6. 7 F. Supp. 2d 1056 (C.D. Cal. 1998), *rev'd*, 225 F.3d 1063 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 1223 (2001).

7. It is important to note from the outset that identity theft has two victims—the person whose identity the thief assumes and the defrauded creditor. For the purposes of this Comment, “victim” signifies only the person whose identity the thief assumes. The particular problem created by identity theft does not apply to defrauded creditors who have a myriad of common law and statutory remedies against the thief.

8. S. REP. NO. 105-274, at 7 (1998).

9. *Id.*

10. *Id.*

11. *Id.*

fraudulent accounts up in the victim's name, tying them to the victim's social security number, guarding them with a secret code (usually the victim's mother's maiden name), and paying on the accounts (for a short time) with checks drawn on an account in the victim's name.¹² Creditors and collectors, being well familiar with elaborate disavowals from debtors, generally continue collection efforts in spite of the victim's claims.¹³ Ultimately, the unpaid fraudulent accounts are charged-off, leaving the victim abused by collection efforts and financially ruined via adverse credit reports.

Meanwhile, the thief has received the benefit of the fraudulent credit accounts, and has sometimes used the assumed identity for other nefarious purposes. In the frequently reported case of thief Scott Gilbert, Gilbert declared bankruptcy, failed to pay taxes, bought a mobile home, received several speeding tickets, and claimed status as a Vietnam veteran, all in the name of Robert Hartle.¹⁴ In the course of committing the prolonged fraud, Gilbert actually called Hartle and taunted him, telling Hartle that no jurisdiction recognized the acts as criminal.¹⁵ Gilbert, at the time, was correct.¹⁶

While the blatancy of Gilbert's actions is rare, identity theft itself is not. Based on figures supplied by the Federal Trade Commission (FTC), the federal agency charged with tracking and compiling reports of identity theft,¹⁷ the General Accounting Office reports annual growth rates of more than three hundred percent in identity theft claims.¹⁸ As stated in the introduction to this Comment, financial institutions and credit card agencies attribute annual losses totaling hundreds of millions of dollars to identity theft.¹⁹ In Washington D.C. alone, identity theft affects almost twenty out of every one hundred thousand people.²⁰ Given the pervasive acceptance of the internet, and the relative comfort with which users make available confidential, personal information—both financial and otherwise—one may safely assume that instances of identity theft will continue to grow.

It is important, then, to understand that identity theft is not a vic-

12. *Id.*

13. Federal Trade Commission, *Identity Theft Victim Assistance Workshop* (Oct. 23-24, 2000), available at <http://www.ftc.gov/bcp/workshops/idtheft/transcripts/001023.htm> (last visited Oct. 29, 2001).

14. S. REP. NO. 105-274, at 5; see also Kristen S. Provenza, *Identity Theft: Prevention and Liability*, 3 N.C. BANKING INST. 319 (1999).

15. S. REP. NO. 105-274, at 6.

16. *See id.*

17. Identity Theft and Assumption Deterrence Act of 1998, Pub. L. NO. 105-318 § 5, 112 Stat. 3010 (1998) (codified as 18 U.S.C. § 1001 (1994 & Supp. V 1999)).

18. *See supra* note 3 and accompanying text.

19. *Id.*

20. *See* Federal Trade Commission *supra* note 13.

timless crime in which only institutions realize loss; the individual victims suffer real damage ranging from wasted time to hospitalization. Reports from the national hotline for reporting identity theft²¹ show victims spending hundreds of hours and thousands of dollars to correct damage done by identity thieves.²² This time is generally spent contacting reporting companies and creditors by telephone and mail²³ in accordance with dispute procedures.²⁴ Since strict compliance with the federal guidelines for disputing credit reports is a prerequisite for mandatory creditor corrective action,²⁵ and since most creditors and reporting agencies require disputes to be registered during business hours, average victims can expect to spend days or weeks away from work restoring their good name.²⁶ As discussed later in more detail, the full process of correction takes, in theory, at least one month for each account the thief establishes.²⁷ Given the nature of the crime, extreme cases take years to completely resolve.²⁸ During this time, victims are often denied credit by lenders or merchants relying on false credit reports,²⁹ lose or are denied employment,³⁰ and face criminal and civil prosecution for fraud, conversion, breach of contract, and the like.³¹ Further, the FTC reports that many victims incur medical expenses relating to stress, sleepless nights, and pressure from creditors.³² A growing number of cases result in severe depression, nervous breakdowns, and hospitalization.³³ Considering these effects, either individually or in the aggregate, it is clear that even minor identity thefts cause dramatic injury and loss for victims. Far from victimless, identity theft leaves those whose identity the thief has co-opted in shambles both financially and emotionally; abused by both the thief and the thief's creditors.

Hence, the question—and the initial subject of this Comment—becomes what recourse do these victims have against the ongoing nightmare that is identity theft? The current answer lies largely in the Fair Credit Reporting Act.

21. 1-877-ID-Theft.

22. See generally Federal Trade Comm'n, *supra* note 13.

23. Federal Trade Commission, *Identity Theft Complaint Data, Figures and Trends on Identity Theft January 2000 through December 2000*, at 4-5, available at <http://www.ftc.gov/bcp/workshops/idtheft/trends-update.pdf> (last visited Jan. 4, 2002) [hereinafter Federal Trade Commission data].

24. See *infra* note 67 and accompanying text; see generally *infra* Part II.

25. See *infra* note 67 and accompanying text; see generally *infra* Part II.

26. See Federal Trade Commission, *supra* note 13.

27. See *infra* note 74 and accompanying text; see discussion *infra* Part II.B.

28. See Federal Trade Commission, *supra* note 13.

29. See Federal Trade Commission data, *supra* note 23.

30. See *id.*

31. See *id.*

32. See *id.*

33. *Id.*

II. THE FAIR CREDIT REPORTING ACT

The Ninetieth Congress recognized the potential for abuse in a credit-driven society when it passed the Fair Credit Reporting Act³⁴ ("FCRA" or "Act") to ensure public confidence in the rapidly expanding area of credit-based consumer lending.³⁵ The Act attempted to meet these lofty goals in essentially two ways. First, it established standards for gathering and reporting both credit and character-based information, hoping industry-wide consistency would serve lenders and protect the public.³⁶ These standards comprehensively regulate the generation, dissemination and use of credit information ("credit reports"), and provide procedures for disputing the information contained therein.³⁷

Second, the Act provides penalties for noncompliance.³⁸ Consumers may recover from reporting agencies (i.e., credit bureaus) and information users (i.e., potential creditors)³⁹ for both negligent⁴⁰ and willful⁴¹ noncompliance, with the latter supporting punitive damages.⁴² Notably, the Act employs a "reasonableness" standard, under which suppliers and reporters of information may escape liability, even if the information supplied or reported is incorrect.⁴³

Also of import, the Act expressly preempts state common law or statutory remedies, making the FCRA the sole recovery tool in actions within its scope.⁴⁴ However, to compensate for limiting state law remedies, the definitional section of the Act is worded broadly, and brings a wide array of commercial entities within its purview,⁴⁵ many of which were not previously regulated in any fashion. In practice, the Act denies recovery for some actionable pre-FCRA conduct, but has broad applicability, and is, therefore, the frequently used vehicle for Congress' regulation of consumer credit-based activity.⁴⁶ It is not surprising, then, that the Act provides the primary recourse for victims of identity theft.

34. 15 U.S.C. §§ 1681-1681t (amended 1996).

35. *Id.* § 1681a (stating Congress's findings and purpose for the Act).

36. *Id.* § 1681b.

37. *Id.* §§ 1681-1681t. (amended 1996).

38. *Id.* §§ 1681n, o.

39. 15 U.S.C. § 1681n, o.

40. *Id.* § 1681o.

41. *Id.* § 1681n.

42. *Id.*

43. *Id.*

44. 15 U.S.C. § 1681t.

45. *Id.* § 1681a.

46. See, e.g., Gramm-Leach-Bliley Act, 15 U.S.C. § 6806(c) (1999) (amending the FCRA to extend coverage to the privacy provisions of the National Bank Act).

A. What Are Credit Reports and How Are They Used?

As stated, Congress enacted the FCRA to ensure consumer confidence in credit-based transactions. An understanding of what the Act *does* is fundamental to the understanding of how the Act meets this goal. That is, what credit reporting is, and how the FCRA regulates it.

Credit reports, in the most basic sense, are collections of information disseminated by a consumer reporting agency chronicling credit transactions initiated by a consumer.⁴⁷ This information may relate either to the character or creditworthiness of the consumer,⁴⁸ but it must be collected from creditors and used or furnished with the expectation of use in determining the consumer's eligibility for credit, employment, insurance, or other "permissible purposes" detailed in the Act.⁴⁹ The key elements of a credit report are: its generation by a third party (the "consumer reporting agency");⁵⁰ its creation based on the information provided by creditors ("furnishers");⁵¹ and its availability to others ("users")⁵² for future credit-related determinations. When these elements are not present, the report is not considered a "consumer report" ("credit report") within the meaning of the Act,⁵³ and therefore not subject to its regulation.

Where a report is deemed a "credit report," the Act regulates both its use and its content. As stated above, credit reports may be used for a variety of determinations and business decisions, each of which is narrowly prescribed by the FCRA. While the Act does not regulate or institutionalize methods of using the reports (e.g., the Act does not establish acceptable debt-to-equity ratios for mortgage lenders), it expressly mandates that the reports be used solely for enumerated transactional determinations.⁵⁴ The purpose of this limitation is to ensure that users of credit reports have legitimate reasons for accessing a consumer's credit information.⁵⁵ And while the Act deems disparate acts like evaluating credit worthiness and determining employability as "permissible purposes," it requires express consumer approval in every instance.⁵⁶ Moreover, not only does the Act require a user to have a permissible purpose, but it also requires consumer approval before the user may act on that permissible purpose. This compound requirement

47. 15 U.S.C. § 1681a(d).

48. *Id.*

49. *Id.*

50. *Id.* § 1681a(f).

51. *Id.* § 1681e(d).

52. 15 U.S.C. § 1681e(d).

53. *Id.* § 1681a(d)(2).

54. *Id.* § 1681b.

55. *See id.*

56. *Id.*

attempts to ensure the consumer's privacy by limiting both access to, and use of, credit reports.

Likewise, the Act limits the contents of credit reports to ensure their reliability. The Act specifically mandates that credit reporting agencies "follow reasonable procedures" to make sure that their reports contain information of the "maximum possible accuracy."⁵⁷ By necessity, this places a huge burden on the agencies to report only reasonably reliable information. Any reporting agency not meeting this standard is subject to both civil and criminal penalties.⁵⁸ This gives the reporting agency an incentive to report only information from reliable furnishers who regularly provide such information as part of the normal course of their business. Acknowledging as much, the FCRA also mandates disclosures from reporting agencies to their information furnishers that inform them of their duties and responsibilities under the Act.⁵⁹ Such duties include not knowingly reporting or purposely avoiding knowledge of false information⁶⁰ and curing where such inaccurate information is reported.⁶¹ These requirements significantly reduce inaccuracies in the reports, and enhance their usefulness and reliability.

The end result of such regulations and duties is to provide accurate information to a specific group of users for a narrowly-drawn purpose. Thus, users of the information—though specifically limited in number and purpose—receive reliable information, on which they can safely determine the creditworthiness of consumers. Since access is limited to users with a permissible purpose⁶² and consumer authorization,⁶³ consumers are assured of the security of their financial information. Provided that all parties keep up their end, the FCRA provides a framework that seems to promote exactly its stated goals.⁶⁴

B. Dispute Resolution

Regardless of the framework's precision, errors will occur and disputes will arise. Realizing as much, a 1996 revision to the FCRA⁶⁵ provided a comprehensive scheme for dispute resolution aimed, again, at the dual goals facilitating commerce (through accurate information) and ensuring consumer confidence in the credit reporting system.⁶⁶ Essen-

57. 15 U.S.C. § 1681e(b).

58. See *infra* notes 88-93 and accompanying text.

59. 15 U.S.C. § 1681e(d)(1).

60. *Id.* § 1681s-2(a)(1)(A).

61. *Id.*

62. *Id.* § 1681b(2).

63. *Id.*

64. See *supra* note 35 and accompanying text.

65. See S. REP. NO. 104-185, at 43 (1995).

66. Pub. L. No. 104-208, Div. A, Title II, § 2409(a), (b), 110 Stat. 3009-439, 3009-442

tially, the scheme requires a reporting agency to verify or delete disputed information from a consumer's file within thirty days of the consumer's notifying the agency of the dispute.⁶⁷ Once notified, the reporting agency has a duty to notify the furnisher about the consumer's dispute within five business days of receiving the consumer's notice.⁶⁸ The furnisher has a duty either to verify or correct the information furnished to the reporting agency.⁶⁹ This verification or correction must be provided to the reporting agency within the reporting agency's thirty-day window, or must be "certified" by the furnisher and "reinserted" if the window has closed and the information has been deleted.⁷⁰ Either way, the reporting agency must notify the consumer of the reporting agency's resolution, and include information on how to contact the furnisher if such contact is necessary.⁷¹ As a final step, where the consumer is not satisfied with the resolution, the consumer may place a permanent letter of dispute in his credit report detailing the reasons for dispute;⁷² the substance of the letter will be reported in any subsequent credit reports.⁷³ Thus, within thirty days of reporting a discrepancy to a consumer reporting agency, the information will be removed or the consumer will be assured that the information is correct.⁷⁴

Similarly, the Act places strict requirements on the initial dissemination of credit reports to users.⁷⁵ Reports may only be generated and issued for certain enumerated, permissible purposes,⁷⁶ and the user of the requested report (i.e., the potential creditor) must "certify" the permitted purpose to the reporting agency.⁷⁷ Further, the reporting agency must have a reasonable belief that the report will be used in connection with a transaction involving the consumer on whom the report is provided.⁷⁸ Generally, the user's certification satisfies the reporting agency's duty.⁷⁹

Again, all of this is driven by the reporting agency's duty to follow reasonable procedures to ensure maximum accuracy in its reporting.

(1996) (codified as 15 U.S.C. §§ 1681i(a), (b) (amended 1996)).

67. 15 U.S.C. § 1681i(a)(1)(A).

68. *Id.* § 1681i(a)(2)(A).

69. *Id.* § 1681i(a)(5), (3).

70. *Id.* § 1681i(a)(5)(B)(i).

71. *Id.* § 1681i(a)(3), (6).

72. 15 U.S.C. § 1681i(b).

73. *Id.* § 1681i(c).

74. In situations where the consumer provides relevant information to the reporting agency after the initial notification of dispute, the thirty-day period is extended to forty-five days. *Id.* § 1681i(a)(1)(B).

75. *Id.* § 1681b.

76. *Id.*

77. 15 U.S.C. § 1681b(b).

78. *Id.* § 1681e(a).

79. See *infra* Part III.

Should it be determined that the agency was unreasonable in its reinvestigation procedures, or that the reporting agency or user was negligent in complying with its duties under the Act, a consumer may support a direct action against the delinquent party.

C. Penalties for Noncompliance

Aimed at promoting the dual goals of accuracy and security, the FCRA utilizes a two-tiered enforcement scheme that subjects users, reporting agencies and furnishers to steep civil or administrative penalties for noncompliance. Direct actions by consumers against violating reporting agencies and users promote consumer confidence through the knowledge that willful or negligent noncompliance will not go unanswered. In comparison, administrative actions against reporting agencies and furnishers, and direct actions by reporting agencies against furnishers, ensure the accuracy of information supplied to reporting agencies. The standards for compliance prescribed by the Act, however, have led to difficult and inconsistent results when interpreted and applied by the courts. The overall effectiveness of the enforcement scheme is, therefore, questionable.

Under the Act, consumers who feel their reported information is inaccurate may support an action against the reporting agency.⁸⁰ Recovery is permitted for both willful and negligent noncompliance⁸¹ with any of the requirements of the Act, including dissemination for an impermissible purpose,⁸² failure to maintain accurate records,⁸³ and failure to comply with dispute procedures.⁸⁴ Of course, it is an affirmative defense to any of the alleged violations that the information reported is accurate and issued for a permissible purpose.⁸⁵ Where this affirmative defense is not available, the threshold question for recovery is whether the reporting agency followed "reasonable procedures" aimed at complying with the Act.⁸⁶ As with any "reasonableness" standard, ultimately such a determination lies with the trier of fact. However, a plaintiff need not adduce direct evidence of unreasonable procedures,

80. 15 U.S.C. §§ 1681n, o.

81. *Id.*

82. *Id.* § 1681b.

83. *Id.* § 1681e.

84. *Id.* § 1681i.

85. See *McPhee v. Chilton Corp.*, 468 F. Supp. 494, 497 (D. Conn. 1978) (holding that accuracy at the time the reporting agency receives the information is a complete defense to liability). But see *Houston v. TRW*, 707 F. Supp. 689, 692 (S.D.N.Y. 1989) (holding that "maximum" accuracy requires updating of information where the reporting agency has notice that previously received information is no longer accurate).

86. 15 U.S.C. § 1681e(b); see *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp. 824, 829 (E.D.N.Y. 1994) (citing *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991)).

but may present the incorrect report itself as evidence of unreasonableness.⁸⁷ If the report itself proves unreasonable under the circumstances, the plaintiff has reached the threshold.

Once determined unreasonable, courts have universally held recoverable not only out-of-pocket expenses, but also damages for mental and emotional distress, damage to reputation, and humiliation.⁸⁸ Moreover, damages for negligent noncompliance are not necessarily predicated on a denial of credit; the mere dissemination or failure to correct misinformation is, itself, actionable.⁸⁹ The same may be true in actions for willful noncompliance, which require only an intentional or knowing act, and not proof of malice.⁹⁰

This same analysis controls in determining the reasonableness of a reporting agency's transmission of a credit report to a user, and the user's employment of the report. The threshold question remains the reasonableness of the parties' procedures for determining that the report was for permissible purposes.⁹¹ As with any issue concerning liability under the FCRA, where the procedures are reasonable, there is no liability.⁹²

Thus, liability for noncompliance hinges not on some strict adherence to form, but whether the noncomplying parties took reasonable precautions against misinformation. If a violation occurs, the consumer may file suit. Even if a report is incorrect, however, or if it is used for an impermissible purpose, reasonable procedures will shield the violator from liability.⁹³

III. APPLICATION OF THE FCRA TO IDENTITY THEFT

In applying these standards to determine liability in an identity theft situation, the particular difficulty lies in the nature of the crime. Specifically, the reporting and reinvestigation scheme outlined in the FCRA does not contemplate an unrelated third-party opening accounts

87. See *Parker v. Parker*, 124 F. Supp. 2d 1216, 1225 (M.D. Ala. 2000) (quoting *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51-52 (D.C. Cir. 1984)).

88. See *Stevenson v. TRW*, 987 F.2d 288 (5th Cir. 1993); *Bryant v. TRW*, 487 F. Supp. 1234 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976).

89. See *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329 (9th Cir. 1995), *followed by* *Philbin v. Trans Union Corp.*, 101 F.3d 957 (3d Cir. 1996). *But see* *Washington v. CSC Credit Services, Inc.* 199 F.3d 263 (5th Cir. 2000), *cert. denied*, 120 S. Ct. 2718 (2000).

90. See *Stevenson*, 987 F.2d 288.

91. See *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1067 (C.D. Cal. 1998), *rev'd*, *Andrews v. TRW, Inc.*, 225 F.3d 1063 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 1223 (2001).

92. See *Andrews*, 7 F. Supp. 2d at 1067.

93. However, if the error is not corrected the continuing violation becomes one with "knowledge" thus subjecting the continuing violator to punitive damages. See 15 U.S.C. §§ 1681i, n.

in a victim's name, and tying those accounts to a victim's established credit history.⁹⁴ As a result, under the FCRA the victim, the reporting agency, users and furnishers all may reasonably comply with the Act and yet the victim receives no relief. While the FCRA may, ultimately, provide a solution to victims of identity theft (i.e., a way to distance oneself from the acts of the thief), the solution only comes through prolonged and diligent effort by the victim, and is compensable only in the event a user or reporting agency willfully or negligently disregards strictures of the Act. Absent such noncompliance, the Act effectively shifts the burden of identity theft away from parties in position to avoid the damage through heightened controls (i.e., the reporting agencies and users) onto unsuspecting and relatively defenseless consumers. Given the dual goals of the FCRA, this outcome is flawed.

An illustrative case is currently under review by the United States Supreme Court. In *Andrews v. Trans Union Corp., Inc.*,⁹⁵ a receptionist in a dentist's office took advantage of having the same first initial and last name of a patient by copying, among other things, the patient's name, social security number, and date of birth, and subsequently using the information to apply for multiple credit cards and cable television service.⁹⁶ The thief completed the applications using various names, each a variation of Andrea (the thief's name) or Adelaide (the patient's name).⁹⁷ Each application was duly processed, and a Dillard's account was opened (and used).⁹⁸ Only when the patient was denied a loan because of the thief's past-due Dillard's account was she informed of the thief's manipulation of her identity and credit report.⁹⁹ The patient immediately contacted the reporting agencies, which began reinvestigation procedures pursuant to FCRA section 1681i.¹⁰⁰ Both agencies determined that the Dillard's account was not the patient's and "suppressed" the delinquency notice, keeping it from reporting on the patient's report.¹⁰¹ One of the reports, however, continued to show "inquiries" from Dillard's as to the patient's creditworthiness.¹⁰²

After the reinvestigation and "correction," the patient filed for violations of the FCRA, including claims that the reporting agencies had not maintained reasonable procedures to ensure "maximum possible

94. See *supra* Part I.

95. See *Andrews*, 7 F. Supp. 2d at 1056, 1063.

96. *Id.* at 1063.

97. On various occasions the thief misspelled the patient's name as "Adeliade" and gave her birth date, rather than the patient's. *Id.* at 1063.

98. A cable television account was also established, but was never used. *Id.*

99. *Id.* at 1064.

100. *Andrews*, 7 F. Supp. 2d at 1064.

101. *Id.*

102. These inquiries corresponded to the date the thief applied for the Dillard's account. *Id.*

accuracy" under section 1681e.¹⁰³ The patient contended that dissemination of her credit information in response to requests under differing names (with various spellings), differing addresses, and differing birth dates constituted unreasonable procedures.¹⁰⁴ The patient further argued that the reporting agencies issued reports for impermissible purposes in violation of section 1681b, because the Act requires a reasonable belief that the report will be used for transactions involving the consumer.¹⁰⁵ Because the transactions triggering the reports did not involve the patient (i.e., the consumer), but one posing *as* the patient, the reports themselves were issued for impermissible purposes.¹⁰⁶

The defendant reporting agencies moved for summary judgment on the simple defense that their beliefs and their procedures were reasonable.¹⁰⁷ The district court agreed, stating first that the disclosures were, as a matter of law, permissible under section 1681b and noting the following:

In an imposter situation such as the case at bar, the recipient of the consumer's report (i.e., the potential creditor to the imposter) "intends to use the information in connection with a credit transaction involving the consumer." The consumer is "involved" in the transaction, because the imposter is purporting to be the consumer.¹⁰⁸

The court held that the initial reporting procedures of the reporting agencies were reasonable,¹⁰⁹ and noted that to require more than a highly probable connection between the party requesting the information and the actual person identified would prove burdensome on credit reporting agencies.¹¹⁰ On the reasonableness and accuracy of the reinvestigation, however, the court held that the continued inaccuracy of the Dillard's inquiry on the patient's "corrected" report raised a ques-

103. *Id.* at 1064-65.

104. *Id.* at 1065.

105. *Andrews*, 7 F. Supp. 2d at 1065; *see also* 15 U.S.C. § 1681b(a)(3).

106. *See Andrews*, 7 F. Supp. 2d at 1065.

107. *Id.*

108. *Id.* at 1068 (emphasis in original).

109. *Id.* at 1071.

110. *Id.* at 1068. The court stated:

Although this argument [that imposter transactions do not constitute transactions with the "consumer"] is creative, the Court does not agree with it. . . . More importantly, it places too heavy a burden on consumer reporting agencies. Under Plaintiff's theory, any time an imposter adopted a consumer's identity, the disclosure of the consumer's information in response to a credit application by the imposter would be per se impermissible. Then the inquiry about the reasonableness of the reporting agency's procedures would always need to be conducted.

Andrews, 7 F. Supp. 2d at 1068.

tion for the trier of fact.¹¹¹ Ultimately, the defendant credit reporting agencies were granted summary judgment as to the reasonableness of their disclosure procedures, but denied as to the accuracy of their reports.¹¹²

On appeal, the Ninth Circuit soundly rejected the district court's reasoning and outcome, and reversed the grant of summary judgment.¹¹³ The court focused not on the burden to the credit reporting agencies, but on the overall reasonableness of their procedures in light of the specific facts of the case.¹¹⁴ The court discussed at length the growing importance of the FCRA strictures in the age of identity theft and stated:

As the district court observed, there are 250,000,000 persons in the United States (not all of them having Social Security numbers) and 1,000,000,000 possibilities as to what any one Social Security number may be. The random chance of anyone matching a name to a number is very small. If TRW could assume that only such chance matching would occur, it was reasonable as a matter of law in releasing the Plaintiff's file when an application matched her last name and the number. *But we do not live in a world in which such matches are made only by chance.*

. . . In a world where names are disseminated with the numbers attached and dishonest persons exist, the matching of a name to a number is not a random matter. It is quintessentially a job for a jury to decide whether identity theft has been common enough for it to be reasonable for a credit reporting agency to disclose credit information merely because a last name matches a social security number on file.¹¹⁵

As an example of facts to consider on remand, the court noted, "TRW argues that people do use nicknames and change addresses. *But how many people misspell their first name? How many people mistake their date of birth?*"¹¹⁶

While the Ninth Circuit opinion seems to loudly champion the concerns of the identity theft victim, it should be noted that the United States Supreme Court has granted certiorari on the decision.¹¹⁷ The Supreme Court decision must, invariably, resolve the policy tensions inherent in the District Court and Ninth Circuit opinions, the tensions interjected into the goals of the FCRA by identity thieves.

111. *Id.* at 1072.

112. *Id.* at 1084.

113. *See Andrews v. TRW, Inc.*, 225 F.3d 1063 (9th Cir. 2000).

114. *Andrews*, 225 F.3d at 1067.

115. *Id.* (emphasis added).

116. *Id.* (emphasis added).

117. *See TRW, Inc. v. Andrews*, 121 S. Ct. 1223 (2001).

If the single aim of the FCRA is to facilitate credit-based commerce while ensuring consumer confidence in such a credit-based system, that system falls apart when identity thieves co-opt victims identities. The unified goal is split into its two component parts—facilitation of commerce and insurance of consumer confidence—with each component representing opposing policy considerations. The question ultimately becomes: Who bears the burden for the acts of the thieves? The district court opinion falls on the side of the commerce, placing the risk and burden of a credit-based system on consumers. This is made clear by the court's interpretation of the "consumer-related" language in section 1681b as meaning any transaction in which the consumer's *identification* is used.¹¹⁸ By contrast, the Ninth Circuit represents a clear pro-consumer stance, placing the burden on the parties in the best position to avoid the loss (i.e., the reporting agencies and users). The Ninth Circuit expressly states as much by rebuffing the reasoning of the district court:

Another consideration for the district court was that a different [pro consumer] rule would impose too heavy a cost on TRW. The statute, however, has already made the determination as to what is a bearable cost for a credit reporting agency. The cost is what it takes to have a reasonable belief.¹¹⁹

What is placed before the Supreme Court is a strict policy argument as to which of the goals of the FCRA, placed in competition by the actions of a third party thief, is controlling.

Phrased in such a way, one must look past the surface inquiry of who should bear the burden, and determine exactly what the burden *is*. The determination is easy with regard to reporting agencies and users. The burden is the cost to heighten reporting and dissemination procedures in order to ensure that reports are requested for "permissible purposes" and that such reports contain information of the "maximum possible accuracy." This much is clear because, as the Ninth Circuit accurately points out, it is expressly dictated in sections 1681b and 1681e of the Act. What is reasonable? Costs that are not prohibitive. What is prohibitive? There is no better judge than the marketplace.

Determining the burden for consumers, however, is harder. As discussed in Part I, identity theft is still a new creature so the average impact is uncertain.¹²⁰ What is certain, though, is that the damages and injuries suffered by the victim are unavoidable. That is, they are un-

118. *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1068 (C.D. Cal. 1998).

119. *Andrews*, 225 F.3d at 1067-68.

120. See *supra* Part I.

avoidable through the actions of the consumer. The consumer should only shoulder the burden of cleaning up after the thief if the theft was *completely* unavoidable. This, however, is not the case in many instances. As noted by the Ninth Circuit, often the credit reporting agencies have an indication that a thief is at work. Trans Union and TRW knew that the person asking for Ms. Andrews' credit reports *couldn't spell her name*. The reporting agencies were also aware that the requesting user did not know Ms. Andrew's birth date and other key information. With this oversight by the credit reporting agencies in mind, how can it be said that Ms. Andrews should be left holding the bag when those charged under the statute with maintaining reasonable procedures allowed the transactions to take place? This, ultimately, is the burden on the consumer—not that the consumer might be victimized by a thief, but that the consumer might be victimized by the users and reporting agencies themselves. Clearly this result undermines one of the primary goals of the FCRA: consumer confidence in the credit-based system.

IV. CONCLUSION

In short, while the FCRA was not designed specifically to provide relief to victims of identity theft, it can. The Act places burdens on those in positions of reporting, compiling and using information, so as to facilitate commerce and ensure consumer confidence. The burdens are only those reasonable under the circumstances, and only those necessary to meet the goals of the Act. As demonstrated by the competing opinions involved in the *Andrews* case, however, the introduction of an identity thief into the FRCA framework creates tension between the Act's dual goals of commercial efficiency and consumer confidence. This tension manifests itself as the question of who bears the risk of protecting the consumer against the thief, and who should bear the liability for the thief's actions. The answer is supplied by the burdens identified expressly in the Act itself: the burden of following "reasonable procedures" to ensure use for "permissible purposes" aimed at "maximum possible accuracy." Where these burdens place the users and reporters of consumer financial information in the best position to reduce the risk created by the thief, it is not only unjust to shift the risk to the consumer, but such a shift directly undermines the fundamental goals of the Act.

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