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Cover Page Footnote
Catherine Bourque is a graduate of American University, Washington College of Law (May 2014). She first became interested in the consumer credit reporting system as an advocacy associate at the Consumer Federation of America and has continued her work throughout law school. She would like to first and foremost thank the Legislation & Policy Brief for this tremendous honor and for all of their help. She would also like to thank the American University Business Law Review, which helped her with the initial writing process. A special thanks to Elizabeth Khalil, Senior Policy Advisor at the FDIC, for her expertise and encouragement.

CAN CONSUMERS BRING STATE CLAIMS FOR FURNISHER ERRORS ON THEIR CREDIT REPORTS

Catherine Bourque*

Introduction

In an increasingly digital world, it can often feel like numbers define us. Whether your social security number, your phone number, or your credit score, the cold truth is that your identity is often boiled down to a single number. In the financial world, your credit score traditionally defines your eligibility for credit and the cost of credit, but the uses of credit scores have expanded to include premiums for insurance, employment eligibility, and other non-financial determinations.[1] Particularly in tough financial times, small fluctuations in credit scores can have large impacts on consumers' access to affordable credit.[2]

As furnishers and credit reporting agencies increasingly send information to each other electronically and use electronic forms for error resolution, the human element of the consumer can get lost in the translation.[3] Credit reporting agencies investigate consumer disputes electronically by using codes to signify complicated and nuanced challenges to errors on credit reports without paying much attention to the specific claims made by consumers.[4] In a system dominated by

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1 *See* Consumer Financial Protection Bureau, Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data, 5 (2012) [hereinafter CFPB Credit Reporting System Report], *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf (providing background on the types of uses for consumer credit reports).

2 *See 60 Minutes: 40 Million Mistakes: Is Your Credit Report Accurate?*, CBS News (February 10, 2013) [hereinafter *60 Minutes: Is Your Credit Report Accurate?*], http://www.cbsnews.com/video/watch/?id=50140748n (noting that only 44 million Americans checked their free credit reports through the federal annualcreditreport.com system and 8 million consumers report mistakes to the three major credit reporting agencies each year).

3 *See Making Sense of Consumer Credit Reports Hearing Before the Subcomm. on Fin. Inst. and Consumer Prot., S. Comm. on Banking, Hous., and Urban Affairs*, 102th Cong. 32 (2012) [hereinafter *Consumer Credit Reports Hearing*] (statement of Chi-Chi Wu, Staff Attorney, National Consumer Law Center), *available at* http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1b5d9716-9a48-4757-90d8-7a69d33af0ca (observing that consumer documentation about disputed credit information is not included when disputes are forwarded to furnishers because the credit reporting bureaus only forward the standardized Metro 2 form).

4 *See id.* at 32 (reporting that mixing of files often occurs because credit reporting agencies only

cold numbers, how can consumers defend their reputations and hold furnishers responsible for errors on their credit reports?

This article addresses whether or not consumers can bring state claims against data furnishers and how the system can be reformed to create a more fair and efficient method of resolving credit report inaccuracies.[5] First, this article explains the current regulation of the credit reporting market and the competing preemption provisions of the Fair Credit Reporting Act. Second, using recent case law, this article analyzes the different methods that courts use to reconcile the competing provisions of FCRA. Third, this article argues for adoption of a more inclusive standard, the recklessness standard, for state claims brought by consumers, particularly because of the industry's movement towards electronic dispute resolution systems. Finally, this article makes recommendations to clarify preemption under the FCRA and improve the dispute process for consumers, including possible actions by the Consumer Financial Protection Bureau (CFPB) and federal legislation.

I. Consumer Credit Reporting Agencies and the History of the Fair Credit Reporting Act

Consumer credit reporting agencies are responsible for generating consumer credit scores, which financial service providers and others use to determine the credit-worthiness of borrowers.[6]

Credit reporting agencies rely on information provided by credit data furnishers, including banks, credit card companies, debt settlement companies, and other creditors to create a specific credit score for each consumer.[7] The algorithm used to determine the actual credit score

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match 7 of 9 digits in social security numbers and do not take sufficient precautions to verify the identity of consumers).

5 *See* Federal Trade Commission, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, FEDERAL TRADE COMMISSION 54 (2012) [hereinafter *FTC Study of Credit Report Accuracy*], *available at* http://www.ftc.gov/os/2013/02/130211factareport.pdf (observing that it is very hard for consumers to remove inaccuracies from credit reports).

6 *See* CFPB CREDIT REPORTING SYSTEM REPORT, *supra* note 1, at 3 (finding that the credit reporting market involves over 200 million consumers, 10,000 data furnishers, and over 1.3 billion consumer trade lines in their proprietary databases); *60 Minutes: Is Your Credit Report Accurate?*, *supra* note 2 (reporting that credit scores can be used in qualifying for a mortgage or credit card, but also for employment and insurance purposes). *See also Consumer Financial Protection Bureau Issues Warning to Nationwide Specialty Consumer Reporting Agencies*, CONSUMER FINANCIAL PROTECTION BUREAU (Nov. 29, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-issues-warning-to-nationwide-specialty-consumer-reporting-agencies/ (warning that specialized consumer credit reporting agencies in different areas like criminal records, rental histories, checking accounts, employment, and insurance claims are also required to provide yearly copies of credit reports to consumers).

7 *See* CFPB CREDIT REPORTING SYSTEM REPORT, *supra* note 1, at 5 (explaining that credit files

number is protected as a trade secret and can be trademarked.[8] The widespread use of credit scores to determine access and cost of credit, housing, and even employment decisions makes the accuracy of the information given to credit reporting agencies critically important for the financial security of consumers.[9]

A. The Fair Credit Reporting Act

Credit reporting agencies are federally regulated by the Fair Credit Reporting Act (FCRA).[10] Congress enacted the FCRA in 1970 "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy."[11]

The statutory authority of the FCRA used to lie with the prudential banking regulators and the Federal Trade Commission (FTC), but the Dodd–Frank Act transferred authority to the recently created Consumer Financial Protection Bureau (CFPB).[12] The CFPB now has authority to supervise and enforce the FCRA for larger participants in the credit reporting market as well as rulemaking authority for the FCRA.[13] The

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include accounts in the consumer's name, often called trade lines; financial information including bankruptcies, tax liens, and other public record information; and inquiries by businesses into the credit of the consumer).

8 *See generally* Brenda Reddix-Smalls, *Credit Scoring and Trade Secrecy: An Algorithmic Quagmire or How the Lack of Transparency in Complex Financial Models Scuttled the Finance Market*, 12 U.C. Davis Bus. L.J. 87 (2011) (detailing how trade secrecy and the lack of transparency in the financial risk models of credit scoring contributed to the financial crisis in 2008).

9 *See* CFPB Credit Reporting System Report, *supra* note 1, at 6 (noting that all parties involved in the credit reporting system have a vested interest in improving the accuracy and efficiency of the credit scoring process).

10 *See* 15 U.S.C. § 1681(b) (2012) ("It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.").

11 Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52–53 (2007) (discussing the standard for a private right of action under the FCRA). *See* 15 U.S.C. § 1681(a) (2012).

12 *Compare* Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission, *available at* http://files.consumerfinance.gov/f/2012/01/FTC.MOUwSig.1.20.pdf (adopting procedures for the FTC and the CFPB to share information and coordinate enforcement efforts), *with* Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. at 42,874 (July 20, 2012) (to be codified at 12 C.F.R. pt. 1090) (establishing rulemaking and supervisory authority over larger actors in the consumer credit reporting market pursuant to authority from the Dodd–Frank Act for the CFPB to supervise nonbank financial service actors). *See also* Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2012).

13 *See* Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. at 42,876 (July 20, 2012) (to be codified at 12 C.F.R. pt. 1090)("More than $7 million in annual receipts resulting from relevant consumer reporting activities. Covered persons meeting the test qualify as larger participants and are subject to the Bureau's supervision authority under 12 U.S.C. 5514."); *Safeco Ins. Co. of Am.*, 551 U.S. at 70 (noting that there was no guidance from the FTC on the definition of "willful" in the FCRA).

FTC has retained some enforcement authority in conjunction with the CFPB, although only the CFPB has supervisory and rulemaking authority for the larger participants in the market.[14]

The FCRA generally outlines procedures and responsibilities of both the consumer credit reporting agencies and the furnishers of consumer credit information.[15] The statute imposes duties on both the credit reporting agencies and data furnishers to provide correct credit information about consumers and to protect personally identifiable consumer information such as social security numbers.[16] The statute also imposes a duty on furnishers to investigate data disputed by consumers with credit reporting agencies and includes a private right of action against credit reporting agencies for failure to properly reinvestigate disputed information by the credit reporting bureau.[17] Currently there is no private right of action to bring suit against furnishers of credit information.[18]

B. FCRA and Preemption

In general, the FCRA preempts state law and protects furnishers of credit reporting information from liability under section 1681t(b)(1)(F).[19] However, this provision conflicts with section 1681h(e) of the FCRA, which states that the consumer cannot bring a claim against a furnisher of credit information "except as to false information furnished with malice or willful intent to injure such consumer."[20] The attempt to reconcile these provisions of the FCRA has resulted in different interpretations of whether or not state tort claims brought by consumers for false information provided to credit reporting agencies are preempted by the FCRA, which would screen data furnishers from liability.[21] Instead consumers will often bring state claims for defamation

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14 *See, e.g.*, *Examining the Uses of Consumer Credit Data Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit, H. Comm. on Fin. Servs.*, 112th Cong. 7–8 (2012) (statement of Robert Schoshinski, Assistant Director, Division of Privacy and Identity Protection, Federal Trade Commission) *available at* http://financialservices.house.gov/uploadedfiles/hhrg-112-ba15-wstate-rschoshinski-20120913.pdf (testifying that the FTC had recently obtained a consent order against Spokeo, a data broker that was acting as a credit reporting agency without following the requirements of FCRA).

15 *See generally* 15 U.S.C. § 1681 (2012).

16 *See* 15 U.S.C. § 1681s-2 (2012).

17 *See* Chi Chi Wu & Elizabeth De Armond, Nat'l Consumer Law Ctr., Fair Credit Reporting 401–02 (7th ed. 2010) (stating that private rights of action are not available for most furnisher violations of the FCRA except when furnishers fail to properly reinvestigate disputed information).

18 *See generally* Jeffrey Bils, *Fighting Unfair Credit Reports: A Proposal to Give Consumers More Power to Enforce the Fair Credit Reporting Act*, 61 UCLA L. Rev. Disc. 226 (2013) (advocating for the inclusion of a private right of action for consumers against data furnishers).

19 15 U.S.C. § 1681t(b)(1)(F) (2012).

20 15 U.S.C. § 1681h(e) (2012).

21 *See* 15 U.S.C. § 1681h(e) (giving consumers a private right of action against furnishers when furnishers act willfully or recklessly).

against furnishers who refuse to remedy errors in the information provided to the consumer reporting agency, creating erroneous reports that hurt their creditworthiness and raise the cost of credit.[22] When information on a consumer credit report is disputed, the credit reporting agency must investigate the complaint.[23] Unfortunately, as discovered in a recent report released by the CFPB, the credit reporting agencies merely send a standard verification form to the data furnisher and rely on the reply from the data furnisher as the full extent of their investigation.[24] This sort of error resolution process falls far short of the required reasonable and fair process that actually results in errors on consumers' credit reports being remedied or removed.[25] While consumers have a private right of action under the FCRA against credit reporting agencies for failing to conduct a reasonable investigation of disputed information, consumers should also be able to bring traditional state common law claims.[26] Under some court approaches to preemption, consumers have been able to bring claims, but only if the furnishers' actions meet the high standard of willful intent or malice.

1. The Three Approaches Used to Reconcile Preemption of State Claims Against Data Furnishers Under the FCRA

Courts have traditionally adopted three approaches to reconcile the competing provisions of FCRA based on different forms of statutory construction.[27] This section introduces the three methods: the total

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[22] *See* 15 U.S.C. § 1681s-2(b) (establishing that furnishers have a duty to provide accurate information on credit reports); *see also Consumer Credit Reports Hearing*, *supra* note 3, at 17–18 (quoting statements from a judge who expressed frustration that there is no right to private enforcement against furnishers under FCRA).

[23] *See* CFPB Credit Reporting System Report, *supra* note 1, at 4 (finding that consumers contacted consumer reporting agencies approximately 8 million times in 2011 to dispute information on their credit file).

[24] *See id.* (noting that consumer reporting agencies do not forward consumer information to credit report furnishers when data is disputed); *accord Consumer Credit Reports Hearing*, *supra* note 3, at 29 (reporting that credit reporting agencies rely on an automated system for dispute resolution that reduces complicated reports by consumers to a simple two-digit number before sending the dispute form to the furnisher for verification, which is automatically accepted).

[25] *See* Consumer Financial Protection Bureau, Bulletin on the FCRA's requirement to investigate disputes and review "all relevant" information provided by consumer reporting agencies about the dispute (2013) [hereinafter CFPB Bulletin) *available at* http://files.consumerfinance.gov/f/201309_cfpb_bulletin_furnishers.pdf (emphasizing that furnishers are expected to review all relevant information provided by CRAs during the verification of a complaint); *60 Minutes: Is Your Credit Report Accurate?*, *supra* note 3 (discovering that credit reporting agencies outsource consumer dispute resolution to personnel in India and Latin America who do not even have phones they can use to investigate the information provided by the consumer).

[26] *See* 15 U.S.C. §§ 1681n, 1681o (2012) (stating that consumers have a private right of action when the credit reporting agency or furnisher has acted negligently or with malice); *see also* Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction,* 59 Am. U. L. Rev. 49, 57 (2009) (observing that plaintiffs suing large out-of-state corporations do not stand the same chances of success in federal court as they do in state court).

[27] *See* Chad M. Pinson & John B. Lawrence, *FCRA Preemption of State Law: A Guide Through Muddy*

preemption approach, the temporal approach, and the statutory approach. These approaches are analyzed according to what is best for the consumer in Part III of this comment.

a. TOTAL PREEMPTION APPROACH

Under the total preemption approach, courts have applied cannons of statutory construction to hold that only section 1681t(b)(1)(F) governs preemption of state claims, meaning that all state claims against furnishers of credit information are preempted, including claims against furnishers who have acted with malice or willful intent.[28] The result is that section 1681h(e) essentially becomes irrelevant.[29]

In part, this approach is predicated on the fact that section 1681t(b)(1)(F) was added in 1996, after section 1681h(e), meaning that Congress intended for section 1681t(b)(1)(F) to replace section 1681h(e) in governing preemption of claims against furnishers.[30] District courts have been using this approach since the section was added to the FCRA in 1996.[31] Recently the popularity of the approach has grown, with the Seventh and Second Circuits adopting it in 2011.[32] While there are split decisions within the Ninth Circuit, the majority of decisions in the circuit have adopted the total preemption approach as well.[33]

The Seventh Circuit was the first circuit court to decide the issue in 2011. In *Purcell v. Bank of America*, the court determined that section 1681t(b)(1)(F) preempts state defamation claims for willful and malicious furnishing of false information to credit reporting agencies.[34]

The Second Circuit has interpreted the FCRA similarly, holding

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Waters, 15 J. CONSUMER & COMMERCIAL L. 47, 50 (2012) (noting that there is little guidance from circuit courts with regard to the different approaches to reconciling the conflicting preemption provisions in the FCRA).

28 *See id.* (advocating for the adoption of the total preemption approach).

29 See Jill A. Conrad, *Preemption Under the Fair Credit Reporting Act*, 25 ANN. REV. BANKING & FIN. L. 579, 588 (2006) (noting that the total preemption approach only applies to furnishers and state claims against credit reporting agencies are not preempted).

30 *See* Pinson & Lawrence, *supra* note 27, at 50–51 (calling the total preemption approach the clearest approach).

31 *See* WU & DE ARMOND, *supra* note 17, at 427 (noting that this approach renders 1681h(e) superfluous).

32 *See* Purcell v. Bank of America, 659 F.3d 622, 624–25 (7th Cir. 2011) (relying on cannons of statutory construction and Congressional intent to adopt the total preemption approach); *see also* Macpherson v. JPMorgan Chase Bank, 665 F.3d 45, 47–48 (2d Cir. 2011) *cert. denied*, 132 S. Ct. 2113 (2012) (finding that the reasoning in *Purcell* was persuasive).

33 *Compare* Buraye v. Equifax, 625 F. Supp. 2d 894, 899 (C.D. Cal. 2008) (adopting the total preemption approach), *with* Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147 (9th Cir. 2009) (ruling that *Gorman* did not survive summary judgment on other grounds).

34 *See* Purcell v. Bank of America, 659 F.3d 622, 624–25 (7th Cir. 2011) (making an analogy between the 1996 addition of § 1681t(b)(1)(F) and a lowering of the speed limit).

that these provisions were not in conflict, holding that preemption of state law by section 1681t(b)(1)(F) was more inclusive. The court ruled that a claim for defamation and intentional infliction of emotional distress for false information furnished to a credit reporting agency was preempted.[35]

b. Temporal Approach

The temporal approach limits the application of section 1681t(b)(1)(F) to after the furnisher has received notice of an error from a credit reporting agency, meaning that the furnisher is liable for maliciously or willfully wrong information under state law only before being notified of the error, but not after.[36]

Additionally, some courts have created more confusion over this approach by only recognizing notice of disputed information that is provided by the credit reporting agency, but not by the consumer.[37] The temporal approach has only been used by a few district courts in Texas, Pennsylvania, and Kansas in recent years, suggesting that the approach has fallen out of favor.[38]

c. Statutory Approach

The statutory approach construes the two competing preemption statutes to mean that state common law claims are covered by section 1681h(e), while state statutes are preempted by section 1681t(b)(1)(F).[39] The courts reason that by excluding two state statutes under section 1681t(b)(1)(F), Congress intended that provision to only apply to statutes and not the common law.[40] This approach has come under fire for failing to follow statutory cannons of construction.[41]

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[35] *See Macpherson*, 665 F.3d at 47–48 (affirming the judgment of the district court).

[36] *See* Conrad, *supra* note 29, at 593 (acknowledging that the temporal approach does not make much sense).

[37] *See, e.g.*, Wenner v. Bank of Am., NA, 637 F. Supp. 2d 944, 953 (D. Kan. 2009) (holding that notice of a furnisher providing defamatory information to a debt collector with malice was not preempted under the qualified immunity provision of the FCRA).

[38] *See, e.g.*, Marcum v. G.L.A. Collection Co., Inc., 646 F. Supp. 2d 870, 874 (E.D. Ky. 2008) (stating that a recent Kentucky decision had changed the trend in the jurisdiction from favoring the temporal approach to adopting the statutory approach); Wenner, 637 F. Supp. 2d at 953 (recognizing that there is little guidance from circuit courts, but that some cases in the district have adopted the temporal approach). *See* Purcell v. Bank of America, 659 F.3d 622, 624 (7th Cir. 2011) (observing that courts have followed the *Erie* doctrine, holding that preemption of state common law claims is the same as preemption of state statutes).

[39] *See* Conrad, *supra* note 29, at 593 (explaining that both the statutory approach and the temporal approach attempt to recognize both preemption provisions of the FCRA, a preferred cannon of statutory construction).

[40] *See id.* (describing how a consumer's claim was preempted under the temporal approach).

[41] *See Purcell*, 659 F.3d at 624 (noting that legislative drafting manuals advise against using plural words so as to avoid confusion between meanings of singular and plural words).

In *Baker v. General Electric*, a woman brought a state defamation claim against a financial institution for reporting a debt from her husband's Lowe's credit card to the credit reporting agencies on her account after her husband filed for bankruptcy.[42] She reported the disputed information to the credit reporting agencies, but her credit continued to be adversely affected and her credit account at Home Depot was closed as a result.[43] The district court held that the case could continue to trial since section 1681t(b)(1)(F) only applied to state statutes and the plaintiff had sufficiently alleged willful and malicious action by the financial institution.[44]

Similarly, in *Carlson v. Trans Union, LLC*, the court held that the subject matter of the claim—the refusal of Verizon to remove erroneous credit information regarding a Verizon account on a consumer credit report—was not preempted because the claim was for defamation and governed by state tort law.[45] As further analyzed in Part III of this article, the statutory approach is the most favorable to consumers.[46]

2. Circumventing the Issue: Other Approaches to Section 1681h(e) and Preemption of State Claims

While these three methods are the predominant methods courts use to reconcile FCRA preemption provisions, some courts have taken an alternate route by failing to reach the question of whether or not these provisions are actually in conflict.[47] Some examples of these different methods include interpreting section 1681h(e) as only referring to credit reporting agencies, and holding that some credit information, such as medical debts, are not included in furnisher responsibilities. These debts are therefore not governed by the relevant preemption provisions.[48]

For instance, the Fourth Circuit has interpreted the statute in a way that the qualified immunity provision, section 1681h(e), refers only to

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42 *See* Baker v. Gen. Elec. Capital, Corp., 819 F. Supp. 2d 1332, 1333–34 (M.D. Ga. 2011) (adopting the statutory approach to preemption under the FCRA).
43 *See id.* at 1333–34 (holding that the consumer could bring her defamation claim against the credit card financier).
44 *See id.* at 1338 (surviving a motion to dismiss).
45 *See, e.g.*, Carlson v. Trans Union, LLC, 259 F. Supp. 2d 517, 517 (N.D. Tex. 2003) (finding that the statutory approach was the most persuasive method for dealing with the competing provisions of FCRA).
46 *See* Conrad, *supra* note 29, at 608 (suggesting that courts should adopt the statutory approach).
47 *See, e.g.*, Ross v. F.D.I.C., 625 F.3d 808 (4th Cir. 2010) (holding that duties under section 1681s-2 only apply to credit reporting agencies and not to furnishers of credit information).
48 *See, e.g.*, Brown v. Mortensen, 253 P.3d 522, 529 (Cal. 2011) *cert. denied*, 132 S. Ct. 847 (2011) (reasoning that the broad savings clause of the FCRA indicated that state law should only be superseded when in direct conflict with the provisions of FCRA).

credit reporting agencies and therefore has no bearing on furnisher liability.[49] The Fourth Circuit used this interpretation to dismiss a consumer's defamation claim against her bank when the bank erroneously reported a mortgage delinquency in her name.[50]

Recognizing that FCRA will only preempt state claims closely resembling the duties and obligations under FCRA, some courts have allowed state claims on other grounds, such as the privacy of medical information. For example, in *Brown v. Mortensen*, the Supreme Court of California allowed the consumer to bring a claim against a debt collection agency under the California Confidentiality of Medical Information Act.[51]

C. Consumers Can Bring Claims Under Section 1681h(e) When the Furnisher Acted with Malice or Willful Intent

When state claims are not preempted, consumers still have the burden of proving that the credit information furnisher acted with malice or willful intent, as required by the qualified immunity provision of section 1681h(e).[52]

In the *Safeco Insurance Co. of America v. Burr* decision, the Supreme Court defined 'willful' in FCRA, although the holding referred to the definition of willful under the section 1681n(a) private right of action.[53] The Court held that the meaning of 'willful' in section 1681n(a) relating to the failure to notify consumers of adverse actions included recklessness, which gives 'willful' a broader meaning than just 'knowing.'[54] The Court rejected the arguments of the insurance industry that 'willfully' had to be a 'knowing' violation.[55] Consumer advocates lauded the decision as a win against the insurance companies, enabling more consumers to bring claims against insurance companies who

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[49] *See Ross*, 625 F.3d at 808 (appealing grant of summary judgment to the credit furnisher).

[50] *See id.* at 815–16 (demonstrating that Ross's claim would have failed to meet the malice standard under section 1681h(e), if it had applied).

[51] *See Brown*, 253 P.3d at 529 (reasoning that § 1681s-2 only relates to accurate reporting of credit information and not to the privacy concerns of medical information disclosed to a third party without consent of the consumer); *see also* Wu & De Armond, *supra* note 17, at 155 (reporting that other courts in California have refused to allow preemption of claims under the Rosenthal Act).

[52] *See* 15 U.S.C. § 1681h(e) (2012) ("[E]xcept as to false information furnished with malice or willful intent to injure such consumer.").

[53] *See generally* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007) (relating to whether insurance companies were liable for not sending adverse action notices when rates were increased).

[54] *See* Meghan F. McClure, *Adverse Action Notices Under the FCRA: The Supreme Court Provides Guidance*, 12 N.C. Banking Inst. 273, 286 (2008) (specifying that the holding was limited to adverse actions and insurance companies).

[55] *See Safeco Ins. Co. of Am.*, 551 U.S. at 61–62 (holding that initial insurance rates qualified as adverse actions under FCRA, requiring disclosure to the consumer).

failed to provide adverse action notices.[56]

This article discusses whether the standard for 'willful' adopted in *Safeco* extends to the definition of 'willful' under section 1681h(e) and what that standard means for consumers seeking to correct errors on their credit reports. However, consumers may be more successful bringing claims under the malice standard than under a recklessness standard for "willful".[57]

The commonly accepted standard for 'malice' under section 1681h(e) is defined by the *New York Times v. Sullivan* case as " statements made with [a] high degree of awareness of their probable falsity."[58] In the case of *Meisel v. USA Shade & Fabric Structures Inc.*, the court held that malice could be established by both the consumer and the related company informing the furnisher of the erroneous or fraudulent information on multiple occasions.[59] However, a Fifth Circuit decision found that the malice standard was not met after the consumer and Target, an involved third-party, had informed the furnisher that the information on the consumer's credit report was erroneous on multiple occasions.[60] As these two competing decisions show, defining the malice standard can be very fact-dependent and can vary widely based on the jurisdiction.[61] This article recommends adopting a standard of malice that more accurately reflects changing technology and consumer credit dispute resolution systems.[62]

D. When Does a Consumer Bring a State Defamation Claim Against a Furnisher?

Typically a state defamation claim is brought after a consumer discovers an error or disputed negative mark on their credit report.[63]

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[56] Deepak Gupta, *Supreme Court Decides Fair Credit Reporting Act Cases*, Consumer Law and Policy Blog (Feb. 2, 2013) http://pubcit.typepad.com/clpblog/2007/06/supreme_court_d.html (writing that the decision was good for consumers because a willful violation of the FCRA could be proved by reckless disregard of the law).

[57] *See infra* note 134.

[58] *See* County Vanlines, Inc. v. Experian Info. Solutions, Inc., 317 F. Supp. 2d 383, 391 (S.D.N.Y. 2004) (finding that credit information reported before the plaintiff was born did not satisfy the malice standard).

[59] *See* Meisel v. USA Shade & Fabric Structures Inc., 795 F. Supp. 2d 481, 488 (N.D. Tex. 2011) (stating that multiple attempts to contact the furnishers of the incorrect credit information without results would be sufficient to allege malice).

[60] *See* Morris v. Equifax Info. Servs., LLC, 457 F.3d 460, 471 (5th Cir. 2006) (holding that the consumer did not present enough evidence of publishing false statements with reckless disregard to satisfy the malice standard).

[61] *See* Pinson & Lawrence, *supra* note 27, at 50 (explaining that it can be hard for consumers to prove malice).

[62] *See infra* note 145.

[63] *Compare* Wu & De Armond, *supra* note 17, at 267 (noting that the lack of a private right of

This article utilizes a hypothetical based loosely on facts from a recent D.C. Circuit Court case to analyze different court approaches and the impacts these approaches have on consumers' ability to correct errors and receive compensation for these errors.[64]

Suppose a long-time customer of a cable company discontinues his service and schedules a disconnection and equipment removal appointment.[65] At the appointment, the technician leaves behind the modem that was rented from the cable company.[66] A month later when the customer calls about receiving his refund, he is informed that he owes the cable company $220 for the modem.[67] He then receives a demand notice from a debt settlement company for the $220.[68] After returning the modem, he is told by the cable company that his account balance was corrected. However, this consumer never receives notice of the correction in writing.[69] After calling the debt settlement company, they stop collection on the debt but never contact the credit reporting agencies to remove the debt collection notice from the consumer's credit report.[70] Later that year, the consumer goes to take out a mortgage and is informed that because the collection for the modem was still on his credit report, he will have to pay an additional $26,000 on his mortgage.[71] The consumer sues the debt collection company for defamation, among other claims.[72] Is his defamation claim preempted by FCRA? As illustrated below, it depends.[73]

II. Is the Preemption of State Defamation Claims Still an Open Question?

Courts, scholars and others have long observed that district courts have adopted multiple approaches to reconciling FCRA's preemption

action under FCRA forces consumers to look to state common law claims for remedies against credit information furnishers), *with* Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702, 703 (6th Cir. 2009) (holding that lack of actual damages does not preclude consumers from proving statutory damages in a claim for a willful violation of FCRA).

64 *See* Himmelstein v. Comcast of the Dist., L.L.C., 908 F. Supp. 2d 49, 51–52 (D.D.C. 2012) (allowing some claims against the cable provider).

65 *See id.*

66 *See id.* (stating that the modem was returned to the cable company before the inquiry for the refund was made).

67 *See id.*

68 *See id.*

69 *See id.* (allowing the claim to proceed under evidence that three attempts to contact were made).

70 *See* Himmelstein v. Comcast of the Dist., L.L.C., 908 F. Supp. 2d 49, 51–52 (D.D.C. 2012).

71 *See id.* (noticing that the consumer was only informed of the inaccuracy after receiving the required adverse action notice while applying for additional credit).

72 *But see id.* (observing that defamation was not one of the claims brought by the consumer).

73 *See* Petition for Writ of Certiorari at 21, *Macpherson v. JPMorgan Chase Bank*, No. 11-1162, 2012 WL 991419 (Mar. 19, 2012) (stating that the different approaches allow some consumers to recover, but leaves other consumers with no recourse).

provisions.[74] Since there is no controlling Supreme Court decision and only a few recent circuit decisions, district courts largely fend for themselves.[75] In general, there are three approaches that district courts have adopted: the total preemption approach, the temporal approach, and the statutory approach.[76] The total preemption approach, which does not allow for any state claims, is the most common.[77] The rise in adoption by the circuit courts of the total preemption approach supports the argument that the law is moving towards recognizing the total preemption approach as the predominant method of determining preemption, which calls into question whether the issue is still open for interpretation by the courts.[78]

A. CONFLICTING DISTRICT COURT DECISIONS: WHAT APPROACH IS BEST FOR THE CONSUMER?

This section discusses the three methods used to reconcile the conflicting preemption clauses of FCRA and analyzes which approach provides consumers with the best ability to seek remedies from data furnishers for errors on their credit reports. Focusing on decisions after 2006, district courts are still using different methods to decide these cases.[79] However, most district courts since 2006 have adopted the total preemption approach with a few choosing to use the statutory approach.[80] Unfortunately, the total preemption approach is the least consumer-friendly approach since it completely preempts all state claims.[81]

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[74] *See* Pinson & Lawrence, *supra* note 27, at 50 (noting that even some circuits have competing approaches to resolving the conflict).

[75] *See, e.g.*, Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147 (9th Cir. 2009) (noting the disarray of district court decisions in the Ninth Circuit).

[76] *See* Pinson & Lawrence, *supra* note 27, at 50 (detailing decisions which employ all three of the different approaches).

[77] *See id.* (advocating for the adoption of the total preemption approach); *see also* WU & DE ARMOND, *supra* note 17, at 153 (suggesting that because the only two circuit decisions on this issue have adopted the total preemption approach, district courts will follow their lead).

[78] *See* Pinson & Lawrence, *supra* note 27, at 51 (arguing that the total preemption approach is best for businesses).

[79] *See* Wenner v. Bank of Am., NA, 637 F. Supp. 2d 944, 952 (D. Kan. 2009) (stating that the Tenth Circuit has not yet addressed the issue, nor is there much guidance from other circuits); Weseman v. Wells Fargo Home Mortg., Inc., CV 06-1338 ST, 2008 WL 542961 (D. Or. Feb. 22, 2008) (noting that most district courts in the Ninth Circuit have chosen either the total preemption or statutory approach, though the total preemption approach is more common).

[80] *See* CHI CHI WU & ELIZABETH DE ARMOND, FAIR CREDIT REPORTING 152 (7th ed. Supp. 2012) (observing that the total preemption approach follows the trend of expanding the scope of preemption and that courts are also narrowly construing § 1681h(e)).

[81] *See* Conrad, *supra* note 29, at 593 (observing that since the total preemption approach denies consumers the ability to bring a claim, it does not support the broad consumer protection purpose of the FCRA).

1. Total Preemption Approach

The total preemption approach provides an easy fix for courts, but this silver bullet does little to help consumers trying to rectify errors on their credit reports. Adopting a "last word wins" method, the total preemption approach completely ignores section 1681h(e) and, therefore, the consumer's ability to bring claims against the data furnisher.[82]

As the most commonly used approach, it is important to fully understand the impact that the total preemption approach has on a consumer's access to recourse for incorrect data provided to credit reporting agencies.[83] In the hypothetical posited in Part II(C) of this comment, recognition of section 1681h(e) would allow the consumer to bring the question to a trier of fact based on a state claim that the debt collector had acted with malice or willful intent. Much like the decision in *Purcell*, if the court in the hypothetical adopted the total preemption approach, the consumer would be left without any recourse in state court because any state law claim would be preempted by section 1681t(b)(1)(F).[84] Since FCRA only provides a private right of action against credit reporting agencies when conducting a reinvestigation of a disputed entry, consumers who try to bring a state claim are constrained under the total preemption approach.[85] Because no state claim could go forward under this approach, it would not matter whether the error was the fault of the data furnisher or whether the consumer had notified the credit reporting agency or data furnisher that the information on their credit report was disputed.[86]

Furthermore, the district courts that have adopted the total preemption approach have not taken into account certain parts of the

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[82] *See id.* at 588–89 (adding that courts also cite the policy argument that Congress intended to make sure that furnishers were not subject to different liability in different states).

[83] *See* Pinson & Lawrence, *supra* note 27, at 51 (advocating that furnishers have only limited liability for incorrect information to encourage voluntary reporting of credit information to the credit reporting agencies).

[84] *Compare* Purcell v. Bank of Am., 659 F.3d 622, 624–25 (7th Cir. 2011) (reversing the judgment of the district court in favor of Bank of America), *with* Boggio v. USAA Fed. Sav. Bank, 696 F.3d 611, 612–13 (6th Cir. 2012) (remanding the case to the trial court because a reasonable jury could find that USAA failed to adequately investigate the disputed car loan information on the consumer's credit report).

[85] *See* Wu & De Armond, *supra* note 18, at 267 (observing that consumers can only hold furnishers accountable for breaches of § 1681s-2(b) obligations when the dispute process has been formally triggered by the credit reporting agency); *see also* Meredith Schramm-Strosser, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq. Bus. L.J. 165, 171 (2012) (noting that consumers are denied the remedy of injunctive relief against credit reporting agencies or furnishers).

[86] *But see* 15 U.S.C. § 1681p (2012) (stating that the amount in controversy in federal court is waived for private rights of action under the statute).

legislative history and theories of statutory construction used in the two other approaches.[87] For instance, adopting this statutory construction would essentially get rid of section 1681h(e), which is an approach that the Supreme Court has disfavored.[88]

The Second and Seventh Circuits definitively decided this issue, choosing the total preemption approach.[89] This suggests that the total preemption approach is becoming the most common and accepted approach for reconciling the two preemption clauses, though this is not good news for consumers.[90] Because there is no incentive for furnishers to correct misinformation on consumer credit reports, the total preemption approach essentially bars consumers from holding furnishers liable for knowingly providing wrongful information to credit reporting agencies.[91] Since furnishers are not likely to spend resources correcting wrong information without the threat of liability, consumers will have to rely on consumer rating agencies to report the dispute to the furnisher and to advocate for the removal of mistakes.[92] This could create a vicious cycle for the consumer who is simply trying to fix a mistake on their credit report but does not have any state law remedy and only the limited ability to bring an FCRA claim.[93] Given the problematic nature of this approach and the unfortunate rise in its prevalence, the best outcome for the consumer may be either amending FCRA to allow some state claims against furnishers of credit information or a Supreme Court decision adopting one of the other approaches.

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87 *See* Brown v. Mortensen, 253 P.3d 522, 532 (Cal. 2011) *cert. denied*, 132 S. Ct. 847 (2011) ("Senator Bryan assured that the bill 'tried to only preempt those areas of this law which affect the operational efficiencies of businesses but do not harm consumers,' and that it was not intended to 'preempt States' rights in the area of liability.'").

88 *See* Meisel v. USA Shade & Fabric Structures Inc., 795 F. Supp. 2d 481, 489 (N.D. Tex. 2011) (criticizing the total preemption approach as out of line with the cannons of statutory construction because rendering a part of a statute useless is not a preferred interpretation).

89 *See Brown*, 253 P.3d at 532 (rejecting the argument that the 1996 Reform Act intended a broader reading of preemption under § 1681t(b)(1)(f)).

90 *See* Pinson & Lawrence, *supra* note 27, at 51 (describing how courts that adopt the total preemption approach ensure that consumers cannot bring state law claims).

91 *See Consumer Credit Reports Hearing*, *supra* note 3, at 17–18 (advocating that consumers be given more ability to hold furnishers liable for misinformation by being allowed to get a private injunction against a furnisher or credit reporting agency); Schramm-Strosser, *supra* note 85, at 170–71 (arguing that private injunctions should be permissible under the statute).

92 *See* Purcell v. Bank of Am., 1:09 CV 356, 2010 WL 4955542 (N.D. Ind. Nov. 30, 2010) (stating that a consumer only has a private right of action under § 1681s-2(b) when the consumer reporting agency notifies the furnisher of the dispute, but not when the consumer disputes the information directly with the furnisher); *see also 60 Minutes: Is Your Credit Report Accurate?*, *supra* note 2 (reporting that employees of credit reporting agencies accepted the results of furnisher investigations of disputed information without question).

93 *See* Conrad, *supra* note 29, at 608. (demonstrating that consumers could not hold furnishers liable under state law even when the furnisher knowingly reported false information to the credit reporting agency).

2. The Temporal Approach

As noted above, the temporal approach limits the application of section 1681t(b)(1)(F) to after the furnisher has received notice of an error from a credit reporting agency. Therefore, the furnisher is liable for maliciously or willfully wrong information before being notified of the error, but not after.[94] Although the temporal approach manages to reconcile the two competing provisions so that both have some affect, it makes little sense that credit information furnishers should be barred from liability after being informed of an error, but still liable for some state claims before being informed of the error.[95] The temporal approach is particularly troubling when viewed through the eyes of the consumer because it grants the furnisher greater protection once notified of an error, meaning that the furnisher would want to have the information reported to them to escape liability under this type of claim.[96]

A complicating factor in the temporal approach is that some courts have interpreted the statute so that notice triggering the private right of action must be given by a credit reporting agency and not a consumer.[97] Paradoxically, it is better for the consumer if the court requires notice from the consumer reporting agency because then only claims that are brought after notice of the dispute from the credit reporting agency will be preempted, rather than any claim brought after the consumer notifies the furnisher of the dispute.[98] It is easier and more likely to contain the specifics of the mistaken information if the consumer notifies the furnisher of the error rather than relying on the credit reporting agency to resolve the dispute with the furnisher.

The consumer in the hypothetical would have different challenges in bringing a successful claim depending on what type of notice was recognized by the court. Since the consumer in the hypothetical never

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[94] *See, e.g.*, Wenner v. Bank of Am., NA, 637 F. Supp. 2d 944, 953 (D. Kan. 2009) (adopting the temporal approach in accordance with the majority of decisions in that district).

[95] *See* Meisel v. USA Shade & Fabric Structures Inc., 795 F. Supp. 2d 481, 490 (N.D. Tex. 2011) (observing that it would be strange for Congress to have intended qualified immunity without notice, but total immunity after the furnisher was alerted to the false information).

[96] *But see* Wu & De Armond, *supra* note 17, at 401 (stating that the private right of action against furnishers kicks in only after notification of the dispute from the credit reporting agency).

[97] *See Wenner*, 637 F. Supp. 2d at 953 (adopting the approach that notice may be provided by the consumer to the furnisher without preempting the claim); *see also* Michael R. Guerrero, *Disputing the Dispute Process: Questioning the Fairness of S1681s-2(a)(8) and S1681j(a)(1)(a) of the Fair and Accurate Credit Reporting Act*, 47 Cal. W. L. Rev. 437, 438–39 (2011) (arguing that it is logical for consumers to dispute the information directly with the furnisher rather than bringing the dispute to the credit reporting agency).

[98] *See Wenner*, 637 F. Supp. 2d at 953 (holding that consumer's defamation claim against furnisher was preempted since the claim occurred after notice of dispute from the consumer).

communicated directly with the credit reporting agency, there was no notice to the data furnisher of the disputed information on the credit report in a jurisdiction that only recognizes notice directly from the credit reporting agency.[99] This means that the consumer could bring a claim against the data furnisher, which is the debt collector in this instance.[100] Although notice would not be an issue, the consumer would have a hard time overcoming the malice and willful intent standard in section 1681(e), making it hard for the consumer to bring a state claim in the hypothetical. In comparison, if the court took the approach that notice of the disputed information could be given by the consumer, the consumer's claim would be preempted since the harm (the error on the credit report) occurred after the consumer had notified the debt settlement company of the cable company's error for the modem.[101] In short, under either method of interpreting notice, the consumer's claim has an uphill battle under the temporal approach.

3. The Statutory Approach

The statutory approach preempts any statutorily based state claims, but allows common law state claims such as claims for defamation.[102] While courts have used different cannons of statutory interpretation to reach this approach, the most persuasive is that section 1681t(b)(1)(F) contains two exceptions, both of which are state statutes.[103] Since the provision does not explicitly exclude common law claims in those states, courts have interpreted Congressional intent to only include preemption of state statutes and not state common law claims.[104] This approach has primarily been adopted by district courts in Pennsylvania, Texas, and Kansas, but the Fifth and Third Circuit have not definitely ruled on this issue.[105] Some courts have also moved from the temporal

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[99] *See, e.g.*, Tilley v. Global Payments, Inc., 603 F. Supp. 2d 1314, 1330–31 (D. Kan. 2009) (recognizing that notice of the dispute may only come from the credit reporting agency and not the consumer).

[100] *See, e.g.*, *id.* (deciding that the consumer can only bring a defamation claim if the consumer reports the dispute to the credit reporting agency).

[101] *But see id.* at 1330 (reasoning that approval of a debt settlement and received email was enough to create a issue of material fact about willful violation of the FCRA).

[102] *See* Conrad, *supra* note 29, at 593 (stating that this approach also attempts to reconcile the two competing preemption provisions).

[103] *See* Manno v. Am. Gen. Fin. Co., 439 F. Supp. 2d 418, 425 (E.D. Pa. 2006) (adding that the phrase "shall not apply to any State law in effect on September 30, 1996" also supports the statutory approach since common law claims cannot go into effect unlike statutes).

[104] *See* Carlson v. Trans Union, LLC, 259 F. Supp. 2d 517, 521 (N.D. Tex. 2003) (holding that FCRA did create a private right of action); *see also Manno*, 439 F. Supp. 2d at 425 (rejecting the argument for the total preemption approach that Congress simply forgot about 1681h(e) when amending FCRA).

[105] *See* Galaz v. Chase Bank USA, N.A., CIV.A. SA-11-CA-0646, 2011 WL 6739612 (W.D. Tex. Dec. 21, 2011) (observing that many district courts in the Fifth Circuit have declined to adopt the total preemption approach); *see also* Meisel v. USA Shade & Fabric Structures Inc., 795 F. Supp. 2d 481, 488 (N.D. Tex. 2011) (adding that the Fifth Circuit generally recognizes 1681h(e));

approach to the statutory approach.[106]

Under the statutory approach, a consumer bringing a state claim for defamation could hold the furnisher liable as long as the consumer could prove malice or willful intent. In the hypothetical discussed above, much like the claim in *Carlson*, the subject matter of the claim that the debt settlement company had erroneously continued to report the debt after receiving notice of the error from both the cable company and the consumer, would be governed by state tort law and not preempted under the statutory approach.[107]

The statutory approach also manages to address concerns that section 1681h(e) is a qualified immunity provision, not a preemption provision, and, as such, the two provisions should not always be construed as being in conflict.[108] Qualified immunity provides that a furnisher should be allowed some protections, but only to a certain level.[109] By allowing state common law claims for malice or willful intent, the statutory approach ensures that section 1681h(e) acts as a qualified immunity clause and not a preemption clause.[110]

However, the statutory approach is still problematic for consumers because it does not allow enforcement of state consumer protection statutes by consumers.[111] Traditionally, state consumer protection laws have provided much greater protection for consumers than federal laws.[112] State statutes under which consumers could bring a claim

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Dietz v. Chase Home Fin., LLC, 41 A.3d 882, 887 (Pa. Super. Ct. 2012) (noting that most district courts in Pennsylvania have adopted the statutory approach); *¶ 52,224 FCRA's Preemptive Effect on Pennsylvania Laws Examined*, CCH-CCGD P 52224 (C.C.H. 2009), 2009 WL 2691675 (stating that most district courts in the Third Circuit have adopted the statutory approach).

106 *See* Marcum v. G.L.A. Collection Co., Inc., 646 F. Supp. 2d 870, 874 (E.D. Ky. 2008) (mentioning that the Western District Court of Kentucky recently moved from following the temporal approach to the statutory approach).

107 *Supra* note 63 (stating that the debt collection agency, the furnisher, never contacted the credit reporting agencies to notify them that the debt was reported in error despite ceasing collection on the debt); *see also Carlson*, 259 F.Supp.2d at 517 (holding that a state defamation claim was not preempted under the statutory approach).

108 *See* Mark H. Tyson, *State Law Furnisher Liability Claims and the FCRA-the State of Confusion*, 63 Consumer Fin. L.Q. Rep. 19, 23 (2009) (arguing that a consumer would be able to show facts to overcome the qualified immunity provision of 1681h(e), but that there are no facts a consumer could allege to overcome total preemption).

109 *See* Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 Val. U. L. Rev. 1061, 1117 (2007) (noting that misattribution of data should meet the recklessness standard under malice and willful intent in 1681h(e)).

110 *See id.* (reasoning that without private enforcement, data aggregators will not be properly incentivized to match data with the correct consumer identity).

111 *See* Conrad, *supra* note 29, at 593 (observing that consumer protection statutes, such as the Pennsylvania Consumer Protection Law, will be preempted under the statutory approach).

112 *C.f.* Travis Plunkett, Moving Forward: The Regulatory Structure and Consumer Credit Protections 7 (Joint Center for Housing Studies at Harvard University ed., 2010) *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/mf10-13.pdf (theorizing that states struggle

against furnishers effectively provides consumers with a private right of action, meaning that the state legislature chose to give consumers the right to enforce a remedy from furnishers for mistakes on credit reports.[113] The statutory approach takes away this decision by the states to give protection to their citizens.[114] This also means that consumers in California and Massachusetts, the two states whose statutes are exceptions to section 1681t(b)(1)(F) preemption, are afforded more remedies than consumers in other states.[115] All consumers, regardless of what state they currently reside in, should be afforded the chance to seek remedies for errors or misinformation on their credit reports.

Although not as common as the total preemption approach, the statutory approach provides the best method for recognizing both competing provisions, ruling in line with the cannons of statutory construction and providing the best remedy for consumers. However, the statutory approach could be more inclusive.[116]

B. Splitting Hairs: Some Courts Have Declined to Decide the Issue

As discussed above, some courts have adopted a number of other interpretations and readings of the statute to avoid reaching the issue of reconciling the two preemption provisions. These courts have interpreted section 1681h(e) as only referring to credit reporting agencies and holding that credit information, such as medical debts, are not included in furnisher responsibilities and are therefore not governed by the relevant preemption provisions.[117] This section

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to enforce strict state banking and fair lending laws due to federal preemption for nationally chartered banks).

113 *See* Jennifer Mitchell, *FCRA Limits Consumer Recourse Against Furnishers of Information*, Journal of Texas Consumer Law, http://www.jtexconsumerlaw.com/V7N2pdf/V7N2fcra.pdf (last visited Feb. 2, 2014) (stating that the private right of action under 1681s-2(b) is not all-inclusive).

114 *See id.* (recognizing that the Fifth Circuit is not currently hearing cases on this preemption issue, leaving district courts without much guidance as to what approach to choose).

115 *See* 15 U.S.C. § 1681t(b)(1)(F) (2012) ("[W]ith respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996)[.])"). *But see* Robert F. Brennan, *Resolving Remedy and Preemption Issues in Credit Reporting Cases*, L.A. Law., December 2009, at 10 (explaining that although Congress explicated excluded the California Consumer Credit Reporting Agencies Act from preemption, the issue has been continually litigated for the past decade).

116 *See* Meisel v. USA Shade & Fabric Structures Inc., 795 F. Supp. 2d 481, 491 (N.D. Tex. 2011) ("The statutory approach creates an unequivocal bright-line rule that will foster manageable judicial administration of these two inconsistent preemption provisions while giving meaning to both.").

117 *See, e.g.*, Brown v. Mortensen, 253 P.3d 522, 529 (Cal. 2011), *cert. denied*, 132 S. Ct. 847 (2011) (reasoning that medical privacy laws preclude medical debts from preemption under FCRA); *see also Consumer Credit Reports Hearing*, *supra* note 3, at 32 (recommending that Congress support legislation removing medical debts from consumer credit reports as these debts are not predictive

discusses the legal merits of these interpretations and determines how these different approaches affect consumers' ability to remedy errors on their credit reports.

1. Pretending There Is No Conflict

Some courts have even suggested that there is no statutory conflict to resolve and therefore declined to decide the issue.[118] The Fourth Circuit adopted this approach in *Ross v. Federal Deposit Insurance Corporation*, reasoning that section 1681h(e) only applies to credit reporting agencies because section 1681h(e) regards disclosures of negative information. The court argued, WaMu (the furnisher) was neither a credit reporting agency, nor did it use Ross' credit report to deny her credit.[119] However, the *Ross* decision fails to take into account part of the statutory language of section 1681h(e) that specifically references furnishers of credit information when they make disclosures subject to section 1681g, section 1681h, or section 1681m of the statute.[120] The plain language of the statute makes it clear that section 1681h(e), the qualified immunity provision, does apply to furnishers of credit information and that the *Ross* court's reasoning is unpersuasive.[121] Much like the total preemption approach, this reading of the statute does not benefit consumers because it does not allow consumers to bring a state claim against furnishers for willful or malicious furnishing of information since section 1681h(e) only applies to credit reporting agencies.[122]

2. Furnisher Responsibilities and Medical Debt

Some courts, such as the Supreme Court of California, have declined to reach the issue because section 1681s-2, the section of the FCRA that details the specific responsibilities of furnishers of credit information, does not cover the issue in dispute.[123] The court in *Brown*

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of the consumer's creditworthiness).

118 *See* Islam v. Option One Mortg. Corp., 432 F. Supp. 2d 181, 194 (D. Mass. 2006) ("The Court, therefore, thinks it quixotic to tilt at these windmills of supposed statutory conflict. Perhaps this be error. If so, might some circuit court shed light on the issue after all these years?").

119 *See* Ross v. F.D.I.C., 625 F.3d 808, 808 (4th Cir. 2010) (holding that reporting by bank to the credit reporting agencies did not fall into the scope of § 1681h(e), and, therefore, the consumer's claim was preempted); *accord* Spencer v. Nat'l City Mortg., 831 F. Supp. 2d 1353, 1361 (N.D. Ga. 2011) (deciding that the Fourth Circuit's reasoning was persuasive and adopting this interpretation).

120 15 U.S.C. § 1681h(e) (2012) ("[W]ith respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title[.]").

121 *See* Wu & De Armond, *supra* note 17, at 428–29 (advising that practitioners may have to advise the court that source of the disclosure does not exclude the wrongdoer from liability under the qualified immunity provision).

122 15 U.S.C. § 1681h(e).

123 *See* Brown v. Mortensen, 253 P.3d 522, 529 (Cal. 2011),) *cert. denied*, 132 S. Ct. 847 (2011)

reasons that if a state defamation claim arose out of a medical debt, that issue was not covered by a furnisher's responsibilities as delegated under section 1681s-2, and, therefore, is not preempted.[124] Under this reasoning, any state claim arising out of a medical claim that met the malice or willful intent bar, per section 1681h(e), could be brought in state court regardless of section 1681t(b)(1)(F).[125]

Take the consumer in the hypothetical. Since his debt does not relate to any private information, such as medical history under HIPPA, according to *Brown*, the claim would probably be preempted.[126] However, if the debt involved a medical bill, the consumer would have a remedy in state court because the medical debt is not covered under the furnisher's responsibilities and not in conflict with the FCRA.[127]

While consumers should be afforded additional privacy protections for personal medical information, the subject matter of the debt should not determine whether or not the consumer has a state claim against a furnisher for an error on their credit report.[128]

C. Defining Malice and Willful Intent Under Section 1681h(e)

This section focuses on how section 1681h(e) permits defamation claims when the data furnisher acts "with malice or willful intent to injure such consumer."[129] The standards of intent and proof for both willful intent and malice must be examined to understand when a consumer can bring a successful state claim against a data furnisher if not preempted by section 1681t(b)(1)(F).

1. Does the Definition of Willful in *Safeco* Change the Preemption of State Defamation Claims Under Section 1681s-2(b)?

As discussed above, the *Safeco* decision held that the meaning of willful in § 1681n(a) relating to failure to notify consumers of adverse

(discussing that § 1681s-2 only relates to furnisher duty to report accurate information and furnisher duty in resolving disputed consumer information).

124 *See id.* (reasoning that the legislative history does not show that Congress intended for the FCRA to preempt medical privacy laws).

125 15 U.S.C. § 1681h(e) (2012).

126 *See Brown*, 253 P.3d at 530 (noting that Congress intended privacy laws to be treated specially in regards to preemption).

127 *C.f.* Wu & De Armond, *supra* note 80, at 155–56 (noting that other California courts have endorsed this interpretation of FCRA, allowing claims under the Rosenthal Act as well).

128 *But see Fact Sheet 6a: Facts on FACTA, the Fair and Accurate Credit Transactions Act*, Privacy Rights Clearinghouse (Feb. 1, 2013), https://www.privacyrights.org/fs/fs6a-facta.htm#7 (explaining that medical information could be used against consumers when applying for jobs or refinancing a mortgage, creating serious privacy implications).

129 15 U.S.C. § 1681h(e).

actions included recklessness, which gives willful a broader meaning than just knowing.[130] The definition of willful is only relevant in interpretations of the statute that allow claims under section 1681h(e).[131]

If courts adopt the *Safeco* definition of willful in section 1681h(e), what will that mean for consumers? First, it means that any decisions predicated on willful violations requiring notice would no longer be relevant. Since willful would encompass recklessness, the notice requirement needed for knowing, would not be necessary to reach the willful standard necessary to bring the claim under section 1681h(e). For the statutory approach, this would mean that any state common law claim could reach the willful standard simply by the data furnisher adopting a categorical approach that allows for too many errors reported to consumer reporting agencies.[132] For instance, a practice or policy adopted by a data furnisher that used an electronic system that continually provided wrong information, such as wrong social security numbers, and did not properly verify the information, could reach the level of reckless and subject the furnisher to liability.[133] For the temporal approach, since the consumer is only allowed to bring claims before the furnisher has been notified, the inclusion of reckless might encompass more claims, but is unlikely to have a substantial impact on the ability of consumers to bring a claim against the furnisher.[134]

2. A Lower Barrier: Defining Malice Under Section 1681h(e)

Although consumers have a hard time bringing a successful claim that the data furnisher acted with willful intent, consumers may have an easier time proving that the furnisher acted with malice.[135] As noted above, the malice standard focuses on a high probability of falseness, but the actual definition varies between jurisdictions and is largely fact

[130] *See* McClure, *supra* note 54, (describing the general holdings of the decision).

[131] 15 U.S.C. § 1681h(e) (does not apply to the total preemption approach); *see also* Conrad, *supra* note 29 (reasoning that the definition of willful is only relevant in relation to courts that have adopted the statutory or temporal approach as § 1681h(e) is subsumed by § 1681t(b)(1)(F) in the total preemption approach).

[132] *See* Ramirez v. Midwest Airlines, Inc., 537 F. Supp. 2d 1161, 1169 (D. Kan. 2008) (willful standard based on reckless disregard of statutory duties rather than harm).

[133] *See Consumer Credit Reports Hearing*, *supra* note 3, at 32 (arguing that debt buyers in particular are not credible sources for verifying disputed consumer credit data); *see also* De Armond, *supra* note 109, at 1126 (detailing that the electronic data verification system used by the credit reporting agencies is impersonal and makes it difficult to prove intent by furnishers); Guerrero, *supra* note 97, at 438–39 (illustrating that the dispute system is broken, in part because consumers can only access their credit reports for free once a year to check for inaccuracies and to see if mistakes have been rectified).

[134] *See* De Armond, *supra* note 109, at 1117 (indicating that the 2003 amendments to FCRA did little to give consumers actual power to seek remedies from furnishers).

[135] *See* Pinson & Lawrence, *supra* note 27, at 50 (observing that willful intent cannot be claimed in cases of negligence).

dependent.[136] Flexible courts, such as the court in *Meisel*, will recognize multiple attempts to get disputed information removed without success as sufficient evidence of malice, meaning that the lucky and diligent consumers may be able to prove malice.[137] In the hypothetical posited above, since the consumer contacted the cable company three times, as well as the debt settlement company, the consumer might be able to meet the malice standard, depending on the case law in the jurisdiction.[138] However, unlike the situation in *Morris v. Equifax Information Services, LLC*, where the company that referred the debt, Target, helped the consumer contest the erroneous information with the furnisher, the cable company did not seem overly concerned with helping the consumer.[139] It is likely that consumers face a similar level of apathy from other large corporations.[140] Furthermore, even with the cooperation of Target, the court in *Morris* still held that the furnisher's actions were not malicious.[141]

Setting a high standard for malice, particularly one that requires "a high degree of awareness" will result in little opportunity for consumers to hold furnishers responsible for erroneously reported information.[142] Much like willful intent, malice should incorporate a standard of recklessness, especially since most consumer information furnished to credit reporting agencies is reported through digital data aggregators.[143] Since data is no longer reviewed by an employee sitting at a desk and looking at a paper copy of the consumer credit report, the courts' understanding of when the furnisher knows or reasonably should know that data is incorrect needs to be updated to incorporate a recklessness standard.[144] Providing a meaningful standard for consumers to hold

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136 *See supra* notes 58–60.

137 *See* Meisel v. USA Shade & Fabric Structures Inc., 795 F. Supp. 2d 481, 490 (N.D. Tex. 2011) (granting removal of the case to state court).

138 *See supra* note 63 (stating that the consumer contacted the cable company three times and even contacted the debt settlement company); *see also* Himmelstein v. Comcast of the Dist., L.L.C., 908 F. Supp. 2d 49, 51–52 (D.D.C. 2012).

139 *See* Morris v. Equifax Info. Servs., LLC, 457 F.3d 460, 471 (5th Cir. 2006) (holding that Equifax did not knowingly publish false information about Morris even though the consumer made multiple contacts with Equifax regarding the disputed information).

140 *See* Guerrero, *supra* note 98, at 460 (reasoning that it logical for consumers to go lodge complaints about disputed credit information with the furnisher, if they know who the furnisher is, but that by lodging the dispute, the consumer is essentially denying themselves recourse).

141 *See, e.g.*, *Morris*, 457 F.3d at 471 (refusing to accept Equifax's argument that the furnisher had the responsibility to investigate the dispute because the furnisher owned the consumer's file and was also a credit reporting agency under the FCRA definition).

142 *See Consumer Credit Reports Hearing*, *supra* note 3, at 32 (arguing that consumers should be able to order credit reporting agencies and furnishers to fix errors on their credit reports or get an injunction against the credit reporting agency).

143 *See* De Armond, *supra* note 110, at 1126 (acknowledging that courts rely on antiquated technology and systems to determine notice).

144 *See id.* (arguing that courts need to apply the recklessness standard in light of modern digital

furnishers responsible for misinformation, fuzzily matched records or other problems will incentivize furnishers to develop better matching systems and will protect the interests of the state in providing common law remedies for claims such as defamation.[145]

III. Methods to Improve Consumer Remedies Under the FCRA

Consumer credit reporting is a complex and multi-faceted market riddled with opportunities for errors.[146] While furnishers and credit reporting agencies should be provided some protection from liability for every little error, adopting practices and approaches to dispute resolution that completely ignore consumers' complaints and efforts to remedy errors is out of sync with the purpose of the FCRA and does little to incentivize data furnishers to improve the accuracy of these systems.[147] Courts have failed to settle on one answer to this preemption issue.[148] Not only do these different approaches create confusion, but none of these approaches provide an effective fix to reconciling the two preemption provisions. Whether through the courts, action by the CFPB, or Congressional action, there is a need for consumers to defend their reputations and hold furnishers responsible for errors.[149]

A. Supreme Court Should Grant Certiorari

The Supreme Court should decide this issue because the conflicting decisions create confusion on an issue of importance to all consumers, businesses who use credit reports, data furnishers, and the credit reporting agencies.[150] A Supreme Court decision would create a

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technology, rather than older, analog processes).

145 *See* De Armond, *supra* note 110, at 1119 (recognizing that states have a strong interest in providing their citizens with remedies under the FCRA); *see also* Guerrero, *supra* note 98, at 455 (recognizing that it costs furnishers about thirty cents to handle each disputed item on a consumer's credit report).

146 *See FTC Study of Credit Report Accuracy*, *supra* note 5, at 35–36 (reporting that 26 percent of study participants contained at least one error on their credit reports and that one in ten had a material error on their report); *see also* CFPB Credit Reporting System Report, *supra* note 1, at 19 (illustrating that the consumer credit reporting agencies often reject consumer trades lines from furnishers due to inconsistencies and anomalies in the data and that data from collection agencies tends to get rejected more often than data from other furnishers).

147 *See Consumer Credit Reports Hearing*, *supra* note 3, at 16 (observing that before the Consumer Financial Protection Bureau was granted authority over the credit reporting, market forces did little to incentivize credit reporting agencies or furnishers to improve their reporting system and that the only incentive came from consumers willing to bring a private enforcement action).

148 *See* Tyson, *supra* note 108, at 20 (providing a summary of the different approaches).

149 *See Consumer Credit Reports Hearing*, *supra* note 3, at 16 (recommending that Congress take several actions, including granting consumers the right to an injunction against credit reporting agencies, and prohibiting medical debt from being included on a consumer credit file).

150 *See* McClure, *supra* note 54, at 283 (noting that the Supreme Court granted certiorari in *Safeco* because of the importance of class action suits under the FCRA to both consumers and lenders); *see also* David D. Schein & James D. Phillips, *Holding Credit Reporting Agencies Accountable: How the*

national standard, which would lower regulatory and litigation costs for data furnishers.[151] Furthermore, if the Supreme Court adopted the statutory approach, consumers would have a better chance of getting errors removed from their credit reports and receiving recompense for injuries resulting from the error.[152] As discussed above, the statutory approach allows for consumers to bring some state common law claims against furnishers for erroneous credit information provided to credit reporting agencies and is the best approach for consumers.

B. New Cop, New Powers: Ways the Consumer Financial Protection Bureau Could Fix the Preemption Issue in FCRA

The CFPB has a chance to affect change in the credit reporting market, specifically on the issue of furnisher liability, given the new powers granted the fledgling agency under Dodd–Frank.[153] Specifically, Dodd–Frank gave the CFPB rulemaking and supervisory authority for the major actors in the credit reporting market.[154] Additionally, since many furnishers of credit information are financial institutions, both bank and non-bank, such as debt collectors, the CFPB also has purview over many of the furnishers.[155] The CFPB has shown an interest in working to improve the credit reporting market, issuing supervisory guidelines for larger participants in the credit reporting market, conducting a study on management of consumer data by the credit reporting agencies, including error resolution, and even issuing a bulletin to alert furnishers of the need to fully and accurately investigate consumer complaints referred to the furnisher from the credit reporting agencies.[156]

Financial Crisis May Be Contributing to Improving Accuracy in Credit Reporting, 24 LOY. CONSUMER L. REV. 329, 339 (2012) (observing that there has been a sharp rise in FCRA litigation with the advent of the Internet and websites such as freecreditscore.com, which portends that a high volume of FCRA litigation will continue in the future).

151 *Accord* Pinson & Lawrence, *supra* note 27, at 50 (explaining that the purpose of the FACT Act was, in part, to lower costs for furnishers by creating a national standard for liability).

152 *See* Conrad, *supra* note 29, at 608 (noting that the statutory approach is also the most consistent with cannons of statutory interpretation as well as the consumer protection goal of the statute).

153 *Compare Consumer Credit Reports Hearing*, *supra* note 3, at 12 (detailing that the CFPB has greater authority over the credit reporting market than the FTC ever did), *with Examining the Uses of Consumer Credit Data Hearing Before the Subcomm. on Fin. Instit. and Consumer Credit, H. Comm. on Fin. Servs.*, *supra* note 14, at 7–8 (describing how the FTC plans on working with the CFPB to bring enforcement actions against bad actors in the consumer credit reporting market).

154 *See generally* Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. 42874 (authority granted in Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act).

155 *See id.* (reporting that the CFPB had supervisory authority over larger actors in the credit reporting market as of September 30, 2012).

156 *See* CFPB CREDIT REPORTING SYSTEM REPORT, *supra* note 1, at 2 (observing that the CFPB had already begun the examinations process for the larger participants in the credit reporting market); CFPB BULLETIN, *supra* note 25 ("The CFPB will continue to evaluate compliance with the requirement to review 'all relevant information' by furnishers subject to its supervisory and

While the CFPB cannot require courts to hold credit information furnishers liable for errors on a consumer's credit report, there are several ways that the CFPB could help consumers make sure that errors or disputed information is removed in a timely and straightforward manner.[157] One way for the CFPB to aid consumers in fixing these errors is to bring enforcement actions against furnishers for reporting inaccurate information in violation of the FCRA such as the enforcement action against American Express.[158] This will incentivize furnishers to adopt good dispute resolution systems and also provide reimbursement to consumers for any harm, such as the $85 million that was returned to consumers in the American Express settlement.[159] Another way that the CFPB could address this problem is by issuing a rule that requires credit reporting agencies to automatically remove any disputed information pending further investigation by the credit reporting agency and the furnisher of the disputed information, which is not current practice.[160] By requiring that disputed information be removed, consumers will be able to get errors removed from their reports quickly and furnishers and credit reporting agencies will want to have adequate procedures in place for prevention and efficient investigation of errors.[161]

Given the mission and structure of the CFPB, enacting some of the changes discussed above would be the most straightforward and fastest way to amend the dispute resolution process in consumer credit reports.[162]

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enforcement authorities.").

157 *See, e.g.*, *Consumer Credit Reports Hearing*, *supra* note 3, at 36 (recommending that the CFPB issue regulations requiring certain accuracy and dispute resolution processes for credit reporting agencies).

158 *See* Consumer Financial Protection Bureau, CFPB Orders American Express to Pay $85 Million Refund to Consumers Harmed by Illegal Credit Card Practices (2012),) *available at* http://www.consumerfinance.gov/pressreleases/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/ (announcing that American Express failed to report consumer disputes of credit information to the credit reporting agencies in violation of FCRA).

159 *See, e.g.*, *id.* (relating that American Express was also required to pay a civil monetary penalty of $27.5 million).

160 *See Consumer Credit Reports Hearing*, *supra* note 3, at 16 (observing that credit reporting agencies overly report negative information).

161 *See* Edward Thrasher, *The Fair Credit Reporting Act: Deficiencies and Solutions*, 21 Temp. Pol. & Civ. Rts. L. Rev. 599, 615 (2012) ("Of course, the optimal standard for consumers would be the opposite: if there is a chance that the information is incorrect, it should be removed until reinvestigated for accuracy."); *see also Consumer Credit Reports Hearing*, *supra* note 3, at 16 (arguing that current market forces do not adequately encourage credit reporting agencies to ensure that information on consumer credit reports is accurate or to conduct a sufficient investigation of disputed information).

162 *C.f. 60 Minutes: Is Your Credit Report Accurate?*, *supra* note 2 (reporting that FTC Commissioner Leibowitz thought that the study results of twenty percent for any error and ten percent for a material error on consumer credit reports was not an acceptable error rate).

C. Legislative Fixes to Credit Reporting Error Resolution

As discussed above, Congressional intent as to the reconciliation of the two preemption provisions remains a matter for interpretation.[163] However, only Congress has the power to amend the FCRA and make clear Congressional intent.[164] As evidenced by recent Congressional hearings, Congress continues to monitor the consumer credit reporting market.[165]

One way that Congress could fix this issue and provide much needed protection for consumers is to amend the FCRA to strengthen the private right of action for consumers who have errors on their credit reports, especially by allowing consumers to get an injunction against furnishers and credit reporting agencies.[166] Another is to incorporate recklessness into the standard of malice or willful intent necessary for the consumer to bring a claim under section 1681h(e).[167] This lower standard, similar to the definition of willful intent adopted in *Safeco*, would enable consumers to more easily bring state claims while maintaining a high enough bar to protect furnishers from frivolous claims.[168] Congress has an interest in establishing a working consumer credit reporting market that balances responsibility and efficiency for the actors in the marketplace.[169] Congress should take action beyond simply holding hearings and give states some discretion in providing

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163 *See Consumer Credit Reports Hearing*, *supra* note 3, at 18 (observing that this confusion leads to furnishers being insulated from liability even in cases of extreme negligence).

164 *See, e.g.*, Blake Ellis, *Bill seeks to erase medical debt from credit reports*, CNN MONEY (Aug. 1, 2011), http://money.cnn.com/2011/08/01/pf/medical_debt_credit_report/#sthash.6TGPfp7O.dpuf (explaining that a proposed bill in the Senate would amend the FCRA to require credit reporting agencies to remove medical debt within 45 days of the debt being paid).

165 *See Consumer Credit Reports Hearing*, *supra* note 3, at 19 (recommending that Congress amend FCRA to give consumers more power to hold furnishers liable as the current system does not support rigorous enough investigation of disputed credit information).

166 *See* Schramm-Strosser, *supra* note 85, at 170–71 (advocating that consumers be allowed to bring injunctions against credit reporting agencies after the reinvestigation of disputed information has failed to provide a remedy); *see also Consumer Credit Reports Hearing*, *supra* note 3, at 19 (testifying that the National Consumer Law Center supports providing consumers the right to ask a court to fix errors on their credit reports when the dispute resolution process has failed).

167 *See* Thrasher, *supra* note 161, at 610–11 (arguing that if the FCRA raised the burden for investigation of consumer disputes by credit reporting agencies, it would also make it easier for consumers to prove willful negligence); *see also* De Armond, *supra* note 109, at 1126 (detailing that the electronic data verification system used by the credit reporting agencies is impersonal and makes it difficult to prove intent by furnishers).

168 *Compare Consumer Credit Reports Hearing*, *supra* note 3, at 30 (explaining that the credit reporting agency does not need to act as a small claims court to transfer the burden of proof in disputes from the consumer to the furnisher), *with* Pinson & Lawrence, *supra* note 27, at 51 (reasoning that Congress intended for furnishers to be somewhat isolated from liability to encourage reporting of credit information to credit reporting agencies).

169 *See Consumer Credit Reports Hearing*, *supra* note 3, at 19 (showing that Congress should amend the FCRA to enable a more accurate credit reporting system by giving consumers the power to get injunctive relief).

consumer protections to their citizens.[170]

Conclusion

The name and purpose of the Fair Credit Reporting Act calls for the protection of the consumer and the establishment of an efficient and fair system in the consumer credit reporting market.[171] Credit reports have an unequivocal importance to the cost of credit and the financial security of consumers.[172] There is little question that the current system places the burden on consumers to prove errors on their credit reports and to get these errors fixed.[173] However, consumers are the least able to remedy these errors, having neither the expertise nor the time and money to remain diligent about their credit reports. The current burdens and incentives in the credit reporting market need to be brought into line with the stated goal of the FCRA and enable consumers to hold furnishers that provide misinformation responsible for their actions. While fixing two small provisions within the FCRA may seem like an inconsequential step, shifting some responsibility to furnishers for their wrong actions starts to shift incentives.[174] In light of the financial crisis and the automation of handling consumer disputes, Congress, federal agencies, and the courts should decide how to reconcile these two preemption provisions, keeping in mind that a fair and efficient system will take into account the incentives and burdens for both furnishers and consumers.

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[170] *See id.* (observing that FCRA is an outlier in respect to the consumer's ability to get injunctive relief under California law, which Congress should change).

[171] *See* 15 U.S.C. § 1681(b) (2012) ("It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter."). *See supra* note 10.

[172] *See* CFPB Credit Reporting System Report, *supra* note 1, at 3 (stating that credit reports and credit scores play a critical role in determining the cost of credit for consumers).

[173] *Compare Consumer Credit Reports Hearing*, *supra* note 3, at 30 (explaining that the credit reporting agency does not need to act as a small claims court to transfer the burden of proof in disputes from the consumer to the furnisher), *with* Pinson & Lawrence, *supra* note 27, at 51 (reasoning that Congress intended for furnishers to be somewhat isolated from liability to encourage reporting of credit information to credit reporting agencies).

[174] *See* Thrasher, *supra* note 161, at 610–11 (noting that small changes in the FCRA would significantly help consumers).