

Theft of Identity: Roadkill on the Information Superhighway

by David A. Szwak

High-tech pirates tap computer-accessed credit information to steal. It's called application fraud and creditors make it easy by authorizing credit without carefully investigating the applicant's identity. The defrauder lives well on the victim's credit, destroying the victim's credit record in the process. When the creditor reports unpaid charges, the application fraud victim is victimized again, this time by collection agencies and duped creditors who sue to recover their losses. If this happens to one of your clients, you will need to know what to do. This article can help.

The Shaw Fiasco

In May 1991, Steven M. Shaw, a used car salesman in Orlando, Florida, used his employer's credit bureau terminal to access the credit reports of Stephen J. Shaw of Washington, D.C. (and other Shaws with a first name derivation of "Steve") from national consumer reporting superbureaus.¹ Steven M. apparently obtained the reports and began making applications for credit with banks, retailers, and credit card companies using identities of the various victims Shaw. Using

the same terminal, he re-accessed the reports to monitor and expand the fraud. After Steven M. succeeded in ringing up more than \$100,000 in credit in the name of Stephen J., a fraud investigator noticed discrepancies in the reports. An investigation disclosed the scam.

Imagine receiving a call notifying you that a client's credit reports show that he lives in another state and that he has thousands of dollars of debt. Your job is to warn other creditors and get the credit bureaus to delete and suppress the false data. Lawsuits may be filed against your client while you are negotiating with creditors and credit bureaus. Harassing letters, calls, and visits from collection agents may follow. Like Stephen J. Shaw, your client will have become "roadkill on the information superhighway."

The number of cases of theft of identity is growing exponentially.² Victims like Shaw have begun to fight back by bringing suits against the defrauders, their employers, the owners and possessors of the defective credit bureau terminal systems, the credit bureaus, collectors, and those who authorize credit without ade-

quately investigating the application.³ The Fair Credit Reporting Act (FCRA) does not provide sufficient protection to consumers; the likelihood that Congress will enact legislation to better regulate the industry appears grim.

Stevenson v. TRW: Breaking Ground

In early 1989 John Stevenson began receiving harassing calls from bill collectors regarding accounts opened by a de-

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¹ See, e.g., *Stephen J. Shaw v. Steven Shaw*, No. 93-874-Civ-Orl-19, (M.D. Fla. 1993); *Edward F. Brock v. Edward Brock*, No. H-93-0317, (S.D. Tex. 1993); *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993).



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¹ The standard credit report has four parts:

- a. Personal Information: name, address, social security number, date of birth, all prior addresses, your spouse's identifiers, names and addresses of your current and past employers, income information and other coded data;
- b. Trade line information: Listing of current and past accounts, dates each account was opened, status of each account, your rating as provided by each creditor, detailed pay histories, your credit limits, account balances, account verification dates, terms of the accounts, types of accounts (Revolving, Installment, 30/60/90, etc.), account designations (co-signor, authorized user, primary, etc.) and other coded data if a late pay, collection, repossession or legal action is involved.
- c. Public Record Data: Judgments, tax liens, bankruptcies, legal actions, repossessions, collections, consumer credit counseling, etc. Few courts exist which send data directly to the bureaus by magnetic tape.

d. Credit Inquiries: At the bottom of every credit report is a cryptic listing of persons who have requested your report. Also, "credit scoring" is done by credit bureaus when a creditor retrieves your report. Scoring is the credit bureau's numerical assessment of the consumer as a credit risk based upon standard factors and application information. Credit scoring is very complex and beyond the scope of this article.

² One of America's largest retailers maintains that "[N]ew application fraud continues to be the fastest growing area for fraud losses. The number of new application fraud incidents during 1991 was approximately 34% above 1990 figures and 20% of all fraud losses. New application fraud losses average \$1,264 (per fraud account) compared to \$856 for all other types of fraud loss. Fraud losses exceeded over \$3.5 million dollars in 1991 (for this retailer alone). This figure does not take into consideration the expense associated with the follow up and investigation. (parenthetical explanations added)."

frauder who used Stevenson's identity. After obtaining his credit reports from the various superbureaus, Stevenson discovered 16 fraudulent accounts. He sent dispute letters to TRW. Almost one month later, TRW sent verification forms to the disputed account creditors.⁴

After its initial investigation, TRW deleted some of the fraudulent accounts. TRW claimed that creditors "insisted that the account[s] was [were] Stevenson's."⁵ A fraud warning statement was finally added to Stevenson's report in December 1989 that advised inquiring creditors that Stevenson's "identifiers" had been used fraudulently to obtain credit. In February 1990, TRW completed its reinvestigation; it concluded that all fraudulent accounts had been deleted. Nonetheless, false data continued to appear, either because the data had never been deleted by TRW or because TRW failed to suppress new information from creditors with the false information.

Stevenson's problems continued and he eventually sued TRW. A bench trial in a Dallas, Texas, federal court resulted in an award to Stevenson of actual damages (\$30,000), attorneys' fees (\$20,700), and punitive damages (\$100,000). On appeal, the Fifth Circuit affirmed the compensatory awards but reversed the punitive award since, the appellate court concluded, Stevenson had failed to carry his burden of proving willful misconduct.

TRW was found to have violated the FCRA in several respects. First, TRW failed to employ "reasonable procedures" to promptly re-investigate existing, dis-

puted data on Stevenson's report.⁷ Important and separable is the fact that TRW failed to promptly delete false data and implement data suppression measures to safeguard it from recapturing false data in the event that its subscribers failed to clear their internal records or magnetic tape data transmissions. The court also found that TRW failed to post an adequate notice on its reports to advise Stevenson that he had a right to have his corrected reports sent to inquiring subscribers who received prior reports containing errors. Finally, the judge found that TRW libeled Stevenson by recklessly publishing false reports without regard to the truth or falsity of their contents, particularly in light of Stevenson's complaints.

The court also found that TRW did not violate its duty to use reasonable procedures to assure the maximum possible accuracy of each new item of data placed on Stevenson's report. TRW maintains regional databanks. Subscribers forward magnetic tape and other data transmissions that are fed directly into those banks. The incoming data bears personal identification coding that is supposed to route each item of data through the matching algorithm to the proper credit report. TRW organizes this information by name, address, and Social Security number. Thus, when the defrauder used the name "John Stevenson" with the victim's Social Security number, regardless of the mail drop address listed, the resulting account was attributed to the victim. TRW's matching algorithm appears to place incoming data in files that bear any two of the three key identifiers. This method of organizing information can create new files or place erroneous data in existing files.

The Stevenson appellate court refused to uphold the district court's finding that TRW willfully violated section 1681i(a) of the FCRA. Section 1681i(a) requires a consumer reporting agency to investigate and delete inaccurate or unverifiable information disputed by a consumer within a "reasonable time" after receiving a notice of dispute or error.⁸ TRW argued

that 10 weeks was a reasonable time to reinvestigate Stevenson's dispute. Other authorities have suggested that 30 days was enough.⁹ As the *Stevenson* court concluded, however, in today's high-tech world of electronic transmissions, telefaxes, and telephones, it should take no more than 30 days to conduct the investigation necessary to investigate a credit dispute, particularly in cases like *Stevenson*, where the agencies and their agents (the creditors), through their own recklessness, allow the fraud and then leave it to the victim to correct the matter.¹⁰ In fairness, it should not require a great deal of time for a credit reporting agency to resolve a credit dispute. This is particularly true in cases of application fraud that are typically evidenced by obvious signs that the victim had no association with the disputed account. The decision in *Stevenson* should give fair warning that credit reporting agencies must take their responsibilities seriously.

Another problem occurs when the fraudulent information continues to "reappear" even after the consumer reporting agency has supposedly deleted the information identified as fraudulent. This anomaly can result from the agency's failure to delete the item in the first place or from internal deficiencies within the agency's computer hardware or software that allow the data to be recaptured when the creditor fails to clear its records. In *Stevenson* this situation resulted in a finding that TRW was negligent in allowing inaccurate, deleted data to reappear back on the report.¹¹

Still more disturbing is the fact that consumer reporting agencies rely, almost exclusively, on magnetic tape data transmissions from their subscribing creditors to update their files. This laxity has been adopted in the reporting agency reinvestigation procedures.¹² While the agencies

⁴ *Stevenson v. TRW*, supra note 3, at 291. "Consumer Dispute Verifications" (commonly known as "CDVs") are computer-generated forms sent to the creditor, by mail, asking the creditor to "check whether the information they have about a consumer matches the information appearing on the consumer's TRW credit report."

⁵ *Id.*

⁶ The standard is an objective one based on what a reasonable, prudent person would do under similar circumstances. *Cahlin v. GMAC*, 936 F.2d 1151 (11th Cir. 1991); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982); *Bryant v. TRW, Inc.*, 689 F.2d 72 (6th Cir. 1982).

⁷ 15 U.S.C. 1681e(b). Preparation of a credit report is a continuing process and the agency's obligation to insure the maximum possible accuracy of incoming data arises and begins with every addition of data. *Cf. Lowry v. Credit Bureau, Inc. of Georgia*, 444 F.Supp. 541 (D. Ga. 1978).

⁸ *Stevenson v. TRW*, supra note 3, at 292.

⁹ *Id.* at 292; *Boothe v. TRW Credit Data*, 768 F.Supp. 434, 438 (S.D.N.Y. 1991); *MIB, Inc.*, 101 F.T.C. 415, 423 (1983).

¹⁰ "TRW urged at trial, however, that where fraud has occurred, the consumer must resolve the problem with the creditor." *Stevenson v. TRW*, supra note 3, at 293. Needless to say, the Court was not impressed.

¹¹ *Id.*; see also *Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F.Supp. 962, 968 (S.D. Ohio 1983).

¹² See *Stevenson v. TRW*, supra, at 293.

are not "strictly liable" for inaccurate data in their files, they bear "some responsibility" to evaluate, assess and investigate the accuracy of information they obtain from their subscribers.¹³ In perhaps the most significant part of the *Stevenson* decision, the court placed the burden of reinvestigation squarely on the credit reporting agencies.¹⁴ Thus an agency is charged with the duty to act in good faith before disseminating information to its subscribers.¹⁵ Agencies that do no more than mimic their subscribers do so at their own peril.¹⁶ Even so, credit reporting agencies regularly fail to comply with the FCRA mandates concerning reinvestigation and security.

Credit Issuer Obligations

Conceptually, credit is nothing more than a contract between the cardholder and the credit issuer. A "credit card" demonstrates to merchants that the person who holds the card has a satisfactory credit rating. If credit is extended, merchants know that the issuer of the card will ensure that the merchant receives payment for the merchandise delivered, and that the debtor intends to pay the issuer.¹⁷ Further, the offer of credit may be withdrawn by the issuer at any time prior to the acceptance of the offer through the use of the card by the cardholder.¹⁸

Credit issuers usually rely on applications to perpetuate their business. And courts have uniformly held that credit issuers must exercise reasonable care in investigating applications received.¹⁹

While credit issuers are not strictly liable for approving fraudulent applications, they must exercise reasonable care to prevent losses.²⁰ After all, credit issuers are in a superior position to prevent and stop credit fraud. In a sense, the credit issuer who fails to reasonably investigate fraudulent credit applications acts in complicity with the defrauder.²¹ And typically the defrauded cardholder is the last to know.

Courts have ruled that merchants must inquire about the identity of a purchaser utilizing credit.²² Also, merchants must examine the charge card and extend credit only as the card authorizes.²³ In

Humble Oil & Ref. Co.,²⁴ the court found the credit issuer liable for carelessly sending a credit card through the mail on the authority of an anonymous telephone caller. The credit issuer failed to take any reasonable precautions to verify the identity of the caller.

Unauthorized use of a credit card is the use of a credit card by a person who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.²⁵

A "cardholder" is generally defined as the person whose identity is listed on the credit application made to the issuer. The cardholder is not liable for fraud perpe-

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²⁰ *TransAmerica Ins. Co. v. Standard Oil Co.*, supra note 19; *Beard v. Goodyear Tire & Rubber Co.*, supra note 19.

²¹ *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196, 201 (2d Cir. 1974); *Humble Oil & Ref. Co. v. Waters*, 159 So.2d 408 (La. App. 1963).

²² *Union Oil Co. v. Lull*, 349 P.2d 243 (Or. 1960).

²³ *Gulf Ref. Co. v. Williams Roofing Co.*, 186 S.W.2d 790 (Ark. 1945).

²⁴ *Id.*

²⁵ 15 U.S.C. 1643(a)(1); *Elder-Beerman v. Nagucki*, 561 N.E.2d 553 (Ohio App. 1988); *Michigan Nat. Bank v. Olsen*, 723 P.2d 438 (Wash. App. 1986); *Standard Oil Co. v. Steele*, 489 N.E.2d 842 (Ohio Mun. 1985); *Harlan v. First Interstate Bank of Utah*, 672 P.2d 73 (Utah 1983), cert. denied, 104 S.Ct. 1911, 466 U.S. 937, 80 L.Ed.2d 460 (1983).

¹³ *Id.*; *Hussain v. Carteret Sav. Bank, F.A.*, 704 F.Supp. 567 (D.N.J. 1989); *Swoager v. Credit Bureau of Greater St. Petersburg, Fla.*, 608 F.Supp. 972, 976 (M.D. Fla. 1985); *Bryant v. TRW*, 689 F.2d 72 (6th Cir. 1982); *Thompson v. San Antonio Retail Merchants Ass'n*, supra note 6.

¹⁴ *Stevenson v. TRW*, supra note 3, at 293.

¹⁵ *Bartels v. Retail Credit Co.*, 175 N.W.2d 292 (Neb. 1970).

¹⁶ *Id.*

¹⁷ *In re Cloud*, 107 B.R. 156 (N.D. Ill. 1989); *Williams v. U.S.*, 192 F.Supp. 97 (S.D. Cal. 1961).

¹⁸ *Feder v. Fortunoff, Inc.*, 494 N.Y.S.2d 42 (N.Y. Super. 2d Dept. 1985).

¹⁹ *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195 (D.C. App. 1991); *TransAmerica Ins. Co. v. Standard Oil Co.*, 325 N.W.2d 210 (N.D. 1982); *First Nat. Bank v. Mullarkey*, 385 N.Y.S.2d 473, 87 Misc.2d 1 (N.Y. Cir. Ct. 1976); *Humble Oil & Ref. Co. v. Waters*, 159 So.2d 408 (La. App. 1963).

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trated through the use of his "identifiers," that is, information that identifies the holder.²⁶ The cardholder is solely responsible for charges; users and holders of related cards are not liable for charges made on the account.²⁷ Further, the cardholder is not liable for fraud committed through the unauthorized misuse of his account number, card, or template.

While the cardholder is not liable for unauthorized use, if he allows a third person to use his account number, card, or template, regardless of the scope of the authority, then the cardholder is liable for all resulting charges made.²⁸ Of course, the consent must be given freely and without fraud or duress.²⁹ If the cardholder makes statements or conducts himself in a manner so as to condone the third party's use of his account number, card, or template, then he may be held to have clothed the third person with "apparent authority," and he may be liable for all resulting use of the account.³⁰ It is important to understand that the cardholder cannot, after the fact, attempt to limit or deny the authority he voluntarily extended to a third person.³¹

The cardholder may not be held liable for unauthorized use of a credit card except where the card is an "accepted credit card." If the card is "accepted," then liability may not exceed \$50. The \$50 limit applies when: (1) the issuer provides the cardholder with adequate notice of limited liability, (2) the issuer provides the cardholder with a description of means by which the issuer may be notified of the loss or theft of the activated card, (3) un-

authorized use occurs before the card issuer has been notified that the cardholder no longer possesses the card or template, and (4) the card issuer provides a method whereby the user of the card can be identified as a person authorized to use it.³²

Under current law, banks, retailers, and other entities disseminating information based on their own experiences with consumers are usually not considered "consumer reporting agencies," subject to all the provisions of the FCRA.³³ Such persons or entities are subject to liability under state law. For example, a defamation claim may be brought for injuries resulting from the publication of false information about an individual's negative credit history.³⁴ If a credit issuer refuses to correct a cardholder's statement within a reasonable time after being informed that the cardholder disputes liability of the alleged charges, then the issuer may be liable for harm to the cardholder.³⁵ Further, the issuer will be liable to the cardholder if he fails to notify all consumer reporting agencies that a dispute has been lodged, and the issuer must comply with the federal Fair Credit Billing Act.³⁶

The issuer is also liable when harm results from its failure to correct an admitted error concerning the cardholder's account.³⁷ Of course, complete accuracy of the information disseminated is a defense to a defamation action.³⁸ A consumer dispute is properly lodged if it is reason-

ably sufficient to put the issuer on notice of the consumer's name and account number. A proper dispute includes a statement as to why the consumer believes an error has been made.³⁹

One of the most important FCRA provisions applicable to banks, retailers, credit issuers, insurers, employers, and other users of consumer reports is set forth at 15 U.S.C. section 1681m. Section 1681m requires written notice to the consumer when a consumer report is used to deny some form of benefit to a consumer. The notice must specify the reasons for the denial and the sources of the adverse information.⁴⁰

Who Has Access to Credit Reports?

Currently, there are no laws restricting access to credit reporting terminals. Terminal subscribers simply certify that they need the terminal and agree to pay a monthly fee and a reporting fee. Individual inquiries are not monitored; there is no assurance that reports will be retrieved for authorized uses. Consumer reporting agencies currently supply terminals to almost all subscribers with an unlimited search algorithm. In essence, there are no limits on the subscriber-inquirer's access to data. At a minimum, only a first and last name is needed to access reports. By leaving search algorithms unrestricted, agencies make it easy to commit credit fraud. The "consumer reporting agency" may provide a credit report to any person if the agency has "reason to believe" the person has a "legitimate business need" for the report.⁴¹ There are other "permissible purposes" described in the FCRA.⁴² Courts have consistently found that impermissible inquiries form the basis of civil liability.⁴³

²⁶ First Nat. Bank of Commerce v. Ordoyne, 528 So.2d 1068 (La. App. 5th Cir. 1988), w.d., 532 So.2d 179 (La. 1988); Union Oil Co. v. Lull, 349 P.2d 243 (Or. 1960).

²⁷ First Nat. Bank of Findlay v. Fulk, 566 N.E.2d 1270 (Ohio App. 1989); State Home Sav. Card Ctr. v. Pinks, 540 N.E.2d 338 (Ohio Mun. 1988).

²⁸ Tower World Airways, Inc. v. PHH Aviation Systems, Inc., 933 F.2d 174 (2d Cir. 1991); Michigan Nat. Bank v. Olsen, 723 P.2d 438 (Wash. App. 1986); Standard Oil Co. v. Steele, 489 N.E.2d 842 (Ohio Mun. 1985).

²⁹ Martin v. American Express, Inc., 361 So.2d 597 (Ala. App. 1978).

³⁰ Tower World Airways, Inc. v. PHH Aviation Systems, Inc., supra note 28; Vaughn v. U.S. Nat. Bank of Oregon, 718 P.2d 769 (Or. App. 1986); Standard Oil Co. v. Steele, supra.

³¹ Standard Oil Co. v. Steele, supra note 30; Selber Bros., Inc. v. Bryant, 406 So.2d 251 (La. App. 1981).

³² 15 U.S.C. 1643(a)(1); Fifth Third Bank/Visa v. Gilbert, 478 N.E.2d 1324 (Ohio App. 1984).

³³ Lois Digianni v. Stern's, 26 F.3d 346, 1994 W.L. 259498 (2d Cir. 1994); Laracunte v. Laracunte, 599 A.2d 968 (N.J. Super. 1991); Smith v. First Nat. Bank, 837 F.2d 1575 (11th Cir. 1988); Alvarez Melendez v. Citibank, 705 F.Supp. 67 (D. Puerto Rico 1988).

³⁴ Alvarez Melendez v. Citibank, supra note 33; Laracunte v. Laracunte, supra note 33.

³⁵ Young v. Bank of America Nat. Trust & Savings Assn., 190 Cal. Rptr. 122, 141 C.A. 3d 108 (1983).

³⁶ FCBA, 15 U.S.C. 1666; Young v. Bank of America Nat. Trust & Savings Assn., supra.

³⁷ Sayers v. GMAC, 522 F.Supp. 835 (D. Mo. 1981). The same is true where the consumer reporting agency admits error and fails to delete. Grant v. TRW, Inc., 789 F. Supp. 690 (D. Md. 1992).

³⁸ Grays v. Trans Union Credit Info. Co., 759 F.Supp. 390 (N.D. Ohio 1990); Moore v. Credit Info. Corp. of America, 673 F.2d 208 (8th Cir. 1982).

³⁹ Gray v. American Express Co., 743 F.2d 10 (D.C. Cir. 1984).

⁴⁰ 15 U.S.C. 1681m(a); Carroll v. Exxon Co., USA, 434 F.Supp. 557 (D. La. 1977); Austin v. BankAmerica Service Corp., 419 F.Supp. 730 (D. Ga. 1974); Morrissey v. TRW Credit Data, 434 F.Supp. 1107 (S.D.N.Y. 1971).

⁴¹ 15 U.S.C. 1681b(3)(E), 1681e.

⁴² 15 U.S.C. 1681b.

⁴³ See, e.g., Yohay v. City of Alexandria, 827 F.2d 967 (4th Cir. 1987); Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693 (10th Cir. 1980); Hansen v. Morgan, 582 F.2d 1216 (9th Cir. 1978); see also 15 U.S.C.A. 1681b (permissible purposes of consumer reports), 1681n (willful noncompliance -

Credit Report Errors: More Often Than You Think!

A 1989 study by Consolidated Information Services, a user of credit reports, found an error rate of 43 percent in a random sample of 1,500 reports reviewed. A survey by Consumers Union found that 48 percent of the credit report sample contained inaccurate information.⁴⁴ Nonetheless, the industry claims that 99.5 percent of credit reports are accurate.⁴⁵ A fairer assessment of the industry figures produces an error rate of 33 percent.⁴⁶

Courts have found that tortious damage to a consumer's credit rating is compensable. As expressed by the New Hampshire Supreme Court in *Dumas v. State Farm Mutual Auto. Ins. Co.*,⁴⁷ it is a "fallacy that damaged credit and financial ruin are not injuries." The credit industry frequently suggests that credit reports are simply used to assess credit worthiness and that they do not serve a role in punishing the consumer. The truth is that the credit report is used to pressure the consumer into paying bills, whether or not the bills were incurred by the consumer whose credit is at risk.

Handling Errors in Credit Reports

Several types of problems are common: inquiries made without the cardholder's approval; errors in personal information listed on the report; credit or collection accounts the cardholder did not create; negative ratings on accounts that do not belong to the cardholder; erroneous information in public records.

Not all credit inquiries are lawful. And impermissible inquiries can result in

civil liability.⁴⁸ In these cases it is important to determine how and why the inquiry was made. It is then necessary to dispute the inquiry with the agency and the creditor. Remember that excessive inquiries alone can result in the denial of credit.

If there are any errors in the recorded personal information, the cardholder must write the agency and demand that it be corrected. In each situation discussed, it is important to ask that the agency send a corrected copy of the report to recent inquirers.

When there is an error in the account information, the first step is to determine whether the cardholder caused it. If the trade line is in the cardholder's name, the cardholder has a "billing dispute."⁴⁹ The creditor and each agency must be contacted.⁵⁰

The most damaging errors are often found in public records. It is widely acknowledged that a bankruptcy, which can stay on credit reports for 10 years from judgment, is the most damaging mark that can be placed on a credit report.⁵¹ If a report contains erroneous public records data, the consumer reporting agency must be notified.⁵² After receiving notice of the

dispute, the creditor must, within 30 days, send a written acknowledgment that the item is in dispute⁵³ and within 90 days the agency must either make the appropriate corrections or conduct an investigation followed by a written explanation to the cardholder of the reasons why the creditor believes the present, disputed entry on the report is correct.⁵⁴ After the cardholder provides a dispute letter to the creditor, the creditor "may not directly or indirectly threaten to report adversely on the obligor's credit rating because of the obligor's failure to pay the [disputed amount]." If the dispute persists, a civil action may be required to remove the error. Consumer reporting agencies must not only assure that "maximum possible accuracy" of data, but they must employ reasonable procedures to promptly investigate disputes.⁵⁵ Currently, consumer reporting agencies cater to their subscribers. Very rarely do they delete disputed data unless the creditor-subscriber directly orders the deletion. This is one area in which the industry refuses to comply with the FCRA. The FCRA provides limited immunity to creditor-subscribers for the reporting of false data.⁵⁶ Nonetheless, the reporting or failure to delete false or improper data previously reported by the creditor-subscriber forms a basis for a finding of reckless and willful conduct.

Also, the cardholder should immediately write the reporting agency to separately request that a "victim's statement"⁵⁷ be added to the report. The next step is to confirm that each consumer reporting agency lists the statement on the report. Each credit report issued by each consumer reporting agency will bear the victim's statement.

Privacy Rights?

The "right to be let alone" from intrusion by fellow private citizens is not expressly stated in our Constitution.⁵⁸ Nonetheless, federal acts protect consumers from invasions of privacy by govern-

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civil liability), 1681o (negligent noncompliance - civil liability), 1681q (individual obtaining consumer report under false pretenses), 1681r (unauthorized disclosures willfully made by employees of a consumer reporting agency).

⁴⁴ *What Are They Saying About Me? The Results of a Review of 161 Credit Reports from the Three Major Credit Bureaus*, CONSUMERS UNION (April 29, 1991).

⁴⁵ *Bad Credit, No Reason*, U.S. NEWS & WORLD REPORT 65 (January 27, 1992).

⁴⁶ E. Mierzewski, "Nightmare on Credit Street or How the Credit Bureau Ruined My Life," (U.S. Public Interest Research Group, Washington, D.C.), June 12, 1990.

⁴⁷ 111 N.H. 43, 45 (1971).

⁴⁸ 15 U.S.C. 1681b, 1681q. See *Yohay v. City of Alexandria*, supra; *Heath v. Credit Bureau of Sheridan, Inc.*, supra; *Hansen v. Morgan*, supra; *Russell v. Shelter Fin. Services*, 604 F.Supp. 201 (W.D. Mo. 1984).

⁴⁹ 15 U.S.C. 1666(a),(b).

⁵⁰ Contact each of the three major consumer reporting agencies:
TRW, Inc.
P.O. Box 2350
Chatsworth, California 91313-2350
(800) 422-4879
(214) 390-3569
fax (214) 390-1680

Equifax / CSC Credit
652 North Belt East
Suite 133
P.O. Box 674422
Houston, Texas 77267
(713) 878-1900
fax (713) 878-4882

Trans Union Corporation
111 West Jackson, 16th Floor
Chicago, Illinois 60604
(800) 241-2858
312-408-1050

⁵¹ 15 U.S.C. 1681c.

⁵² 15 U.S.C. 1666(a).

⁵³ *Id.*

⁵⁴ 15 U.S.C. 1666a. You must pay any undisputed portion of the bill.

⁵⁵ 15 U.S.C. 1681e, 1681i.

⁵⁶ 15 U.S.C. 1681h(e).

⁵⁷ 15 U.S.C. 1681i(b),(c). The "victim's statement" is also referred to as the "statement of dispute."

⁵⁸ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193.

mental agencies.⁵⁹ The Fair Credit Reporting Act requires that "consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."⁶⁰ The FCRA also compels "consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit...in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."⁶¹ In short, federal law provides the consumer no real protection. Courts have acknowledged that the advent of computerized information storage and retrieval has increased the danger of harm to consumers from the inaccurate and unwarranted disclosure of personal and credit data.⁶²

The New Hampshire Legislature has not enacted laws sufficient to supplement the FCRA and provide a real measure of protection for the credit and privacy rights of its citizens.⁶³ New Hampshire Revised Statutes Annotated chapter 359-B constitutes a consumer credit reporting law that closely tracks the FCRA and, unfortunately, provides little added relief. Many other states have implemented better consumer protections that serve to: (1) reduce reinvestigation periods,⁶⁴ (2) allow consumers to visually inspect their files,⁶⁵ (3) provide consumers a cause of action for privacy invasions,⁶⁶ (4) reduce report-

ing periods from those under 15 U.S.C. section 1681(c),⁶⁷ (5) prevent accumulation of certain data by creditors,⁶⁸ (6) prevent reporting of criminal arrests unless conviction results,⁶⁹ (6) make banking records confidential,⁷⁰ (7) restrict disclosure of tax record data,⁷¹ and (8) limit the price for a credit report charged by the agency to the consumer.⁷²

Using Credit Reports to Investigate?

Increasingly, attorneys, investigators, and police are using consumer reporting agencies to investigate adverse claims and witnesses in the course of litigation. But the FCRA prohibits unauthorized requests for credit reports of adverse litigants.⁷³

Many questions have been raised as to whether the various reports prepared

by insurers constitute "consumer reports" subject to the FCRA.⁷⁴ Courts have held that information and general reports gathered and assembled by insurance companies are not "consumer reports."⁷⁵ The courts appear split on whether an investigative report on an insured claimant may be a "consumer report." The split seems to focus on two concerns: (1) whether a "consumer reporting agency" prepared the report, and (2) the purpose for which the data were assembled.

Police agencies may not obtain consumer reports on suspects or witnesses in the course of a criminal investigation.⁷⁶ FCRA restrictions apply to all persons, including police and governmental entities.⁷⁷ It is impermissible to request or access consumer reports to investigate income or assess collection in domestic pro-

⁵⁹ See, e.g., 12 U.S.C. 3401, et. seq. (Right to Financial Privacy).

⁶⁰ 15 U.S.C. 1681(a)(4).

⁶¹ 15 U.S.C. 1681(b).

⁶² *State v. Credit Bureau of Nashua*, 342 A.2d 640 (N.H. 1975). The court in *People v. Blair*, 602 P.2d 738 (Cal. 1979), in a criminal setting, found that a credit cardholder had a reasonable expectation of privacy and a correlative right to privacy in the information contained in credit card account and charge receipt records and that same will be kept confidential and not disclosed except if compelled by legal process.

⁶³ Robert E. Smith, *Compilation of State and Federal Privacy Laws*, PRIVACY JOURNAL (1992).

⁶⁴ ARIZ. REV. STAT. ANN., § 44-1693(A)(4); CONN. GEN. STAT. ANN., § 36-432(b); LA. REV. STAT. ANN., title 9, § 3571.1(C).

⁶⁵ CAL. CIV. CODE, articles 1785.1, 1786.

⁶⁶ ME. REV. STAT. ANN., title 10, § 1312; MONT. CODE ANN., § 31-3-301, et. seq.; N.Y. GEN. BUS. LAWS, § 380.

⁶⁷ CAL. CIV. CODE, article 1785.13; MASS. GEN. LAWS ANN., ch. 93, § 51, et. seq.; N.M. STAT. ANN., § 56-3-1.

⁶⁸ CAL. CIV. CODE, articles 1725, 1747.8; DEL. CODE ANN., title 11, §§ 914-915; FLA. STAT. ANN., § 832.075; GA. CODE ANN., § 10-1-393.3; IOWA CODE ANN., § 537.8101; KAN. STAT. ANN., § 50-669; MASS. GEN. LAWS ANN., ch. 93, § 104; MINN. STAT. ANN., §§ 325F.981-982; NEVADA REV. STAT., § 598.088; N.J. STAT. ANN., § 56:11-17; N.Y. GEN. BUS. LAWS, § 520-a; N.D. CENT. CODE, § 51-14.1-03; OHIO REV. CODE ANN., § 1349.17; VIRGINIA CODE ANN., §§ 11-33.1, 11-34; WASH. REV. CODE ANN., § 62A-512.

⁶⁹ CONN. GEN. STAT. ANN., § 54-142a; IND. CODE ANN., § 35-4.8; KY. REV. STAT. ANN., § 431.350; R.I. GEN. LAWS, § 12-1-12; S.C. CODE ANN., § 17-4; W.VA. CODE, § 15-2-24(h).

⁷⁰ ALA. CODE, § 5-5A-43; *Peterson v. Idaho First National Bank*, 367 P.2d 284 (Idaho 1961); ME. REV. STAT. ANN., tit. 9-B, § 161; MD. FIN. INST. CODE ANN., § 1-302; OKLA. STAT. ANN., tit. 6, § 2201-2206.

⁷¹ ALASKA STAT., § 9.25.100; COLO. REV. STAT., § 39-21-113; IDAHO CODE, § 63-3077; LA. REV. STAT. ANN. 47:1508; ME. REV. STAT. ANN. 36-5340; N.D. CENT. CODE, § 57-38-57; OHIO REV. CODE ANN., § 5747.18; S.D. CODIFIED LAWS ANN., § 10-43-48; UTAH CODE ANN., § 59-14-72.

⁷² LA. REV. STAT. ANN., title 9, § 3571.1(A)(3); MINN. STAT. ANN., § 13C.01, as amended by ch. 569, § 5 (1991); N.M. STAT. ANN., § 56-3-1. Note: 15 U.S.C. 1681j, 1681i.

⁷³ See 15 U.S.C. 1681n, 1681q; F.T.C. Informal Staff Opinion Letter, C. Lee Peeler, August 27, 1977; F.T.C. Informal Staff Opinion Letter, Kim Garner, June 17, 1985; Decisions Transfer Binder, 1969-1973,

Cons. Credit Guide (CCH) § 99,444 (May 27, 1991); *Maloney v. City of Chicago*, 678 F.Supp. 703 (N.D. Ill. 1987); *Houghton v. New Jersey Manufacturers Ins. Co.*, 795 F.2d 1144 (3d Cir. 1986); *Southern Maryland Credit Bureau, Inc.*, 101 F.T.C. 19, 23 (1983); *Trans Union Credit Information Co.*, 102 F.T.C. 1109 (1983); *Rice v. Montgomery Ward & Co., Inc.*, 450 F.Supp. 668 (D.N.C. 1978).

⁷⁴ *Indiana Ins. Co. v. Plummer Power Mower & Tool Rental, Inc.*, 590 N.E.2d 1085 (Ind. App. 4 Dist. 1992); *Kemp v. City of Orange*, 260 Cal.Rptr. 131 (Cal. App. 4 Dist. 1989); *Cochran v. Metropolitan Life Ins. Co.*, infra; *St Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881 (5th Cir. 1989); *Hovater v. Equifax, Inc.*, 823 F.2d 413 (11th Cir. 1987).

⁷⁵ *Beresch v. Retail Credit Co.*, 358 F.Supp. 260 (D. Cal. 1973) (investigative report is a "consumer report"); *Kiblen v. Pickle*, 653 P.2d 1338 (Wash. App. 1982) (insurance claim investigation report is not a "consumer report" unless used to deny benefits. If benefits are denied, insurer must comply with 15 U.S.C. 1681m). *Cochran v. Metropolitan Life Ins. Co.*, 472 F.Supp. 827 (D. Ga. 1979) (investigative report on medical disability claimant is not a "consumer report").

⁷⁶ *People v. Warmus*, 561 N.Y.S.2d 111 (N.Y. Co. Ct. 1990); *Peeler, F.T.C. Informal Staff Opinion Letter*, Feb. 26, 1979; *White, F.T.C. Informal Staff Opinion Letter*, Feb. 18, 1977.

⁷⁷ *U.S. v. Puntorieri*, 379 F.Supp. 332 (D.N.Y. 1974); *F.T.C. v. Managers, Retail Credit Co.*, 357 F.Supp. 347 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 988 (D.C. Cir. 1973).

ceedings.⁷⁸ However, a creditor may obtain a non-applicant spouse's credit report in the course of investigating an application by the other spouse.⁷⁹ Courts have held that drug screening and urinalysis reports are not "consumer reports."⁸⁰

Prescreening is a process whereby a consumer reporting agency prepares a special search algorithm for a subscriber who seeks a special, specific class of people in order to direct and pinpoint their marketing efforts. The agency uses the algorithm to search its entire database to determine which consumers meet the special criteria of the subscriber. At least one court has held that prescreening reports and the procedures used to assemble the listing are not an invasion of privacy and do not violate the provisions of the FCRA.⁸¹

Statute of Limitations

It is crucial to identify the correct limitation period that applies to claims against consumer reporting agencies. The FCRA provides a two-year period. Generally, the two years begin to run when a consumer report is issued to a user by the agency.⁸² The "discovery rule" tolls the start of the limitation period until the consumer knew or should have known of the issuance of the report or the injury.⁸³ The "discovery rule" applies only in cases of willful or intentional violations of the FCRA. It does not apply to negligence actions. Some courts have held that the "discovery rule" applies only where the

defendant materially and willfully misrepresents information.⁸⁴ Nonetheless, each transmission of the same credit report is a separate and distinct tort to which a separate statute of limitation applies.⁸⁵

The uniform rules that apply to the consumer reporting agencies under the FCRA do not apply to common law claims against the agencies, subscribers, or other third parties.⁸⁶ In federal court these state law claims would be covered by the "Erie" doctrine.

Causation and Evidentiary Comments

One of the most difficult hurdles for a consumer is proving causation. To recover greater than nominal compensatory damages, a credit cardholding plaintiff must prove, by a preponderance of the evidence, that damages were incurred.⁸⁷

One special type of damage—credit denials—present a special causation problem. Plaintiff must show that the credit denial was caused by inaccurate data appearing in the report issued by the agency. Further, plaintiff must tie the inaccuracies of the credit report to the consumer reporting agency's failure to employ "reasonable procedures."⁸⁸ To simplify the perceived mysteries of the credit bureaus and ensure that the double causal link is made, it is critical to carefully explain to the trier of fact how the reporting system functions in connection with basic computer database principles.⁸⁹ Courts have held that causation was proven when plaintiff presented evidence that inaccuracies led an existing creditor to discontinue its relationship with the plaintiff.⁹⁰ Courts have ruled that the doctrines of "res ipsa loquitur" and liability "per se" will not save an otherwise doomed FCRA action.⁹¹

(continued on next page)

⁸⁴ Houghton v. Insurance Crime Prevention Institute, 795 F.2d 322 (3d Cir. 1986); Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985); Lawhorn v. Trans Union Corp., 515 F.Supp. 19 (E.D. Mo. 1981).

⁸⁵ Hyde v. Hibernia National Bank in Jefferson Parish, supra.

⁸⁶ Wilson v. Retail Credit Co., 438 F.2d 1043, 1045 (5th Cir. 1971); Emerson v. J.F. Shea Co., 76 Cal.App.3d 579, 143 Cal.Rptr. 170.

⁸⁷ Cf. Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 119 Cal. Rptr. 82.

⁸⁸ 15 U.S.C. 1681e(b); Pendleton v. Trans Union Systems Corp., 76 F.R.D. 192 (U.S.D.C. E.D. Pa.); Cahlin v. GMAC, 936 F.2d 1151 (11th Cir. 1991).

⁸⁹ Luster v. Retail Credit Co., 575 F.2d 609 (8th Cir. 1978).

⁹⁰ Erdman v. White, 411 N.E.2d 653 (Ind. App. 1980).

⁹¹ Venable v. Equifax Credit Information Services, 1994 W.L. 268264 (E.D. Pa. 1994).

⁷⁸ Houghton v. New Jersey Manufacturers Ins. Co., supra; Chiapetta v. Tellefron, no. 85-C-1673 (N.D. Ill. 1985).

⁷⁹ Smith v. GSH Residential Real Estate Corp., 935 F.2d 1287 (table), unpublished opinion, (4th Cir. 1991); Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984); 15 U.S.C. 1681b(3)(A).

⁸⁰ Hodge v. Texaco, U.S.A., 764 F.Supp. 424 (W.D. La. 1991); Chube v. Exxon Chem. Americas, 760 F.Supp. 557 (M.D. La. 1991).

⁸¹ Yonter v. ITT Cons. Fin. Corp., 1992 W.L. 58798 (E.D. La. 1992); Yonter v. Aetna Fin. Co., 777 F.Supp. 490 (E.D. La. 1991).

⁸² Hyde v. Hibernia Nat'l Bank, 861 F.2d 446 (5th Cir. 1988), cert. denied, 491 U.S. 910, 105 L.Ed.2d 706, 109 S.Ct. 3199.

⁸³ Hyde v. Hibernia Nat'l Bank, supra; Rylewicz v. Beaton Services, Ltd., 698 F.Supp. 1391 (N.D. Ill. 1988), aff'd, 888 F.2d 1175 (7th Cir. 1988).

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THEFT OF IDENTITY (continued from page 185)

Expert testimony about the interpretation of credit reports is admissible and probably necessary to assist the trier of fact in understanding coded and cryptic items on the report.⁹² Many of the coded items form the crux of the detailed account histories, credit scoring, and ratings. As plaintiff must prove the inaccuracies and causation, expert testimony can be critical.

In claims of reputational damage, consumers are entitled to a presumption that their reputations are good at the time of the FCRA violation.⁹³ This presumption makes it unnecessary for the plaintiff to prove his own good name until attacked by the defense.

Courts have held that inaccuracies⁹⁴ in a consumer report can alone be the basis of proof that a consumer reporting

agency failed to use reasonable procedures to ensure the maximum possible accuracy of data it supplied.⁹⁵ After all, erroneous reports serve only to injure the subjects of the reports and deny them the benefits of their good names and credit records.⁹⁶ Consumer reporting agencies must present information so as to maximize accuracy. They will be held liable for FCRA violations resulting in harm from the original publication and all reasonably foreseeable republications.⁹⁷

Conclusion

The people who make unlawful and reckless use of technology are out of control. It is a danger we all face. The consumer reporting industry has long operated behind a veil of secrecy. While profits have soared, they did so at the expense of our privacy and security. We have advanced to the information age, yet our outdated laws seem to fit the "horse and buggy" era. As attorneys, we have an obligation to assist industry while at the same time improving our laws to protect the consuming public.

⁹² *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 441 (n.10) (3d Cir. 1971); *Commonwealth v. Kaufman*, 126 A.2d 758, 761 (Pa. Super. 1956).

⁹³ *Razor v. Retail Credit Co.*, 554 P.2d 1041 (Wash. 1976).

⁹⁴ Determining accuracy means assessing more than factual truthfulness and requires analyzing the report for its potential to mislead. This factor must be weighed against the availability of more accurate information and the burden of producing such information. *Alexander v. Moore & Associates, Inc.*, 553 F.Supp. 948 (D. Haw. 1982); *Koropoulos v. The Credit Bureau, Inc.*, 734 F.2d 37 (D.C. Cir. 1984).

⁹⁵ *Cf. Stewart v. The Credit Bureau, Inc.*, 734 F.2d 47, 49 (D.C. Cir. 1984).

⁹⁶ *Roemer v. Retail Credit Co.*, 3 Cal.App.3d 368, 83 Cal. Rptr. 540 (1970). *In re Retailers Comm. Agency, Inc.*, 174 N.E.2d 376 (Mass. 1961).

⁹⁷ *Alexander v. Moore & Associates, Inc.*, 553 F.Supp. 948 (D. Haw. 1982); *Luster v. Retail Credit Co.*, 575 F.2d 609 (8th Cir. 1978).

PRESIDENT'S MESSAGE
(continued from page 154)

Unfortunately, a number of the recently elected politicians are not listening to voters who are calling for less government and more accountability. Therefore, we expect to face major "tort reform" proposals in both the state and federal upcoming legislative sessions.

On the federal level you will be hearing about the so-called "Common Sense Legal Reform Act of 1995." Although not completed, some of its provisions include loser pay measures, restrictions on products liability, including abolition of strict liability for product sellers, abolition of private right of actions through use of federal pre-emption legislation, and the elimination of joint liability for non-economic damages.

On the state level the agenda already includes loser pay proposals and legislation to limit the responsibility of public officials to properly perform their duties. It is ironic that the same politicians who have run on a platform of less government are embarking on a course to legislate away the rights of individual taxpayers and consumers, rights that have been developed over several hundred years.

Our association must take the lead in the upcoming legislative fights and make the point that it is in the courts that justice belongs to people, not politicians, to juries, not insurance companies, and to individuals, not government.

In the upcoming months many of you will be hearing from us as we seek your assistance to ensure this message is brought home to our elected representatives.

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President's Message

by A.G. O'Neil, Jr.

The month of November proved to be a very eventful and informative period of my presidency.

November began with my being fortunate enough to be able to participate in our second annual Bermuda Fall Seminar. Members of our organization joined the Massachusetts Academy of Trial Attorneys as well as trial attorneys from Rhode Island and Vermont at the Elbow Beach Hotel in Bermuda. There we were treated to good weather, great food and well-run CLE programs.

Much of the credit for the success of this event must be given to the Massachusetts Academy of Trial Attorneys, especially its Executive Director, Barbara Sullivan, and her staff, Susan Buerkel and Louise O'Connor. Together they organized numerous social events, including a golf tournament, tennis tournament and several evening receptions. I am happy to report the New Hampshire contingent accounted itself well in these events, including Steve Goldman, whose team won the golf tournament, and Laurie Kinghorn, who won the ladies' tennis tournament, outdoing her husband, Cliff, who managed to place third. Rumor has it that our organization also posted near 100 percent attendance at the evening receptions.

New Hampshire attorneys also figured prominently in the CLE programs. David Cole helped organize the Federal Court Seminar and then served as a moderator for a seminar featuring David Nixon and Dort Bigg discussing the handling of the "Professional Negligence Case." Ken Brown also served as a panelist on a program focusing on "Significant Current Issues in Federal Practice."

On our final evening a number of our members gathered at the Henry the VIII restaurant for an end-of-vacation dinner. There we learned that a certain member of the defense bar has many hidden talents (see photographs on page 157 for further details).

Current plans call for us to participate in this event again next year. It is an event you should not miss!

ON THE COVER:

Senate Chamber,
New Hampshire State House —
photo by Bill Finney

Unfortunately, the relaxed mood created by the trip to Bermuda was short-lived. We returned home on the same day as the nationwide election results were being reported. Two days later Tom Watson, Jennifer Soldati and I were on our way to New Orleans to participate in a legislative conference with leaders from state Trial Lawyers organizations from around the country. During the conference we learned that our state has not been alone in facing significant attacks on the rights of its citizens to hold wrongdoers accountable and to use the court system to demand positive change. The good news is that when voters have been presented with a chance to vote directly on so-called "tort reform," in states such as Arizona and Michigan, they have soundly rejected it by margins of nearly 2-1.

(continued on page 188)



A.G. "Jerry" O'Neil, Jr. was born on May 15, 1954. He received his B.A. from St. Michael's College in Winooski, Vermont, and his J.D. from DePaul University in 1979. He is a member of the Belknap County Bar Association, the New Hampshire Bar Association, and the Association of Trial Lawyers of America. He is a partner in the Laconia firm of Normandin, Cheney & O'Neil.

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TRIAL BAR NEWS

ISSN 08934789
280 Pleasant Street
Concord, N.H. 03301
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The statements and opinions expressed in the editorials, articles and commentaries are those of the authors and not necessarily those of the Association. Although the TRIAL BAR NEWS is the official publication of the Association, opinions expressed should not be construed as an endorsement by the New Hampshire Trial Lawyers Association of any opinions or facts expressed therein. Opposing viewpoints are welcome and, if possible, will be published.

Subscription price: \$150/year to non-members; \$50 to members (included in annual dues). Advertising rates on request. POSTMASTER: Send address changes to TRIAL BAR NEWS, P.O. Box 447, Concord, N.H. 03302-0447. Second-class postage paid at Concord, N.H.

TRIAL BAR NEWS

Volume 16 - Winter 1994



Includes TBN Cumulative
Index Update

THEFT OF IDENTITY: Data Rape

By: David A. Szwak



David A. Szwak is an attorney with Bodenheimer, Jones, Klotz & Simmons, in Shreveport, Louisiana. He is admitted to practice in Louisiana, as well as the federal courts

of the Eastern, Western and Middle Districts of Louisiana, the Eastern District of Arkansas, the Southern and Northern Districts of Texas and the Fifth Circuit court of Appeals. He is a member of the Harry V. Booth American Inn of Court, Shreveport Chapter, and is Editor of "The Bar Review," Shreveport Bar Association. He has authored various legal articles, but is an acknowledged expert in the field of consumer credit. He has authored other credit-related articles, lectured on the credit

topics and regularly litigates in the consumer field.

Computerized information super-highway pirates are stealing credit reports of unknowing victims and using the stolen data to commit application fraud. Creditors make it easy, since they take little care in investigating applications and often issue credit to the defrauders in the identity of an unsuspecting victim. The defrauder lives in luxury on the victim's credit, which is rapidly being destroyed. When the creditors report unpaid charges in the victim's identity to credit bureaus, those victims are often harassed and sued by the duped creditors. Victims describe it as "data rape" and it could happen to you or your clients. You will need to know what to do if that happens and this article can help.

The Shaw Fiasco

In May, 1991, Steven M. Shaw, a used car salesman in Orlando, Florida, used his employer's credit bureau terminal to access the credit reports¹ of Stephen J. Shaw, of Washington, D.C., and other Shaws' with the name "Steve," from national consumer reporting super-bureaus. He obtained the reports and began making applications for credit with banks, retailers and credit card companies in the identities of the various victims Shaw. Using the same terminal he re-accessed the reports to monitor and enlarge the fraud.

After ringing up over \$100,000 in credit in Stephen J. Shaw's identity alone, a fraud analyst noticed discrepancies in the victim's report when the defrauder made application and a report inquiry was made. Imagine the shock of learning that your credit reports reflect that you live in another state, with many thousands of dollars of debt and countless credit inquiries due to the volume of fraudulent applications. Further, it becomes your job to get the duped creditors and credit bureaus to delete and suppress the false data from your reports and warn future creditors. Lawsuits may be filed against you by the duped creditors in an attempt to collect from you, not to mention harassing letters, calls and visits from duped creditors, collectors and credit bureau employees. Stephen J. Shaw and many other fraud victims feel they have been raped by the defrauders, while being pinned down by the credit industry. The number of cases of theft of identity is growing exponentially.² Victims like Shaw have begun to fight back by bringing suits against the defrauders and the credit industry.³ The Fair Credit Reporting Act [FCRA] has not provided sufficient protection to consumers and the likelihood that Congress will pass any law to restrict the industry appears grim.

Stevenson v. TRW: Breaking Ground

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In early 1989, John Stevenson began receiving harassing calls from bill collectors regarding accounts opened by a defrauder in Stevenson's identity. After receiving his credit reports from the various superbureaus, he discovered about sixteen (16) fraudulent accounts. He sent a dispute letter to TRW. TRW, almost one month later, sent Consumer Dispute Verifications (CDV's) to the disputed account creditors. CDV's are computer generated forms sent to the subscriber, by mail, asking the subscriber to "check whether the information they have about a consumer matches the information appearing on the consumer's TRW credit report."

After its initial investigation, TRW removed some of the fraudulent accounts. TRW claimed that other subscribers "insisted that the account(s) was (were) Stevenson's." A fraud warning statement was finally added to Stevenson's report in December, 1989, advising future inquiring creditors-subscribers that Stevenson's identifiers had been used fraudulently to obtain credit. In February, 1990, TRW "completed" its reinvestigation and claimed all fraud-related items were deleted. Nonetheless, false data continued to appear and reappear, either because it had never been deleted by TRW or due to TRW's failure to suppress the item(s) in the event incoming data transmissions from its subscribers continued to maintain the false, fraud-related information.

Stevenson's problems continued and he eventually sued TRW which resulted in a bench trial in a Dallas, Texas federal court. The Judge awarded Stevenson actual damages of \$30,000, attorneys' fees of \$20,700, and punitive damages of \$100,000. On appeal, the Fifth Circuit affirmed the compensatory awards but reversed the punitive award, finding "willfulness" had not been proven.

TRW was found to have violated the FCRA in several respects. First, TRW failed to employ "reasonable procedures" to promptly reinvestigate existing, disputed data on Stevenson's report. Important and separable is the fact that TRW failed to promptly delete false data and use data suppression measures to prevent recapture of false data should its subscribers fail to clear their internal

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records and/or magnetic tape data transmissions. The Court also found that TRW failed to post an adequate notice on its reports to advise Stevenson that he had a right to have his corrected reports sent to inquiring subscribers who received prior reports containing errors. Finally, the Judge found that TRW libeled Stevenson by recklessly publishing false reports without regard to the truth or falsity of their contents, particularly in light of Stevenson's complaints.

Of interest is the Court's finding that TRW did not violate its duty to use reasonable procedures to assure the maximum possible accuracy of each new item of data placed on Stevenson's report.⁷ TRW maintains a databank(s), regionally subdivided, whereby its subscribers forward magnetic tape and other data transmissions which are fed directly into the input device. The incoming data bears consumer personal identification coding which is supposed to route each item of data, through the matching algorithm, to

the proper credit report. The name, address and social security number seem to be the three (3) key identifiers used in matching incoming data to files. Thus, when the defrauder used the name "John Stevenson," with plaintiff's social security number, regardless of the mail drop address listed or used, the resulting fraudulent account data ended up on Plaintiff's credit reports. TRW's matching algorithm appears to place incoming data in files which bear any two of the three key identifiers discussed above. This can result in the creation of new files and/or placement of erroneous data in other files or multiple, existing files.

The Court refused to uphold the District Court's finding that TRW willfully violated the FRCA, particularly 15 U.S.C. 1681i(a). This provision requires a consumer reporting agency to investigate and delete inaccurate or unverifiable information disputed by a consumer within a "reasonable time" from receipt of a dispute or notice of error.⁸ TRW

argued that ten weeks or seventy (70) days was "reasonable" to reinvestigate Stevenson's dispute. Other authorities have suggested that thirty (30) days is fair and "reasonable".⁹ In the high-tech world today, including electronic transmissions, telefaxes and telephones, it seems evident that thirty (30) days is far more than fair and "reasonable," particularly in cases like Stevenson, where the agencies and their agents, the subscribers, through their own laxity and recklessness, allowed the fraud and then attempted to place the onus on the fraud victim to correct the matter.¹⁰ Fraud disputes should not require excessive time to resolve. Application fraud cases, as in Stevenson, generally bear obvious signs that the victim had no association with the disputed account. For that reason alone the account should be deleted from the victim's reports.

Another problem occurs where the consumer reporting agency deletes data yet the same item continues to "reap-

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pear". This can be caused by the agency's failure to delete the item in the first place, by the agency's failure to engage the data suppression function when the data is initially deleted, or by internal deficiencies within the agency's computer hardware or software which allows data recapture when the subscriber fails to clear its records and magnetic tapes. The Stevenson Court held that TRW was merely negligent in allowing inaccurate, deleted data to be placed back on the report.¹¹

Still more disturbing is the fact that consumer reporting agencies rely, almost exclusively, on magnetic tape data transmissions from their subscribers in order to update their files. This laxity has been adopted in their reinvestigation procedures.¹² While the agencies are not "strictly liable" for inaccurate data in their files, they bear "some responsibility" in evaluating, assessing and investigating the accuracy of information obtained from their subscribers.¹³ The Stevenson Court went one step further in placing the burden of reinvestigation "squarely" on the agencies.¹⁴ An agency must act impartially and in good faith in carefully evaluating all information and making a thorough and complete investigation before disseminating information to its subscribers.¹⁵ Thus, agencies may not simply mimic their subscribers.¹⁶ The agencies regularly fail to comply with the FCRA mandates concerning reinvestigation and security of data.

Conclusion

Technology is not out of control but the people making unlawful and reckless use of it are and that is the danger we all face. As attorneys we must be aware of how our laws can be improved to protect the general public while assisting industry. The consumer reporting industry has long operated behind a veil of secrecy and, while their profits soared, our privacy and security have undergone a steady degeneration. We are in the information age yet our outdated laws fit the "horse and buggy" era.

Endnotes

1. The standard credit report contains a vast amount of personal information, trade line (account) information, and

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Theft of Identity

A Credit Nightmare

By David A. Szwak

Years ago, a person's credit worthiness¹ was judged by local neighbors, friends, and merchants. A person's reputation in his or her community was a valued and necessary asset. The accuracy of the judgment of reputation depended on how many persons concurred. As society expanded and became more mobile, local credit bureaus and larger consumer reporting agencies² formed to track information on individual consumers. The advent of management information systems and computer databases revolutionized the means by which these entities could enter, delete, store, report, and search for items of information. Computer database technology provided the key to prevent widespread errors, obsolete information, and endless duplication of paper copies. Despite advances in technology new and creative problems have arisen in the credit reporting industry. In this article I will identify and discuss but a few of the major problems plaguing the credit reporting industry.

Personal Privacy³ And Confidentiality Of Credit Records

Credit reporting agencies and other creditors control massive amounts of information about each consumer.⁴ The data can be accessed through a computer terminal linked to any credit bureau.⁵ Usually, a credit bureau leases terminals to any person or entity who expresses a "need" and makes a "promise" not to misuse any information disclosed.⁶

Consumers do not realize the vast misuse of personal and credit information occurring each day.⁷ Such misuse occurs in many ways.⁸ For example, consider this scenario:⁹ A dishonest car salesman, while on the dealership premises, uses the dealership credit bureau terminal by turning the computer device on, entering a "1/800" access number (usually and foolishly posted on the face of the monitor or keyboard) and a first and last name (properly spelled) to retrieve a full credit report of the target of the inquiry.¹⁰ Armed with sufficient information, the defrauder begins making applications for credit.¹¹ Cars, boats, mobile

homes, VCR's, furniture, and the like are new luxury items purchased in the identities of unsuspecting victims.

Before discussing the subsequent effects of such a scheme, I want to focus on the initial problem. First, the car dealership, like most businesses, is not adequately warned of the potential for misuse and the relative ease of unauthorized inquiries.¹² Nonetheless, this should not excuse the dealership for leaving the device unguarded in the showroom or in an area accessible to anyone. Also, some discretion and care should have been used to ensure that only "authorized,"¹³ bonded employees use the device.

Next, the credit bureau or entity who leased the computer terminal failed to incorporate any of the available hardware or external safeguards¹⁴ which would allow a business ("user") to prevent access to the device by unauthorized persons.¹⁵ Many people do not realize that a computer device can be protected by a key and lock or similar device, just like a door. Individual user identifiers can be issued to authorized personnel. In the future, fingerprint and eyeball scanners will be used to identify computer users. Third, the complete database system, the warehouse of billions of bytes of data, lacked any software or other internal safeguards. The defrauder is able to merely dial a "1/800" phone number to complete access by modem linkup. Thereafter, the defrauder is only required to enter a first and last name, properly spelled,¹⁶ to retrieve a full credit report on the party made target of the inquiry, not to mention the credit reports of others with the same name.¹⁷ A credit report contains a vast amount of information which bears upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, mode of living, and other personal characteristics.¹⁸ The sad truth is that the defrauder could have entered your or my name and assumed our identities, thereby destroying our credit worthiness, reputation, and credit history. It should be noted that defrauders tend to target the elderly or others who have perfect credit and pay histories. You should not expect a defrauder to assume a deadbeat's identity, as he or she already has that — nothing ventured, nothing gained!¹⁹

Finally, a couple of related scams affecting your privacy are operating. The Social Security Administration has been the target of numerous information brokers, like Nationwide Electronic Tracking (NET) of Tampa, FL, as social security records contain a large quantity of information, including a person's past earnings, names of employers, family history, bank account numbers, and the like. Bribery of social security employees recently led to mass indictments. Thieves sought such records for sale to lawyers, investigators, employers, and insurance companies. Another scam involves telephonic or personal requests for unnecessary information by department stores, banks, governmental agencies, and other private entities and persons. Many times this is the easiest source of data for the defrauder.

Your personal and credit information is being collected, assembled and sold by many entities without your knowledge or consent.²⁰ Specialized, "target market research" lists are compiled for sale to anyone seeking a common group of persons. For example, you may not want your name on a list of persons purchasing pornography based upon your subscription to Playboy. Of course, the purchases of persons living at your address or with similar names may cause your name to end up on unusual mailing lists.

Free-Wheeling Plastic Cards: Credit Issuer's Duties

While a credit issuer has many duties in the extension process, I intend to focus on the most generic process. Have you ever wondered why credit card issuers only require a "bare-bones" credit application, prior to issuing a card to you, while a bank or other lending institution hassled you about every minor detail of your personal and credit life?²¹ I believe the answer lies in the regulation of the industry²² and the fact that credit card issuers expect a certain percentage of fraud²³ thereby building these losses into their economic "profit" equation as a cost of doing business.

Some time ago the credit card industry was virtually unregulated so many credit issuers decided to market cards by directly mailing activated credit devices, on an

unsolicited basis, to everyone. Profits rose as many cards were received and used by new customers. A large number of the cards fell into the hands of defrauders who inadvertently received the devices. Many consumers complained²⁴ of credit reporting errors based on the fraudulent use of the credit device in their name.

Slowly, but surely, Congress worked and enacted 15 U.S.C. 1642 which provides (in pertinent part): "No credit card²⁵ shall be issued except in response to a request or application therefor."

Also enacted was 15 U.S.C. 1643 which provides that a cardholder may only be held "liable" for the unauthorized use of a credit card if "the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it." The provision also states that the card holder may be held liable for unauthorized charges if the credit card is an "accepted credit card." This provision creates a question as to whether or not a credit issuer is holding a person "liable" when the issuer reports negatively on the account to consumer reporting agencies. In the defrauder example I have cited, it seems clear that the card is not "accepted" regardless of whether the issuer used any means to identify the user of the device as authorized. While the statutory law has been drafted and narrowed to favor the credit industry,²⁶ the jurisprudence has been more even-handed. Courts have uniformly held that a credit issuer must perform a "necessary investigation"²⁷ of the applicant prior to issuing a credit card or other credit extension. The investigation should include, at a minimum, verifying the applicant's identity (as matching the application), scrutinizing the applicant's credit report, and checking other references and information provided. Even if the issuer decides to forego verification of the applicant's identity during the application process, the issuer must use some defined "method whereby the user of such card can be identified as the person authorized to use it."²⁸ How many times has a sales clerk asked to see your picture identification or driver's license when using any of your credit cards?²⁹

I venture to guess that it rarely occurs. It is not a burden to commerce to take an extra moment to verify a person's identity and, at least, note the identity of the user, if he or she is not the person named on the credit card.

Consumers have been afforded some relief by the Fair Credit Billing Act,³⁰ Credit Transactions Act,³¹ and the Fair Credit Reporting Act,³² which have defined areas of coverage and are part of the broad

set of federal laws generally known as the "Consumer Credit Protection Act of 1968."³³

Credit Report Errors: What Can I Do?

People rarely check their credit report³⁴ until they need it to make a purchase. In fact, studies show that only three to five percent of all Americans see their credit reports and, for 30 to 50 percent of all consumers, errors,³⁵ of some kind, appear on the report.³⁶ Some of the errors are harmless, but many are negative and cause a potential creditor to deny credit.³⁷ Do you know what to do if you find any errors on your credit report? The following outline should assist you.

The first step is to contact each of the three major consumer reporting agencies: TRW Inc.,³⁸ P.O. Box 2350, Chatsworth, CA 91313-2350, call 1/800/422-4879; Equifax/CSC Credit,³⁹ 652 North Belt East, Suite 133, P.O. Box 674422, Houston 77267, call 713/878-1900; Trans Union Corporation,⁴⁰ 208 South Market Street, Suite 430, Wichita, KS 67202, call 713/873-5532 (Houston office).

Your letter,⁴¹ by certified mail⁴² should request a copy of your credit report,⁴³ fully identify yourself⁴⁴ and enclose a check for the copy request,⁴⁵ unless you were recently denied credit in which case the inquiry is free.⁴⁶ Recent legislation by various states reduced the fees for reports but credit reporting political action committees (PACS) have vowed to fight any restrictions.

Upon receiving each report you must carefully review all areas of the reports. Each report should have instructions for ease of interpretation.⁴⁷ There are several errors which are common. The first involves credit inquiries. You may find that some party has inquired about your credit without your approval.⁴⁸ If you find such an inquiry listed, contact the consumer reporting agency and get the full name, address, and phone number of the inquirer. Contact the company⁴⁹ and demand an explanation of why your report was pulled by the company. Thereafter you should demand removal of any improper inquiry from your report.⁵⁰ One of the factors causing credit denial is the existence of too many credit inquiries on your report within a given period.⁵¹ It is unlawful and grounds for a civil action when a person inquires about your credit for an impermissible purpose.⁵²

The second type of error involves personal information listed on the report. If you find any errors in your address,

employment, or other personal information, you need to write the consumer reporting agency and clearly explain their error(s) and demand correction. In each situation ask for a copy of the corrected report.

The final and most prevalent problem is erroneous credit account⁵³ or public records information on the credit report. Such errors may include the listing of credit accounts you did not create, collection accounts for which you are not liable, negative ratings on accounts which do not belong to you or public records information which is erroneous or which should not be linked to you. When you find an error in credit account or public record information⁵⁴ you must first determine whether the listed account or information is something which you created or allowed to be opened in your name. If the account or entry is a proper listing⁵⁵ but contains erroneous information, you have a "billing dispute"⁵⁶ problem. You must write the consumer reporting agency and the creditor explaining the erroneous information⁵⁷ you found and demand removal of the error.⁵⁸ After receiving your notice of dispute the creditor must, within 30 days, send you written acknowledgment of your dispute and, not later than 90 days after receipt of your notice, either make the appropriate corrections in your report or send a written explanation to you, after conducting an investigation of your dispute, setting forth the reasons why the creditor believes the present, disputed entry on your report is correct.⁵⁹ After you provide a dispute letter⁶⁰ to the creditor, the creditor "may not directly or indirectly threaten to report⁶¹ adversely on the obligor's credit rating or credit standing because of the obligor's failure to pay the amount [the disputed amount]..."⁶² If the dispute persists, a civil action may be required to remove the error from your report.⁶³

If you find an account on your report which you do not recognize and did not authorize, then you are faced with either a problem of your report being "mixed"⁶⁴ with the report of another consumer, usually a consumer reporting agency error, or a probable case of application fraud, whereby someone may have assumed your personal and credit identity. You must immediately write the consumer reporting agency and the creditor(s) whose account(s) appear on your report. Advise the creditor(s) that the account erroneously appears on your credit report and demand its removal. Fully identify yourself so no question can be raised as to your identity, as complainant. Also, ask for a copy of all account information and the credit appli-

cation. If more than one account appears as such, you are likely facing a defrauder using your personal and credit identity.⁶⁵ You must immediately contact the United States Secret Service. The Secret Service maintains offices in most major cities. Explain the situation and provide them copies of all reports and other documents. Remember, the Secret Service can help locate, investigate, and prosecute the defrauder. Also, immediately write the reporting agency, in a separate request, and demand that a "victim's statement" be added to your report stating your belief that your personal and credit identity is being used without your permission.⁶⁷ In the statement, clearly demand that no credit be extended in your name without verbal and written verification from you at your home or work addresses and your home or work telephone numbers.⁶⁸ Be sure that each consumer reporting agency lists the statement on your report. Each credit report issued by each consumer reporting agency will bear the victim's statement.⁶⁹ During the necessary investigation in the credit extension process, the credit issuer should review the applicant's credit report and the credit issuer must see the victim's statement.⁷⁰

The most important thing to do in all cases is to document each phone call, letter, or other communication. Keep copies of all written communications. Make notes of the contents and participants of all verbal communications. When possible, use certified mail to ensure proof of your efforts to communicate. It is advantageous to enlist an attorney in the early stages so that documentation can be monitored.

Conclusion

It is always preferable to avoid costly litigation. However, if it becomes necessary in order to clear your good name⁷¹ and preserve your valued property and privacy rights in credit worthiness then this article should provide a useful course of action.⁷² Careful documentation and persistence should produce favorable results.

1. Generally, information which involves a person's "credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C.S. § 1681a(d) (1982).
2. Credit bureaus, regardless of locality and size, are "consumer reporting agencies," as defined in 15 U.S.C.S. § 1681a(f) (1982). Some larger credit bureaus or "superbureaus" are regional or national clearing-houses for credit data. TRW, Trans Union and Equifax/CSC Credit are the three main "superbureaus" that centralize and service the large network of smaller, local credit bureaus.
3. In 1990, a Harris Poll, at the direction of

Equifax Credit Information Services, Inc., "found that 79 percent of those surveyed were concerned about threats to their personal privacy. Only 64 percent had expressed the same fear in a 1978 poll. The 1990 poll also found that close to half those surveyed thought that technology had gotten out of control. (emphasis added). What Price Privacy, Consumer Reports, May 1991 at 356. Technology is not out of control but the people making unlawful and/or improper use of the technology are, and that is the danger.

4. There is a growing market for information about consumers. Not mere mailing list data but information about your most intimate transactions. The more a business knows about you the more focused their marketing efforts can be. In *People v. Blair*, 602 P.2d 738 (Cal. 1979), the court found that a credit card holder has a reasonable expectation of privacy and a correlative right to privacy in the information contained in credit card account and charge receipt records and that same will be kept confidential and not disclosed except if compelled by legal process.
5. Recently, Equifax Credit Information Services, a consumer reporting agency, and Lotus Development, a software manufacturer, terminated a plan to market a database which would have allowed anyone with a computer to purchase a list of names, buying habits, and income levels of selected households.
6. There are no legal restrictions on who may obtain a credit reporting terminal. The "consumer reporting agency" may provide a credit report to any person if the agency has "reason to believe" the person has a "legitimate business need" for the report. 15 U.S.C.S. § 1681b(3)(E) (1982). There are other "permissible purposes" described in the FCRA. 15 U.S.C.S. § 1681b (1982). Terminal subscribers simply certify that they need the terminal and agree to pay a monthly fee and a small fee per report. The subscriber's individual inquiries are not monitored to ensure that reports are retrieved for the certified use.
7. Computerized information storage and retrieval has increased the danger of harm to consumers resulting from inaccurate and unwarranted disclosures of personal and credit data. *State v. Credit Bureau of Nashua*, 342 A.2d 640 (N.H. 1975).
8. More often, attorneys are using consumer reporting agencies to investigate adverse claims and witnesses in the course of litigation. This problem has been referred to as the "Heeter-Cahoots violation."
9. See, e.g., *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967 (4th Cir. 1987); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214 (9th Cir. 1978); see also, 15 U.S.C.S. § 1681b (1982) (permissible purposes of consumer reports), *id.* at § 1681n (willful non-compliance — civil liability), *id.* at § 1681o (negligent noncompliance — civil liability), *id.* at § 1681q (individual obtaining consumer report under false pretenses), *id.* at § 1681r (unauthorized disclosures willfully made by employees of a consumer reporting agency).
10. See, e.g., *Charles A. Ferguson, et al v. Charles E. Ferguson, et al*, suit no. J-C-92-2, United States District Court, Eastern

District of Arkansas (1992); *Brock, et al v. Edward Brock, et al*, suit no. H-93-0317, United States District Court, Southern District of Texas (1993).

11. "Application fraud" occurs when someone else uses your "personal identifiers" to apply for credit. Usually, the victim's name, or some derivation, and the victim's social security number are used. A post office box or other mailing address accessible to the defrauder is listed on the application. One of America's largest retailers maintains that "[N]ew application fraud continues to be the fastest growing area for fraud losses. The number of new application fraud incidents during 1991 was approximately 34 percent above 1990 figures and 20 percent of all fraud losses. New application fraud losses average \$1,264 (per fraud account) compared to \$856 for all other types of fraud loss. Fraud losses exceeded more than \$3.5 million in 1991 (for this retailer alone). This figure does not take into consideration the expense associated with the follow up and investigation. (parenthetical explanations added)." See, e.g., *Stephanie A. Michael v. TRW Inc., et al*, suit no. 92-0669-CV-W-3, United States District Court, Western District of Missouri (1992); *Eric M. Brown, et al v. American Express Company, et al*, suit no. 2-92-CV-0130 (Tex.).
12. Consumer reporting agencies currently afford terminals to almost all subscribers with an unlimited search algorithm. In essence, the subscriber-inquirer is not limited in their ability to retrieve all data and need only enter a first and last name to access reports. If this sounds incredible please read Jeffrey Rothfeder, *Privacy For Sale* (1992).
13. Under a subscriber agreement with a consumer reporting agency, the subscriber is to identify and designate the users of the terminal.
14. Even a company policy and enforcement procedure would be helpful to deter such employee misuse.
15. See, e.g., *Yohay v. City of Alexandria*, 827 F.2d 967 (4th Cir. 1987).
16. This is an unrestricted inquiry search algorithm. It is commonly provided to all subscribers.
17. A "name only" search is likely to turn up numerous persons with the same name.
18. The standard credit report has four parts:
 - a. Personal Information: name, address, social security number, date of birth, all prior addresses, current addresses, spouse's name, names and addresses of current and past employers, income information, and other data in coded form;
 - b. Trade line information: A listing of current and past accounts is shown. Next to each account is the date the account was opened, the status of the account, rating as provided by the creditor, detailed pay history, credit limits, account balance, account verification date, terms of the account, type of account (revolving, installment, 30/60/90, etc.), account designation (co-signor, authorized user, primary, etc.) and other coded data if a late pay, collection, repossession, or legal action is involved.
 - c. Public Record Data: Judgments, tax liens, bankruptcies, legal actions, repossessions, collections, consumer credit

counseling, etc. Few courts exist which send the data directly to the bureaus by magnetic tape. Many credit bureaus pay persons, many of whom are unqualified to interpret legal documents, to scour the public records to collect any data which may exist. You may recall hearing about the Norwich, VT, tax lien fiasco by TRW.

- d. Credit Inquiries: At the bottom of every credit report is a cryptic listing of persons, companies and others who have requested the report of the individual. Inquiries usually drop from the report after two years from the date of inquiry. Persons making inquiries must have a "permissible purpose" for peering into a file.

Also, "credit scoring" is done by credit bureaus when a creditor retrieves your credit report. Scoring is the credit bureau's numerical assessment of the consumer as a credit risk based upon standard factors and application information.

Credit scoring is very complex and beyond the scope of this article.

19. Industry-wide credit fraud equates to many billions of dollars of losses per year. Guess who pays for that fraud loss? The "cost of doing business," in such a lax manner, is passed on to all credit card holders in the form of higher interest rates.
20. Grocery stores are currently employing scanner devices which provide detailed lists of items you buy. This helps grocers track inventory and purchases. Have you seen the recent Citibank commercials? They are going to allow you to use your Visa at the grocery stores. After each purchase, Citibank will have a complete list of your purchases which it, in turn, will sell to others who provide consumer profiles, buying habits, and the like. It should be obvious that your current credit account and charge receipt data is being distributed by creditors. You may want to be cautious about where

you use your credit card! In any event, I think it is fair to say that you have a reasonable expectation that your grocery or other credit purchases will not and should not be distributed to third persons.

21. There are generally three types of credit cards: (1) multi-purpose bankcards (e.g., Mastercard and Visa); (2) gasoline and retailer cards; and (3) travel and entertainment cards (e.g., American Express Travel Related Services, Inc.). A study in the 1980s evidenced that 48 percent of American families had credit cards with at least one national retailer, 42 percent with at least one bank, 37 percent with at least one other retailer, 28 percent with at least one gasoline company, 10 percent with at least one travel and entertainment company, and five percent have at least one card of other kinds. Federal Reserve Bulletin, December 1984. These percentages have increased since the 1980s.
22. I do not believe the government is capable of restricting the credit industry by legislation but I do believe that the industry should not be immunized from the social controls of litigation.
23. Credit card issuers are in a better position than consumers to prevent and ensure against the risk of credit card fraud and credit card theft by mail, particularly application fraud, where the card holder never received the device or never requested the device. *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196 (2d Cir. 1974).
24. In fact, in 1991, the Federal Trade Commission received more than 10,000 consumer complaints concerning credit report errors and the credit bureaus' refusals to delete false data. The number of complaints have risen at 20 percent a year.
25. A "credit card" is merely an indication to sellers of commodities that the person who received the card from the issuer will pay or ensure that the seller receives payment for the merchandise delivered. *Williams v. U.S.*, 192 F.Supp. 97 (S.D. Cal. 1961).
26. See, e.g., 15 U.S.C.S. § 1642 (1982).
27. Credit grantors must exercise reasonable care and diligence in the investigation of credit card applications. *First Nat. City Bank v. Mullarkey*, 87 Misc.2d 1, 385 N.Y.S.2d 473 (1976); *Transamerica Insurance Company v. Standard Oil Company (Indiana)*, 325 N.W.2d 210 (N.D. 1982); *Humble Oil & Refining Company v. Waters*, 150 So.2d 408 (La. App. 1963); *Beard v. Goodyear Tire & Rubber Company*, 587 A.2d 195 (D.C. App. 1991).
28. 15 U.S.C.S. § 1643 (1982).
29. Coincidentally, there seems to be a misconception that it is unlawful for a retailer to ask for identification at the point of sale. It is not unlawful or unreasonable.
30. 15 U.S.C.S. §§ 1666-1666j (1982 & Supp.).
31. *Id.* at § 1631.
32. *Id.* at §§ 1681-1681s.
33. *Id.* at § 1601 (1982).
34. Credit reports are information files accumulated, stored, and maintained by creditors, banks, lessors, insurance companies, and the like, and is shared on a cooperative basis with the credit bureaus and credit reporting super-bureaus. In exchange, creditors may pay a nominal sum to access credit reports. Most of the data transfers are completed by computer terminal and magnetic computer tapes or disks. Additionally, credit bureaus and other snoops scour the public records to find any negative information about consumers.

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35. Accuracy of a credit report and the data contained therein are judged on an objective basis. *Cahlin v. GMAC*, 936 F.2d 1151 (11th Cir. 1991).
36. A 1989 study by Consolidated Information Services, a user of credit reports, found an error rate of 43 percent in a random sample of 1,500 reports reviewed. A survey by Consumers Union found that 48 percent of the credit report sample contained inaccurate information. Consumers Union, *What Are They Saying About Me? The Results of a Review of 161 Credit Reports from the Three Major Credit Bureaus*, April 29, 1991. Nonetheless, the industry claims that 99.5 percent of credit reports are accurate. *Bad Credit, No Reason*, U.S. News & World Report, Jan. 27, 1992, at 65. This contention by the industry is based upon the number of errors investigated in 1988 (three million complaints) with the number of reports issued that year (four million). This is not a fair analysis. The comparison should be made against the number of consumers who actually saw their reports and complained (only nine million). The latter comparison produces an error rate of 33 percent. E. Mierzewski, "Nightmare on Credit Street or How the Credit Bureau Ruined My Life," (U.S. Public Interest Research Group, Washington, DC), June 12, 1990.
37. TRW suggests that their "credentials" program prevents errors. What consumer, in their right mind, would pay \$39 a year to TRW to supply TRW with updated data while TRW profits from the use of their data? Is it really necessary to have your TRW report accessible to you 24 hours a day? What if you are not located in a region where TRW is the predominant servicing agency?
38. In the late 1980s, TRW acquired Chilton Credit Reporting in a hostile takeover. The move was designed to provide national reporting services from the database in Irvine, CA. Concurrently, CBI/Equifax acquired CSC Credit Services to compete with TRW.
39. CBI/Equifax Credit Information Services, Inc., acquired CSC Credit Services, Inc., and now operates nationwide. Both entities, while maintaining separate names, utilize the same database in Atlanta, GA.
40. Trans Union is a privately held corporation based in Chicago, IL.
41. 15 U.S.C.S. § 1681g (1982).
42. Return receipt requested.
43. A credit report is subject to change continually. Courts have recognized that preparation of a credit report should be viewed as a continuing process and the consumer reporting agencies' obligation to ensure the maximum possible accuracy of the data arises and begins with every addition of data. See, e.g., *Lowry v. Credit Bureau, Inc. of Georgia*, 444 F.Supp. 541 (N.D. Ga. 1978); see also 15 U.S.C.S. § 1681e(b) (1982).
44. Be sure to list your full name, any aliases, current address, addresses for the past five years, social security number, age, and date of birth. If other members of your household have the same or similar name, be sure to identify yourself accordingly.
45. You should call the agency and ask the price for the report or check local laws concerning charges for disclosure. 15 U.S.C.S. §§ 1681j, i (1982). Several states enacted laws to reduce and restrict the credit bureau's rate of charges for consumer report disclosures.
46. You must attach a copy of your letter of denial of credit.
47. Nonetheless, there will be "coded" data which you may not understand. You should contact the credit bureau and make them explain it. It is their obligation.
48. That does not mean that it was an impermissible inquiry "per se." 15 U.S.C.S. § 1681b (1982 & Supp. 1993).
49. You may want to address your letter to the president, CEO, or the compliance officer.
50. This demand is made to the consumer reporting agency.
51. Thus, the mere existence of too many inquiries can be justification for credit denial.
52. 15 U.S.C.S. §§ 1681b, q (1982 & Supp. 1993).
53. Also referred to as "trade line" data.
54. Erroneous public record data or public record data improperly placed on a consumer's report can be the most damaging type. It is widely acknowledged that a bankruptcy, which can stay on your credit reports for 10 years from judgment, is the most negative mark which can be placed on a credit report. 15 U.S.C.S. § 1681c (1982).
55. "Proper" refers to the fact that you have or may have a business relationship with that entity or the general fact of the reported item is true though the specifics of the entry listed on the report are incorrect.
56. 15 U.S.C.S. §§ 1666(a), (b) (1982 & Supp. 1993). Billing disputes involve erroneous credit account data. If you have erroneous public records data on your report, you need to communicate directly with the consumer reporting agency.
57. You need to explain the precise error and why you contend that the entry is incorrect.
58. Again, fully identify yourself and the disputed item with such detail that no one can suggest that you have been vague or ambiguous.
59. 15 U.S.C.S. § 1666(a) (1982 & Supp. 1993).
60. *Id.*
61. Certainly if the creditor cannot threaten to take such action he or she is equally precluded from doing so. A more interesting question is whether the creditor must delete or cause to be deleted previously reported data concerning the disputed amount.
62. 15 U.S.C.S. § 1666a (1982 & Supp. 1993). You must pay any undisputed portion of the bill.
63. Consumer reporting agencies must not only assure the "maximum possible accuracy" of data entered on your report but must employ reasonable procedures to promptly investigate disputed matters. 15 U.S.C.S. §§ 1681e, i (1982). Reinvestigation of disputed matters means that the consumer reporting agency must do more than mimic the findings of the creditor. Currently, consumer reporting agencies rarely delete disputed data unless the creditor-subscriber directly orders the deletion. This is one area where the industry refuses to comply with the FCRA. The FCRA provides limited immunity to creditors-subscribers for the reporting of false data. 15 U.S.C.S. § 1681h(e) (1982). Nonetheless, the reporting or failure to cause deletion of false or improper data previously reported by the creditor-subscriber can dispense with immunity and provides a basis for reckless and willful conduct. There appears to be industry-wide inertia against correcting reporting errors.
64. This is referred to as the "mis-merging" of files and is very common. In April 1991, a Wyoming jury awarded Paul Jacques \$290,000 after he proved TRW's willful violation of FCRA by failing to employ procedures to prevent mis-merging of credit files.
65. In essence, your personal identifiers are being used to commit application fraud.
66. 15 U.S.C.S. §§ 1681i(b), (c) (1982). The "victim's statement" is also referred to as the "statement of dispute."
67. You may also make a written explanation of any other disputed data on the report which the agency refuses to delete or which has been confirmed by the subscriber or source of the data.
68. The verification procedure might slow your credit extension process but it should protect you.
69. 15 U.S.C.S. § 1681i(c) (1982).
70. I recommend to all my clients that a statement be placed on their report which demands that a creditor contact them, orally and in writing, at their address and/or work, to verify requests for extensions of credit, prior to any such extension. It may slow down the process slightly but it protects my clients.
71. Remember what Shakespeare said: "Who steals my purse steals trash ... but he that filches my good name robs me of that which not enriches him, and makes me poor." *Othello*, Act 3, s.3. With theft of identity and application fraud, not to mention the problems of the consumer reporting industry, I am afraid everyone but the victim is enriched!
72. Some clients ask "Can I make the credit bureaus remove me from their databank?" The answer is "no." You can avoid being on their databank only by never being born, or by paying cash for everything, never buying or selling anything, never applying for a job, insurance, or any type of account, living in a tent on someone else's property without utilities, and never getting injured or receiving medical treatment. Well ... that sounds reasonable to me!?!



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