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Show Me the Money, Legally –An Attorney's Guide to Credit Reports and the Fair Credit Reporting Act

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SHOW ME THE MONEY, LEGALLY –
AN ATTORNEY’S GUIDE TO CREDIT REPORTS AND THE
FAIR CREDIT REPORTING ACT
by
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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
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Professor Kathleen Payne
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INTRODUCTION

The age of information is upon us; the most private information is no longer beyond detection. The consequences of this open access to personal information can be devastating and Congress has responded by enacting numerous statutes to protect individual privacy, including the Fair Credit Reporting Act. This Act has special relevance to attorneys involved in debt collection. Attorneys are frequently called on to recover a debt owed to their clients from third parties. Sometimes the attorney takes on the case from the beginning and seeks a court order obligating a defendant to pay; some attorneys will be asked to collect on a debt that has already been reduced to judgment or that has simply been referred for collection. As reality has shown time and again, the first step for an attorney in either circumstance is usually to decide whether the defendant’s ability to pay the debt makes pursuing collection worthwhile. Determining if the defendant is judgment proof without wasting too much in resources is in the best interests of both the attorney and the client. There will also be situations where a defendant has disappeared and the attorney needs to locate him in order to initiate litigation or collection efforts. In any case, the attorney might want to obtain the defendant’s credit report (more accurately called a

consumer report)¹ as a starting point for debt recovery. Attorneys may also desire consumer reports for a myriad of other reasons in litigation unrelated to debt collection. Although a consumer report can be a valuable tool for any attorney involved in debt recovery, it is imperative that the attorney understands the limitations and obligations imposed on the use of these reports by the Fair Credit Reporting Act.² Ignorance of these requirements can have harmful consequences for both the attorney and the individual on whom the report was obtained. Misuse of a consumer report by an attorney leaves the individual at risk for invasions of privacy, including the devastating crime of identity theft, and also exposes the attorney to potential criminal and civil liability.³

Although there is a wealth of case law interpreting the Act, there is little consensus across jurisdictions on its application to issues that particularly impact on debt-collecting attorneys. Additionally, many of the existing cases have serious analytical problems because the courts have misinterpreted or ignored the precise language of the Act, relevant Congressional intent, and administrative determinations. Furthermore, recent amendments to the Act have called into question the underlying assumptions behind numerous cases that were favorable to debt collectors. This article attempts to highlight the major issues that attorneys may face when recovering money for their clients and the potential legal hazards that exist under the current state of the law. Part I will address the legality of obtaining consumer reports under the Fair Credit Reporting Act, including a discussion of the definition of consumer reports and the purposes for which they may and may not be used by attorneys. Part II will summarize the various types of liability that can result from misuse of these reports, including actions for both civil and criminal enforcement of the Act

I. THE FAIR CREDIT REPORTING ACT – CONSUMER REPORTS, PERMISSIBLE PURPOSES AND ATTORNEYS

The Fair Credit Reporting Act (FCRA) is primarily a consumer protection law that strictly regulates the circumstances under which a consumer report may be obtained and how that report may be used. The industry for gathering personal information has experienced explosive growth and shows no signs of slowing down. The largest, nationwide credit bureaus, Equifax, Trans Union, and Experian (formerly TRW), alone generate over one billion consumer reports per year.⁴ Only an estimated 57.4 million reports go to the actual consumer that was the subject of the report.⁵ These reports may include a consumer's sensitive personal information, like name, age, Social Security Number, home and business addresses, employment information, previous addresses, spouse's name, estimated income, value of car and home, bank accounts, credit accounts, payment history, mortgages, and public records, such as tax liens, bankruptcies, and judgments.⁶ Protecting the confidentiality of this information has been the major theme of the FCRA's legislative history.⁷ Recently, in 2003, Congress adopted the Fair and Accurate Credit Transactions Act (FACTA)⁸ which amended the FCRA to add more consumer protections and specifically combat the growing threat of identity theft.⁹

The Federal Trade Commission (FTC) is the administrative agency that has authority to promulgate rules and regulations under the Act.¹⁰ In 1990, the FTC published an Official Staff Commentary regarding the FCRA,¹¹ and it has also on occasion published Staff Opinion Letters illuminating its interpretation of the provisions. Although not binding in court, these resources have been found very persuasive and they will be referenced throughout this article.

A. What is a Consumer Report?

The first step in understanding the limitations of the FCRA is to know precisely what a consumer report is and what it is not. This is critical because when information is considered a

consumer report, it is subject to the FCRA and may only be used for specific, enumerated purposes.¹² However, if the information is not a consumer report to begin with, the information may be used for any purpose subject to common law civil liability. Unfortunately, the task of determining what is a report subject to the FCRA is made quite difficult because the definition of consumer report is intertwined with the listing of permissible purposes for which the reports may be used. Therefore, in defining consumer report, the two provisions must always be read together.

A consumer report is defined as any communication of information by a

consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title.¹³

Section 1681b of the FCRA is the statute that lays out the permissible purposes for which a consumer report may be used. There are only two of the twelve purposes¹⁴ that are particularly relevant for the debt collecting attorney and, therefore, they are the only provisions which will be discussed in this article. The relevant purposes can be broadly described as follows: collection of a consumer account and in connection with a consumer-initiated business transaction. These broad descriptions are what generally appear in court opinions and will still ring true in many jurisdictions. However, the generality of these labels is hopelessly imprecise when the exact words of the statute are read as a whole. Section 1681b(a) provides

any consumer reporting agency may furnish a consumer report under the following circumstances and no other: (3) To a person which it has reason to believe--(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the . . . collection of an account of, the consumer; or . . . (F) otherwise has a legitimate business need for the information--(i) in connection with a business transaction that is initiated by the consumer¹⁵

Both of these sections invoke several terms of art that must also be defined before the meaning of consumer report starts to emerge. First, the FCRA defines “consumer” as “an individual.”¹⁶ Next, a “consumer reporting agency” is any individual or entity that “regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.”¹⁷ Additionally, “credit” is defined in the FCRA by reference¹⁸ to the Equal Credit Opportunity Act which states “‘credit’ means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefore [sic].”¹⁹ Finally, “account” is now also defined by reference²⁰ to the Electronic Fund Transfer Act which describes an account as “a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 1602(i) of this title), as described in regulations of the Board, established primarily for personal, family, or household purposes.”²¹ Notably, an “open end credit plan” is essentially a standard consumer credit card, which is excluded from the definition of account when the balance is “occasional or incidental.”²²

For a debt collection attorney, there are a number of key points that are locked away in these less than artfully drafted provisions. The most important rule that emerges is the FCRA does not apply to reports dealing with the credit characteristics of businesses;²³ it only applies to such reports on natural persons. Additionally, information that would normally be a consumer report can only be designated as one if the information is initially obtained from a consumer reporting agency.²⁴ It has never been questioned that the national credit bureaus, Experian, Trans Union and Equifax, are consumer reporting agencies. It is also important to note that if the report is initially obtained from a consumer reporting agency, it does not lose its status as a

consumer report by virtue of being passed through an intermediary to its ultimate user.²⁵ For example, if a client obtains a consumer report illegally and then passes it on to his attorney, both the client and the attorney may be liable for violations of the FCRA.²⁶ It is no defense for the attorney that she did not obtain the report directly from a consumer reporting agency.²⁷

Additionally, information is only a consumer report if it is collected by the consumer reporting agency for an enumerated permissible purpose, the consumer reporting agency expects the information to be used for such a purpose, or if it is actually used for such a purpose.²⁸ Defendants in FCRA litigation have tried to avoid liability by claiming that the Act did not apply to their actions if they used a report for an impermissible purpose because it then no longer fit the definition of a consumer report.²⁹ In recent years, courts have rejected this argument under the plain terms of the definitional statute which looks beyond just how the report was used.³⁰ This means that a court must generally examine the motives of the consumer reporting agency in any action under FCRA to determine whether a report can be classified as a consumer report. The impact of these inquiries will be mixed because consumer reporting agencies jealously guard against revealing their internal methods and trade secrets. Therefore, the record is often sparse on the topic leaving courts to make uninformed judgments.³¹ However, the FTC has revealed its thinking in a Staff Opinion Letter where it concluded that a listing of credit cards held by a consumer without more information was a consumer report.³² The letter stated this information, “[w]hen in the files of a credit bureau, . . . is, at the very least, information collected in whole or in part for the purposes set forth” in the FCRA.³³ Therefore, it is prudent for any attorney to assume that what is traditionally thought of as an individual’s “credit report,” is always going to be a consumer report that is subject to the FCRA, especially when obtained from one of the nationwide credit bureaus. This means that attorneys must be sure they are going to use the

report for a permissible purpose or they will be exposing themselves to liability under the FCRA. Additionally, a “likelihood of collection score” obtained from Experian is also considered a consumer report.³⁴

As noted previously, the definition of a consumer report is intertwined with the permissible purposes for which consumer reports may be used. These purposes include determining eligibility for (1) consumer credit or insurance, (2) employment purposes or (3) other purposes authorized by section 1681b.³⁵ The relevant purposes will be discussed in much greater detail below, but it will suffice for now to note that in the text of the statute the word “eligibility” actually modifies all three purpose descriptions. It is hard to say whether this was intentional as it leaves the provision sounding awkward but the legislative history suggests that the need to regulate access to consumer reports for determining eligibility for credit, insurance and employment was the main motive behind adopting the FCRA.³⁶ Unfortunately, this portion of the statute is circular in that it defines a consumer report by reference to the uses for which a consumer report may be used. This rotating logic has wreaked havoc in court decisions interpreting at least one permissible purpose that is particularly relevant to attorneys, the business transaction provision.³⁷

Furthermore, it is extremely important to note that the definition of consumer report goes further than merely credit information. The FCRA says that information may be a consumer report when it bears on at least one of the other listed criteria, namely “character, general reputation, personal characteristics, or mode of living.”³⁸ It is recognized that this is a very broad standard that covers a wide variety of information, like driving records, employment history, criminal records, and even the existence of child support obligations.³⁹ It is likewise important to be aware that just because information appears in the public record, it is not immune

from being considered information that creates a consumer report.⁴⁰ Finally, it has been said that a report that contains solely the name and address of an individual is not a consumer report because it does not bear on any of the criteria listed in the statute.⁴¹

B. How May Consumer Reports Be Used by Attorneys?

It should be apparent from the preceding section that Congress intended the definition of consumer report to be very expansive and to cover the most sought after information about individuals.⁴² This was necessary to effect the FCRA's goal of protecting the privacy of the consumer. What will also become apparent in this section is that Congress wanted to strictly limit access to this information by narrowly prescribing the circumstances under which these reports may be disseminated and used. Unfortunately for the consumer, courts have not looked carefully enough at the limiting statutory language and have allowed access to consumer reports in situations that Congress likely did not intend. This section will serve both a summary of the current law that is applicable for debt collecting attorneys and also attempt to underline the weaknesses of the current approach taken by the majority of jurisdictions. Moreover, the recent FACTA amendments have further undermined the validity of current interpretations of the FCRA. Although courts have been slow to catch the true meaning of the FCRA, this article should place attorneys on guard that their current practices in obtaining consumer reports may actually be contrary to the law and that existing authority may soon change.

1. *Consumer Report Used In Connection With a Credit Transaction Involving the Collection of the Consumer's Account*

The first permissible, and most prevalent, purpose cited with respect to debt collection allows for a consumer report to be used "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the . . . collection of an account of, the consumer."⁴³ This provision has historically been understood to allow an

attorney to obtain a consumer report to collect a debt related to a credit account, but not to collect a general business debt unless it has been reduced to judgment.⁴⁴ If the use could be justified under this provision, then courts would allow the consumer report to be used to both find the debtor and determine whether the debtor had sufficient assets to satisfy the debt.⁴⁵ However, courts have been loose with their analysis that this purpose is only valid when it relates to a credit transaction, and they have allowed this provision to be used to collect on many types of debts without even discussing the “credit transaction” language. For example, courts have allowed consumer reports to be obtained to collect on debts for medical services,⁴⁶ debts caused by breach of a business contract that was made subject to a mechanic’s lien,⁴⁷ college tuition debt,⁴⁸ and debts that are not even specified.⁴⁹

Additionally, even the FTC has been less than precise regarding the importance of the debt arising from a credit transaction. In the Official Staff Commentary, the FTC stated that collection agencies have a permissible purpose to “receive a consumer report on a consumer for use in attempting to collect that consumer’s debt, regardless of whether debt is assigned or referred.”⁵⁰ In the same paragraph, the FTC goes on to say that an “attorney may obtain a consumer report . . . for use in connection with a decision whether to sue that individual to collect a credit account.”⁵¹ It is unlikely the FTC really interpreted this provision as imposing a double standard between collection agencies and attorneys, but it does highlight the common and imprecise way in which the “credit transaction” language has been referenced. Another inconsistency is found in a FTC Staff Opinion Letter which states that an attorney for a residential landlord may not obtain a consumer report on a tenant that vacated his apartment without paying the rent.⁵² The Opinion Letter specifically states that this is not a credit account

which would give rise to the permissible purpose.⁵³ With the authorities in such a state of conflict, it is not surprising that courts have had difficulty correctly interpreting the FCRA.

Another significant FTC interpretation of the FCRA is the so-called “judgment creditor theory.” In the Official Staff Commentary, the FTC states without qualification that a “judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with collection of the judgment debt, because it is in the same position as any creditor attempting to collect a debt from a consumer.”⁵⁴ Again, there is a noticeable lack of discussion about the debt arising from a credit transaction. Despite this, the judgment creditor theory has been whole-heartedly accepted by some courts.⁵⁵ As always, there is one important caveat; if the judgment debtor is a business, consumer reports may not be obtained by the individual owners of the business if they are not personally liable for the business’ debts.⁵⁶

The case law and FTC interpretations on the “judgment creditor theory” suggest there was an underlying assumption that because there was a debtor, there must be a creditor. The assumption continues that if there was a creditor, there would be a credit transaction that would, in turn, give rise to a permissible purpose under the statute. Prior to 2003, this assumption may have been fueled by the lack of a definition of the term “credit” in the FCRA. As previously mentioned, the adoption of FACTA brought important changes to the FCRA. Most notably, Congress chose to define both “credit” and “account” for the first time within the FCRA itself.⁵⁷

Only two cases to date have been reported that take into account the first of these amended provisions. First, in *Miller v. Trans Union, L.L.C.*, the court flatly rejected the judgment creditor theory in the context of court-ordered child support payments.⁵⁸ The Northern District Court of Illinois held that the new definition of credit, which includes the *granting* of a right to defer payment, did not apply to court-ordered payments which lacked any element of a

consensual transaction.⁵⁹ Furthermore, it rejected the FTC's interpretation as being decided prior to the 2003 amendments and "no longer persuasive."⁶⁰ The Court emphasized that "individuals who do not consent to a transaction deserve greater, not lesser, privacy protections under the FCRA."⁶¹ Indeed, this sentiment is fully consistent with the legislative intent of the FCRA to protect individual privacy while still allowing for freedom of access to information where appropriate in credit transactions.⁶²

Shortly after *Miller v. Trans Union, L.L.C.* was decided, the Ninth Circuit Court of Appeals decided *Pintos v. Pacific Creditors Ass'n* and came to the same conclusions.⁶³ In *Pintos*, the debtor's car was towed and impounded.⁶⁴ The towing company obtained a lien on her car for the costs of towing and later sold the car to satisfy the debt.⁶⁵ The sale did not cover the full debt, so the towing company transferred the deficiency claim to a collection agency which obtained the debtor's consumer report.⁶⁶ Specifically, the Ninth Circuit ruled "FACTA makes clear that debt collection is a permissible purpose for obtaining a credit report under section 1681b(a)(3)(A) only in connection with a 'credit transaction' in which a consumer has participated directly and voluntarily."⁶⁷ This transaction did not satisfy the new definition of credit because it arose by statute and did not involve voluntary consumer participation.⁶⁸ The Ninth Circuit also explicitly recognized that "[n]ot all 'debt' involves a 'credit transaction.'"⁶⁹

It is somewhat surprising that with all the focus on FACTA's new definition of "credit," the courts in *Miller* and *Pintos* failed to notice another new definition, that of the word "account."⁷⁰ Since the collection efforts have to be related to "an account of . . . the consumer"⁷¹ in order to have a permissible purpose under this section, the absence of any discussion of this new definition is quite noticeable. The definition of account is quite limited and includes only "a demand deposit, savings deposit, or other asset account [including credit cards with regular

balances] . . . established primarily for personal, family, or household purposes.”⁷² Reading the two definitions together appears to leave a permissible purpose open only to true creditors who become so by consent of the consumer debtor and who are seeking to collect on a personal credit card or from a personal savings, checking or other type of bank account.

With no court or FTC interpretations on this provision to date, it is difficult to tell whether this narrow definition in conjunction with the *Miller* and *Pintos* line of reasoning will completely invalidate section 1681b(a)(3)(A) as an avenue for most debt collection efforts. However, if one views the legislative intent as attempting to protect individual privacy by broadly defining what a consumer report is and narrowly circumscribing the situations in which it may be released and used, the suggested outcome is not at all absurd. Nevertheless, for the time being, debt collectors outside of 7th and 9th Circuits can continue to rely on the expansive interpretation given to section 1681b(a)(3)(A) by the courts and the FTC. However, the debt collecting attorney will want to pay careful attention to the continuing validity of the judgment creditor theory in her jurisdiction in order to best serve her client while still avoiding personal liability for improperly obtaining a consumer report.⁷³

2. Consumer Report Used By Attorney With Legitimate Business Need and In Connection With a Consumer-Initiated Business Transaction

The other most widely used FCRA provision by attorneys allows for a consumer report to be obtained when the user “has a legitimate business need for the information--(i) in connection with a business transaction that is initiated by the consumer”⁷⁴ This purpose usually gets raised by attorneys who are not yet directly involved in debt collection, but who are preparing to go down that road, i.e. preparing for litigation relating to a debt.

a. The Problem With the Current Construction of “Business Transaction”

As it was in the previous section, imprecision is the name of the game when it comes to interpreting this provision. As a result of its dual status as both a permissible purpose under section 1681b and also as part of the definition of consumer report in section 1681a(d), courts have struggled to differentiate between the analyses applicable to each distinct role.⁷⁵ Language from cases interpreting the definitional section have been used as rationale to support cases decided solely on the existence of a permissible purpose where the presence of a consumer report was never disputed. For example, in *Houghton v. New Jersey Manufacturers Insurance Co.*, the Third Circuit Court of Appeals held that a report produced by Equifax that detailed an individual’s activities since the date of an accident, past health history, and general financial information for purposes of an insurance company’s investigation into the personal injury claim of that individual did not fall within the definition of a consumer report.⁷⁶ The holding was based on the fact that the information was not used, collected for or expected to be used for determining the individual’s eligibility for any benefit named in the FCRA, like insurance, credit or employment.⁷⁷ The court went on to adopt a narrow view of the “business transaction” purpose with respect to its role in defining a consumer report by ruling that the only business transactions that would be covered are those that are “related to one of the other specifically enumerated transactions . . . , i.e., credit, insurance eligibility, employment, or licensing.”⁷⁸ The court further summarized this requirement by stating there must be a “consumer relationship . . . between the party requesting the report and the subject of the report.”⁷⁹ Though agreeing with the outcome, the concurrence prophetically voiced its concern that this “limited construction” given to the business transaction section “in connection with the definition of consumer report”

would carry over in the analysis “of the section in which it appears,” namely the permissible purposes section.⁸⁰

Indeed, cases have arisen that rely on the definitional analysis from *Houghton* when the true issue of the case was whether a permissible purpose existed to obtain an individual’s credit report, which is almost always a consumer report under the FCRA.⁸¹ The Seventh Circuit Court of Appeals has recognized this conundrum regarding the interplay of the two provisions and concluded that when considering whether information fits the definition of a consumer report, the restrictive interpretation of the “business transaction” language, as set forth in *Houghton*, should control.⁸² However, the permissible purpose section does stand on its own and when the existence of a consumer report has been confirmed, the understanding of the “business transaction” section can be loosened.⁸³ This is perfectly logical because when solely looking to the permissible purposes section, the narrow interpretation of “business transaction” becomes redundant since the limiting uses (credit, insurance, employment, etc.) are already contained elsewhere within the same section. There would have been no need for Congress to create a “catch-all provision” that could only catch purposes already covered. Furthermore, it is not even clear that the *Houghton* rule is a sound one given that it purports to restrict the definition of consumer report when Congress clearly intended the definition to be all-encompassing and the same redundancy problem appears when this provision is considered as part of the definitional section because credit, insurance and employment are also already listed within that section.

Furthermore, any discussion of the FTC Staff Commentary is conspicuously absent from these cases. This may not be that surprising since they are basically in direct conflict. Although not binding, the Commentary has been widely used in interpreting the “collection of a consumer account” provision and it provides useful guidance for untangling the opinions under this

provision as well. The FTC begins by stating the “issue of whether credit, employment, or insurance provides a permissible purpose is determined *exclusively* by reference” to the other subsections of section 1681b(a)(3).⁸⁴ This supports the claim that Congress did not intend this provision to include or be repetitive of the other specifically enumerated purposes. The FTC continues that a business transaction is a “transaction with a consumer primarily for personal, family or household purposes” and not transactions purely for commercial purposes.⁸⁵ Again, there is no obvious intent to limit the purposes to those already enumerated but reinforces the understanding that purely business transactions are not covered. Finally, the FTC summarizes the provision as providing a permissible purpose to obtain a consumer report “for use in connection with some action the consumer takes from which he or she might expect to receive a benefit that is not more specifically covered” by another subsection.⁸⁶ Examples of these transactions include applying to rent an apartment, paying for goods with check, applying for checking or savings account, and seeking to participate in a computer dating service.⁸⁷ These commentaries simply do not support any attempt to link a business transaction as a permissible purpose to the limiting words in the definitional section. However, the FTC has provided a different limitation on the meaning of this permissible purpose in a Staff Opinion Letter. Specifically, the FTC commented that the only legitimate business need to obtain a consumer report in connection with a “new business transaction is to determine the consumer’s ‘eligibility’” for the transaction.⁸⁸ If this is the correct interpretation of this permissible purpose, it is doubtful that it can serve as the basis for most requests by attorneys for consumer reports once a relationship already exists between the debtor and an attorney’s client.

The importance of this discussion cannot be overlooked by the attorney who seeks to rely on cases interpreting the “business transaction” purpose to obtain a consumer report. The result

of the courts' confusion in interpreting these two different pieces of the statute is that the analytical basis of much of the case law on the permissible purpose piece is not supported by the text of the FCRA or the FTC Commentary. This may cut both ways for attorneys depending on which side they are on in the FCRA claim. Many of the cases decided under this section have ruled there was no permissible purpose based on the imprecise analysis discussed above; attorneys seeking to avoid these cases can argue the decisions did not correctly interpret the statute. However, these lawyers should be wary of the FTC Commentary as it might be used against them in the absence of case law. Furthermore, attorneys seeking to rely on cases that did find a permissible purpose under the business transaction section should also be closely watching for developments in their jurisdictions that would render those decisions moot. Nevertheless, the cases on this topic are still recognized by the courts as good law and examples of the application of this purpose to uses made by attorneys will be discussed next.

b. Examples of Attorneys' Uses of Consumer Reports under this Provision

As a refresher, the FCRA language provides a permissible purpose to obtain a consumer report if the user has a "legitimate business need . . . in connection with a business transaction that is initiated by the consumer."⁸⁹ Generally, litigation itself is not a business transaction so a plaintiff cannot always rely on this provision to determine whether a defendant can pay a judgment or for preparation for a trial or deposition.⁹⁰ However, the underlying events that gave rise to the claim may provide a permissible purpose if the events constituted a consumer-initiated business transaction.⁹¹ For example, if the litigation results because a debt was created through such a business transaction, a permissible purpose may be found if the litigation is about the debt.⁹² Disregarding any of the analytical problems discussed in the previous section, this line of cases may be very important to the debt collecting attorney given the possibility of a sea change

under the “collection of a consumer account” purpose which would not allow for consumer reports to be obtained for collection of basic business debts.⁹³

Importantly, litigation arising from a tort does not supply a permissible purpose under this section.⁹⁴ Additionally, there may be limits on the time that is allowed to pass before a business transaction that was at one time initiated by a consumer can no longer be so classified. For example, in a Staff Opinion Letter, the FTC concluded that even though a landlord has the right to obtain a consumer report when a prospective tenant applies to rent an apartment, the landlord may lose that right when the tenant vacates the premises without paying and the landlord is seeking the information to determine if the tenant is worth suing “long after the transaction commenced.”⁹⁵ In addition to the passage of time, a change in circumstances may also render a business transaction purpose impermissible. In *Smith v. Bob Smith Chevrolet, Inc.*, the debtor purchased a car from the dealership which obtained his consumer report after a dispute had arisen over the amount the debtor owed to the dealership.⁹⁶ Although the dealership could have obtained the debtor’s consumer report with respect to the initial financing of the car, the true purpose of the dealership in obtaining the report when it did was to determine if it could collect an additional sum from the debtor over what they had already agreed to; this was determined not to be a consumer-initiated transaction.⁹⁷

This provision has also been frequently and unsuccessfully invoked in divorce litigation. In *Cole v. American Family Mutual Insurance Co.*, a soon-to-be ex-husband obtained a consumer report on his spouse in order to assist his accountant and divorce lawyer in tracking missing joint marital assets.⁹⁸ The husband argued that the report was obtained in connection with a business transaction because the divorce was deciding “money and property issues.”⁹⁹ The court rejected this argument and also held that it made no difference that the report also

contained information relating to the husband since he was clearly after information about the wife.¹⁰⁰ The *Cole* court also relied on several other cases that have disallowed this type of use under the business transaction section.¹⁰¹

Furthermore, consumer reports may not be obtained under this section “solely for use in discrediting a witness at trial or for locating a witness.”¹⁰² Nor may they be used by one attorney to impugn another attorney’s credibility in court.¹⁰³ Finally, it is worth noting that just a general desire to investigate someone’s background is not a permissible purpose under the FCRA.¹⁰⁴ The limited application of the business transaction purpose indicates that it is generally not fruitful ground for the debt-collecting attorney in litigation, unless the pending litigation is actually about collecting on the debt. Even then, it is still not crystal clear if that sort of use is really in keeping with the spirit of the FCRA as interpreted by the FTC.

If eligibility for consumer transactions was at the forefront of Congress’ thinking when drafting the FCRA, attorneys have an obligation to respect that intent and should not take advantage of oversights made by Congress or the courts. It is worth noting as well that a standard credit report of an individual may not be the panacea that many attorneys think it is. Although consumer reporting agencies undoubtedly have the ability to unearth unlimited amounts of personal information, a basic credit report will not show much more than a listing of credit accounts and payment histories, along with prior and current addresses. This type of information may assist an attorney in locating someone if it was up to date, which is unlikely if the consumer is seeking to avoid debt collectors. However, the information will only be inferentially helpful in determining whether a consumer has sufficient assets to pay a debt. It may establish that the consumer is so far in debt that the current collector can decide not to waste the time pursuing him. Short of this, however, the credit report will not tell the collector what

assets the individual has or where they can be found. It is imperative that the attorney have an understanding of what information he is hoping to glean from the credit report and determine if there are more effective alternatives for detection¹⁰⁵ because the courts have not looked favorably upon attorneys who obtain consumer reports in violation of the FCRA.

II. ATTORNEY LIABILITY FOR MISUSE OF A CONSUMER REPORT

A thorough understanding of the permissible purposes for which consumer reports may be obtained is essential because failure to comply with those provisions can expose the user to both civil and criminal liability. The FCRA provides a civil cause of action against users of consumer reports who do not have a permissible purpose to obtain the report and who act willfully, knowingly or negligently.¹⁰⁶ The FCRA also imposes criminal liability on users who knowingly and willfully obtain a consumer report under false pretenses.¹⁰⁷ The FCRA preempts most common law tort claims¹⁰⁸ and state statutory claims¹⁰⁹ relating to consumer reports so the federal provisions are the predominant way to establish any liability for improper use of information governed by the FCRA.¹¹⁰

A. Civil Liability under the FCRA

There are three kinds of civil liability created in the FCRA.¹¹¹ The first provides for the recovery of actual damages or statutory damages, ranging from \$100 to \$1,000, when a user willfully fails to comply with any requirement of the act, including obtaining a report for an impermissible purpose.¹¹² Both punitive damages, attorneys' fees and costs are also allowed under the act for this type of violation.¹¹³ For many years, willful noncompliance with the FCRA required that the user have actual knowledge that her conduct violated the statute.¹¹⁴ However, a recent Supreme Court opinion has overturned those cases in part by expanding the definition of willfulness to cover reckless disregard of a statutory duty in addition to knowing violations.¹¹⁵ In

order for a user of a consumer report to satisfy this recklessness standard, it must be shown that a “reasonable reading of the statute’s terms” would reveal the violation and that there was a “substantially greater” risk of a violation occurring than if the conduct was merely negligent.¹¹⁶ The existence of any case law or FTC guidance on the violation is relevant to this analysis.¹¹⁷ This ruling may have important consequences for attorneys who use consumer reports supplied by third parties. For example, in one case an attorney hired a private investigator who obtained a consumer report on an ex-spouse in post-divorce litigation to set aside alimony.¹¹⁸ This purpose is not permitted by any provision of the FCRA and is addressed by numerous cases. The court ruled the attorney did not willfully violate the FCRA because he had no part in acquiring the consumer report and no knowledge of how the private investigator obtained it.¹¹⁹ Under a reckless disregard standard, the failure of the attorney to inquire about how the consumer report was obtained may have created liability on his part given that there is no support for the use he made of the report being a permissible purpose. In fact, the authorities are so stacked against this use being permissible, it is possible the attorney consciously ignored the risk of the violation which amounts to more than mere negligence.

The second type of civil liability allows for recovery of the greater of the consumer’s actual damages or statutory damages of \$1,000 when the report is obtained under false pretenses or knowingly without a permissible purpose.¹²⁰ Again, punitive damages, attorneys’ fees and costs are also allowed for this type of violation.¹²¹ While the first category of liability could be predicated on any violation of the Act, this form of liability is only concerned with the existence of a permissible purpose. Indeed, having a permissible purpose is a complete defense to liability under this provision.¹²² Furthermore, the recklessness standard applicable to the first type of

liability does not carry over into this provision which requires actual knowledge of a lack of permissible purpose or the use of false pretenses.

Generally, false pretenses exist when a person knowingly obtains a consumer report for an impermissible purpose *and* fails to disclose his true motivation to the consumer reporting agency.¹²³ False pretenses may not be found when the user had a permissible purpose to obtain the report but lied about it when making the request.¹²⁴ One court has ruled that users can not be held civilly liable if they believed they had a proper purpose at the time of the request but were later found to be erroneous by the court.¹²⁵ The same court also noted, however, that attorneys may be held to a higher standard in determining what they knew at the time the report was obtained.¹²⁶ An important factor in any false pretenses claim is that consumer reporting agencies are required to obtain a certification from the user that the information will be used in compliance with the FCRA. Specifically, the user must identify herself, certify the purpose for which the information will be used, and certify that it will be used for no other purpose.¹²⁷ Furthermore, the consumer reporting agency is obligated to disclose the responsibilities of the user under the Act, including what constitutes a permissible purpose.¹²⁸ These requirements make it difficult for a user who made a false certification to claim that she was unaware of the permissible purposes under the act and, thus, makes it fairly easy to establish false pretenses.¹²⁹

Users may also be able to avoid liability under this provision by relying on the assurances of the consumer reporting agencies that certain types of information are not consumer reports and, therefore, not covered by the FCRA's permissible purposes.¹³⁰ However, this sort of reliance could potentially serve as the basis for a claim of willful violation, as discussed above, or a negligent violation. Moreover, there is another variety of liability included within this second type. In addition to being liable directly to the consumer, a user that obtains a consumer

report under false pretenses or knowingly without a permissible purpose may also be liable to the consumer reporting agency from which it obtained the report.¹³¹ This liability extends to the actual damages sustained by the agency or \$1,000, whichever is greater.¹³²

Finally, the third type of civil liability created by the FCRA is for a negligent failure to comply with any requirement of the act and a successful consumer can recover actual damages, attorneys' fees and costs.¹³³ It should be noted that there are no statutory or punitive damages provided for a negligent violation. Negligence claims are most frequently brought against consumer reporting agencies for their failure to strictly comply with the FCRA's procedural requirements.¹³⁴ These claims are not often brought against users of reports because the plaintiff has to prove actual damages in order to be successful and such damages may be difficult to prove.

Actual damages can be shown when a consumer has been denied credit or offered credit on less favorable terms because of the FCRA violation.¹³⁵ For example, a landlord requiring a consumer tenant to pay a higher amount for a security deposit can support a claim for actual damages.¹³⁶ Additionally, a consumer who refrains from applying for credit because of her fear of being turned down may establish actual damages.¹³⁷ A large component of actual damages may consist of mental or emotional distress, including humiliation, if adequately supported by evidence.¹³⁸ For instance, one court held that a plaintiff's statements, corroborated by her son, that the improper use of her consumer report caused her to cry, become "hysterical, panicky, and an 'emotional wreck,'" and led to anxiety, an inability to sleep, and depression were enough to survive summary judgment on the issue of actual damages.¹³⁹ Another court ordered a remitter from a jury award of \$100,000 to \$25,000 for a negligent violation of the FCRA when the only evidence was the plaintiff's testimony of his embarrassment and deep emotional distress.¹⁴⁰ In

another case, an actual damage award of \$61,500 was allowed to stand when the plaintiff claimed mental distress and contribution to marital problems.¹⁴¹ Finally, loss of reputation can also constitute actual damages.¹⁴²

Punitive damages are authorized as deemed appropriate by the court for willful or knowingly violations of the FCRA. Courts will generally award punitive damages when the conduct was in willful or wanton disregard of the plaintiff's rights,¹⁴³ or involved willful concealments or misrepresentations.¹⁴⁴ There is no requirement that the defendant must have acted with malice or an evil motive to justify an award of punitive damages.¹⁴⁵ Furthermore, an award of actual damages is not a prerequisite for punitive damages; punitives may be awarded when the plaintiff has only recovered statutory damages.¹⁴⁶ Punitive damages can be a very attractive reason to bring an available FCRA claim because the awards routinely go well into the five-figure dollar range. Some examples include: punitive damage award in the amount of \$10,000 in addition to purely statutory damages;¹⁴⁷ awards of \$5,000 in punitive damages to each of three plaintiffs who also received \$500 each in compensatory damages;¹⁴⁸ assessment of \$15,000 in punitive damages and no actual or statutory damages;¹⁴⁹ and an actual damage award of \$2,500 coupled with punitive damages of \$25,000.¹⁵⁰

In addition to the allowance of actual, statutory and punitive damages, all successful FCRA plaintiffs are also entitled to attorneys' fees and court costs. To be successful, the plaintiff must have secured some type of damage award, though actual damages need not be proved in a claim for a willful or knowing violation.¹⁵¹ However, in an action for a negligent violation of the FCRA, a plaintiff must prove actual damages in order to be entitled to fees because actual damages are the only type of relief allowed by that provision.¹⁵² It is also worth

noting that generally injunctive relief is not allowed under the FCRA, however, the courts have split on this issue.¹⁵³

B. Criminal Liability under the FCRA

The criminal provision of the FCRA has been used very rarely and there are few reported decisions discussing the requirements to establish liability for its violation. The statute provides “[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under Title 18, imprisoned for not more than 2 years, or both.”¹⁵⁴ Importantly, the use of the word “willfully” in this section is not interpreted the same way as in the civil liability section. In the same Supreme Court case that held willful conduct included reckless disregard in civil actions, the Court reaffirmed that, in the context of criminal statutes, willful still implies liability for knowing violations only.¹⁵⁵ The requirement of false pretenses should be interpreted the same as it has been under the civil provisions; however, it has not come up frequently enough to know whether courts would treat the sections equivalently.

One case that has discussed this provision in some detail is *United States v. Valenzano*.¹⁵⁶ In this case, a tax preparer was being charged both under the FCRA and the Hobbs Act for actions of extortion and deception.¹⁵⁷ The defendant would obtain consumer reports on potential clients from Trans Union after they contacted him for tax assistance.¹⁵⁸ His certification to the consumer reporting agency claimed he wanted to screen potential clients before extending credit to them.¹⁵⁹ The government brought charges related to only two consumers but was not able to sustain its burden on either case.¹⁶⁰ In the first charge, the defendant obtained a consumer report on an individual who contacted him for an appointment but failed to keep it and there was no further contact between the consumer and the defendant.¹⁶¹ The Sixth Circuit Court of Appeals

was unwilling to find false pretenses in this situation under a “little-used” statute when the government could cite no authority in support.¹⁶² The court found it significant that the government could not produce evidence that the defendant made any particular assertion to Trans Union in obtaining the report, there was no actual harm and no effort to defraud this consumer.¹⁶³ In the second charge, the defendant requested a consumer report under similar circumstances, but the government could not prove that he ever received the information.¹⁶⁴

In another Sixth Circuit case, a defendant was charged with violating the criminal provision of the FCRA in obtaining consumer reports by posing as a paralegal for attorneys involved in debt collection.¹⁶⁵ Though the outcome of the case is unknown, the court apparently thought the charges were strong enough to withstand three mistrials and the reported opinion remanded it to trial for another chance.¹⁶⁶ An interesting twist on the criminal liability statute can be found in *Commonwealth v. Source One Associates, Inc.*, where Massachusetts was pursuing a civil enforcement action against a re-seller of financial information for violating state consumer protection laws.¹⁶⁷ The court ordered the defendant to pay a civil penalty of \$500,000 for state law violations that were predicated on obtaining consumer reports under false pretenses in defiance of the FCRA.¹⁶⁸ The defendant would receive requests for financial information on individuals from his clients.¹⁶⁹ The first thing the defendant would do is retrieve the individual’s credit report.¹⁷⁰ The finding of false pretenses was based primarily on the fact that the defendant never inquired into the purpose for which his clients wanted the information but he consistently represented to Equifax that the reports were being used “in connection with credit transactions involving the consumer.”¹⁷¹ In summary, although criminal enforcement under the FCRA has not been seen regularly in the past, it is never safe to assume that it will not become more popular in the future.

CONCLUSION

In a time of instant access to information, it is not surprising that everyone wants to be in the know, including attorneys. However, when it comes to credit, financial and other information that may be contained in consumer reports, there can be a cost to not restraining one's desire for such information. The Fair Credit Reporting Act was enacted to ensure that everyone exercises their responsibilities under the Act "with fairness, impartiality, and a respect for the consumer's right to privacy."¹⁷² Too many attorneys have discovered the hard way that individual credit reports are not just available for the taking. There are very strict limitations on who can access these reports and for what purposes they may be used. Unfortunately, the courts have created substantial confusion in this area of law by not reading all the provisions of the Act thoroughly. Recent amendments to the Act have only added to the uncertainty and it is foreseeable that a major change in the Act's interpretation could be on its way. In the mean time, attorneys who wish to avoid liability should exercise sound judgment as to the necessity of seeking someone's consumer report. As always, attorneys must respect the balance Congress created between the goals of debt collectors and the privacy protections afforded to consumers by the Fair Credit Reporting Act.

¹ See *infra* Part I.A.

² 15 U.S.C. §§ 1681-1681x (2000 & Supp. V 2006).

³ See *infra* Part II.

⁴ NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING 4 (6th ed. 2006).

⁵ *Id.*

⁶ *Id.* at 5.

⁷ See 15 U.S.C. § 1681(a)(4) (2000) ("There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."). See also NAT'L CONSUMER LAW CTR., *supra* note 6, at 10-11.

⁸ Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 U.S.C. and 20 U.S.C.).

⁹ See NAT'L CONSUMER LAW CTR., *supra* note 6, at 21-23.

¹⁰ See § 1681s-2(e).

¹¹ FTC Official Staff Commentary, 16 C.F.R. pt. 600 app. (2007)

¹² *Id.* at § 603(d) ¶ 2 (noting the Act does not apply to commercial credit reports). See also NAT'L CONSUMER LAW CTR., *supra* note 6, at 25 (reiterating principle that report must be consumer report to invoke protections of FCRA)

but warning that improper use of a report falling outside the FCRA can still expose the user to common law tort liability).

¹³ 15 U.S.C. § 1681a(d)(1).

¹⁴ Other permissible purposes of which an attorney should be aware are use of a consumer report for employment purposes, § 1681b(a)(3)(b), and also obtaining a consumer report pursuant to written authorization from the consumer, § 1681b(a)(2). Consumer reports may also be obtained pursuant to a court order, § 1681b(a)(1), but this generally does not include attorney issued subpoenas, 16 C.F.R. pt. 600 app. § 604(1) ¶ 1. For more information, see NAT'L CONSUMER LAW CTR., *supra* note 6.

¹⁵ § 1681b(a)(3)(A), (3)(F)(i).

¹⁶ § 1681a(c).

¹⁷ § 1681a(f).

¹⁸ § 1681a(r)(5). It is important to note that this definition was not part of the FCRA until it was added by the 2003 amendments under FACTA.

¹⁹ 15 U.S.C. § 1691a(d) (2000).

²⁰ § 1681a(r)(4). This is also a new definition added under FACTA, see *infra* Part I.B.1.

²¹ 15 U.S.C. § 1693a(2) (2000).

²² *Id.* See *Benion v. Bank One, Dayton, N.A.*, 144 F.3d 1056, 1057 (7th Cir. 1998); *Goldman v. First Nat'l Bank of Chi.*, 532 F.2d 10, 18-20 (7th Cir. 1976); *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 338-40 (10th Cir. 1973); *Maes v. Motivation for Tomorrow, Inc.*, 356 F. Supp. 47, 50 (N.D. Cal. 1973).

²³ 16 C.F.R. pt. 600 app. § 603(d) ¶ 3B-C (2007) (stating reports on businesses are not consumer reports even if they contain some information about individuals with ownership interest in the business). See also FED. TRADE COMM'N STAFF OPINION LETTER TO HANER (Aug. 27, 1998), *available at* <http://www.ftc.gov/os/statutes/fcra/haner.shtml> (stating that a report on a sole proprietorship's credit is not a consumer report even though it contains information about the individual who is liable for the debts because it was provided for "commercial purposes"); NAT'L CONSUMER LAW CTR., *supra* note 6, at 26.

²⁴ 15 U.S.C. § 1681a(d)(1).

²⁵ *Chester v. Purvis*, 260 F. Supp. 2d 711, 715 (S.D. Ind. 2003) (holding attorney user of report could be liable under FCRA when client obtained report from consumer reporting agency).

²⁶ *Id.* See also *infra* Part II.

²⁷ However, there may be other defenses available to the attorney, like absence of willfulness or negligence. See *infra* Part II.

²⁸ *Houghton v. N.J. Mfrs. Ins. Co.*, 795 F.2d 1144, 1148 (3d Cir. 1986) (holding defendant's request for a report relating to the genuineness of a personal injury claim was not a consumer report because it did not relate to the subject's eligibility for credit, insurance or employment).

²⁹ See, e.g., *Hovater v. Equifax, Inc.*, 823 F.2d 413 (11th Cir. 1987); *Matthews v. Worthen Bank & Trust Co.*, 741 F.2d 217 (8th Cir. 1984); *Henry v. Forbes*, 433 F. Supp. 5 (D. Minn. 1976); *Sizemore v. Bambi Leasing Corp.*, 360 F. Supp. 252 (N.D. Ga. 1973). See also NAT'L CONSUMER LAW CTR., *supra* note 6, at 207.

³⁰ See, e.g., *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 (7th Cir. 1988); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978).

³¹ See *Ippolito*, 864 F.2d at 453 (noting record is "devoid of basic information concerning why Equifax collected the information used," there is no "general information on how or why Equifax stores information," and the purpose for which the information was collected "is a fact that is peculiarly within Equifax's knowledge"). See also *Heath*, 618 F.2d at 696 (stating that a presumption could arise that a consumer reporting agency expected the information to be used for a proper purpose if it compiled information that related to "personal financial status" without knowing the purpose for which it would actually be used).

³² FED. TRADE COMM'N STAFF OPINION LETTER TO BUCHMAN (Mar. 2, 1998), *available at* <http://www.ftc.gov/os/statutes/fcra/buchman.shtml>.

³³ *Id.*

³⁴ *Robinson v. TSYS Total Debt Mgmt., Inc.*, 47 F. Supp. 2d 502, 512 (D. Md. 2006).

³⁵ 15 U.S.C. § 1681a(d)(1).

³⁶ 116 CONG. REC. 36, 572 (1970) (statement of Rep. Sullivan). See also *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991); *Ippolito*, 864 F.2d at 452.

³⁷ See *infra* Part I.B.2.

³⁸ 15 U.S.C. § 1681a(d)(1).

³⁹ *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002). *See also* *Trans Union Corp. v. FTC*, 81 F.3d 228, 231 (D.C. Cir. 1996); FED. TRADE COMM’N STAFF OPINION LETTER TO POQUETTE (June 10, 1998), *available at* <http://www.ftc.gov/os/statutes/fcra/poquette.shtm> (“Those in the business community who believe the FCRA is limited to credit are misreading the law.”).

⁴⁰ *Cotto v. Jenney*, 721 F. Supp. 5, 7 (D. Mass. 1989) (noting reports solely consisting of public information are still covered by FCRA because it is just as capable of being abused as non-public information). *See also* *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001) (stating § 1681k actually creates higher standards for reporting public information used for employment purposes).

⁴¹ 16 C.F.R. pt. 600 app. § 603(d) ¶ 4F (2007). *See also* *Ley v. Boron Oil Co.*, 419 F. Supp. 1240, 1242 (W.D. Pa. 1976) (holding a report that simply gave information on the identity of a person, here an attorney who threatened suit, is not a consumer report because there was no relation to any consumer transaction); NAT’L CONSUMER LAW CTR., *supra* note 6, at 28.

⁴² *Cotto*, 721 F. Supp. at 7.

⁴³ 15 U.S.C. § 1681b(a)(3)(A).

⁴⁴ NAT’L CONSUMER LAW CTR., *supra* note 6, at 210. Agency principles apply under the FCRA; therefore an attorney representing a client has exactly the same permissible purpose as the client does in the situation. *Id.* at 206. *See also* 16 C.F.R. pt. 600 app. § 604(3)(E) ¶ 6 (“attorney collecting a debt for a creditor client, including a party suing on a debt or collecting on behalf of a judgment creditor” has same permissible purpose as client).

⁴⁵ *Korotki v. Thomas, Ronald & Cooper, P.A.*, No. 96-1877, 1997 U.S. App. LEXIS 34157, at *3-4 (4th Cir. Dec. 5, 1997) (permissible to locate debtor); *Washington v. S. Shore Bank*, No. 02 C 7403, 2004 WL 2038425, at *5 (N.D. Ill. 2004) (permissible to both locate debtor and determine collectibility); *Stonehart v. Rosenthal*, No. 01 Civ. 651 (SAS), 2001 U.S. Dist. LEXIS 11566, at *13 (S.D.N.Y. Aug. 13, 2001) (permissible to locate debtor); *Edge v. Prof’l Claims Bureau, Inc.*, 64 F. Supp. 2d 115, 116 (E.D.N.Y. 1999) (permissible to find debtor’s address).

⁴⁶ *See Edge*, 64 F. Supp. 2d at 116 (hospital debt was referred to collection agency and agency obtained report to get address of a guarantor of the debt); *Stonehart*, 2001 U.S. Dist. LEXIS 11566, at *13 (debt relating to the provision of dental services).

⁴⁷ *Korotki*, 1997 U.S. App. LEXIS 34157, at *3-7 (holding there existed a permissible purpose for collection of account when debt arose from business contract for construction work and became subject to mechanic’s lien and that the party owed the money need not wait until debt has been reduced to judgment).

⁴⁸ *Shah v. Collecto, Inc.*, No. Civ.A.2004-4059, 2005 WL 2216242, at *12 (D. Md. Sept. 12, 2005) (Debt referred to collection agency from a college and the agency obtained the report to assess whether debtor had assets to justify further collection efforts. This was permissible even though it turned out there was no debt actually owed because the agency had “reason to believe” the debt was owed and that was sufficient.)

⁴⁹ *Perretta v. Capital Acquisitions & Mgmt. Co.*, No. C-02-05561 RMW, 2003 WL 21383757, at *5 (N.D. Cal. May 5, 2003) (holding consumer report may be obtained to collect on account but not specifying what kind of account).

⁵⁰ 16 C.F.R. pt. 600 app. § 604(3)(A) ¶ 1.

⁵¹ *Id.*

⁵² FED. TRADE COMM’N STAFF OPINION LETTER TO LONG (July 6, 2000), *available at* <http://www.ftc.gov/os/statutes/fcra/long.shtm>.

⁵³ *Id.*

⁵⁴ 16 C.F.R. pt. 600 app. § 604(3)(A) ¶ 2.

⁵⁵ *Hasburn v. County of L.A.*, 323 F.3d 801, 804 (9th Cir. 2003) (allowing consumer report to be obtained in connection with collecting court order child support); *Korotki v. Thomas, Ronald & Cooper, P.A.*, No. 96-1877, 1997 U.S. App. LEXIS 34157, at *7 (4th Cir. Dec. 5, 1997) (stating they do not need to wait until there is a judgment although they would be able to get a consumer report then as well); *Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260, 261 (S.D.N.Y. 1994) (attempting to collect court ordered child support arrears).

⁵⁶ *Sather v. Weintraut*, No. Civ.01-1370(JNE/JGL), 2003 WL 21692111, at *3 (D. Minn. July 10, 2003) (holding could not obtain report on shareholders of corporation because they were not being held personally liable). However, when a business owner will be personally liable on an obligation, it is permissible to obtain the individuals credit report. *See* FED. TRADE COMM’N STAFF OPINION LETTER TO BANKING AGENCY COUNSELS (June 22, 2001), *available at* <http://www.ftc.gov/os/statutes/fcra/tatelbaum2.shtm>.

⁵⁷ *See supra* Part I.A.

⁵⁸ No. 06 C 2883, 2007 WL 641559, at *1 (N.D. Ill. Feb. 28, 2007).

⁵⁹ *Id.* at *5.

⁶⁰ *Id.*

⁶¹ *Id.* (citing *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725 (7th Cir. 2004) (“Many of the enumerated permissible purposes set forth in § 1681b are transactions initiated by the consumer; these purposes therefore do not create significant privacy concerns.”)).

⁶² 15 U.S.C. § 1681(a) (2000).

⁶³ 504 F.3d 792 (9th Cir. 2007).

⁶⁴ *Id.* at 796.

⁶⁵ *Id.*

⁶⁶ *Id.* at 796-97.

⁶⁷ *Id.* at 796.

⁶⁸ *Id.* at 799.

⁶⁹ *Id.*

⁷⁰ 15 U.S.C. § 1681a(r)(4).

⁷¹ § 1681b(a)(3)(A).

⁷² 15 U.S.C. § 1693a(2) (2000).

⁷³ *See infra* Part II.

⁷⁴ § 1681b(a)(3)(A), (3)(F)(i).

⁷⁵ *See supra* notes 36-38 and accompanying text.

⁷⁶ 795 F.2d 1144, 1150 (3d Cir. 1986).

⁷⁷ *Id.* at 1149.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1151 (Sloviter, J., concurring).

⁸¹ *Bakker v. McKinnon*, 152 F.3d 1007, 1012 (8th Cir. 1998) (no business need to obtain credit report on opposing party in litigation because no consumer relationship); *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991) (no business need existed to determine whether a defendant was judgment proof because no consumer relationship); *Daley v. Haddonfield Lumber, Inc.*, 943 F. Supp. 464, 468 (D.N.J. 1996) (“[T]he absence of a consumer relationship between the requesting party and the subject of the credit report requires the court to find that the requesting party did not have a permissible purpose”); *Boothe v. TRW Credit Data*, 557 F. Supp 66, 70 (S.D.N.Y. 1982) (actually decided before *Houghton* but using the same analysis).

⁸² *Ippolito v. WNS, Inc.*, 964 F.2d 440, 451 n.11 (7th Cir. 1988).

⁸³ *Id.*

⁸⁴ 16 C.F.R. pt. 600 app. § 604(3)(E) ¶ 1 (emphasis added).

⁸⁵ *Id.* at § 604(3)(E) ¶ 2.

⁸⁶ *Id.* at § 604(3)(E) ¶ 3.

⁸⁷ *Id.*

⁸⁸ FED. TRADE COMM’N STAFF OPINION LETTER TO BUCHMAN (Mar. 2, 1998), *available at* <http://www.ftc.gov/os/statutes/fcra/buchman.shtm> (“Congress intended the ‘permissible purposes’ provisions of the FCRA to cover primarily ‘eligibility’ issues.”).

⁸⁹ 15 U.S.C. § 1681b(a)(3)(F)(i).

⁹⁰ *Bakker v. McKinnon*, 152 F.3d 1007, 1012 (8th Cir. 1998); *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991); *Duncan v. Handmaker*, 149 F.3d 424, 427-28 (6th Cir. 1998); 16 C.F.R. pt. 600 app. § 604(3)(E) ¶ 4.

⁹¹ 16 C.F.R. pt. 600 app. § 604(3)(E) ¶ 4.

⁹² *Duncan*, 149 F.3d at 427-28 (holding no permissible purpose existed in suit between lender and debtor that was not about the debt that existed between them but was suit for negligence brought by debtor); *Chester v. Purvis*, 260 F. Supp. 2d 711, 716 (S.D. Ind. 2003) (finding no permissible purpose in suit between debtor and creditor unrelated to debt); *Allen v. Kirkland & Ellis*, No. 91 C 8271, 1992 WL 206285, at *4 (N.D. Ill. Aug. 17, 1992) (holding consumer report was properly obtained in lawsuit regarding business debts between the parties).

⁹³ *See supra* Part I.B.1.

⁹⁴ *Bakker*, 152 F.3d at 1012 (rejecting claim of legitimate business need by attorney representing women against dentist who had allegedly touched women improperly); *Mone*, 945 F.2d at 308 (finding no permissible purpose to determine collectibility of defendant in claim for unfair competition); *Duncan*, 149 F.3d at 427-28; 16 C.F.R. pt. 600 app. § 604(3)(E) ¶ 4.

⁹⁵ FED. TRADE COMM’N STAFF OPINION LETTER TO LONG (July 6, 2000), *available at* <http://www.ftc.gov/os/statutes/fcra/long.shtm>.

⁹⁶ 275 F. Supp. 2d 808, 812 (W.D. Ky. 2003).

⁹⁷ *Id.* at 817.

⁹⁸ 410 F. Supp. 2d 1020,1022 (D. Kan. 2006).

⁹⁹ *Id.* at 1023.

¹⁰⁰ *Id.*

¹⁰¹ *Yohay v. Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 969, 971-72 (4th Cir. 1987); *Rodgers v. McCullough*, 296 F. Supp. 2d 895, 901 (W.D. Tenn. 2003); *Thibodeaux v. Rupers*, 196 F. Supp. 2d 585, 591-92 (S.D. Ohio 2001). *See also* 16 C.F.R. pt. 600 app. § 604(3)(A) ¶ 5B.

¹⁰² 16 C.F.R. pt. 600 app. § 604(3)(E) ¶ 4.

¹⁰³ *Klapper v. Shapiro*, 586 N.Y.S.2d 846, 848, 851 (Sup. Ct. 1992) (“The judicial forum is not an arena for the display of personal antagonism between attorneys.”).

¹⁰⁴ *Phillips v. Grendahl*, 312 F.3d 357, 367-68 (8th Cir. 2002) (noting marriage is not a business transaction that would give prospective mother-in-law legitimate business need to investigate future son-in-law).

¹⁰⁵ Private investigators are, of course, an alternative means of acquiring information. However, attorneys should also be concerned with whether their investigators fit the definition of consumer reporting agency in the FCRA which would bring the information gathered by them within the scope of the Act.

¹⁰⁶ 15 U.S.C. § 1681n-o (2000).

¹⁰⁷ § 1681q.

¹⁰⁸ § 1681h(e).

¹⁰⁹ § 1681t.

¹¹⁰ *See Jordan v. Trans Union, L.L.C.*, 377 F. Supp. 2d 1307 (N.D. Ga. 2005); *Gorman v. Wolpoff & Abramson, L.L.P.*, 370 F. Supp. 2d 1005 (N.D. Cal. 2005); NAT’L CONSUMER LAW CTR., *supra* note 6, at 311-35.

¹¹¹ An action to enforce this liability may be brought within 2 years from the date of discovery of the violation or 5 years after the date on which the violation occurred, whichever is earlier. § 1681p.

¹¹² § 1681n(a)(1)(A).

¹¹³ § 1681n(a)(2)-(3).

¹¹⁴ *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips v. Grendahl*, 312 F.3d 357, 367-68 (8th Cir. 2002); *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Duncan v. Handmaker*, 149 F.3d 424, 427-28 (6th Cir. 1998); *Casella v. Equifax Credit Info. Sys.*, 5 F.3d 469, 476 (2d Cir. 1995); *Zamora v. Valley Fed. Savs. & Loan Ass’n*, 811 F.2d 1368, 1370 (10th Cir. 1987); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986).

¹¹⁵ *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2208 (2007).

¹¹⁶ *Id.* at 2215.

¹¹⁷ *Id.* at 2216.

¹¹⁸ *Berman v. Parco*, 986 F. Supp. 195, 200 (S.D.N.Y. 1997).

¹¹⁹ *Id.*

¹²⁰ 15 U.S.C. § 1681n(a)(1)(B).

¹²¹ § 1681n(a)(2)-(3).

¹²² *Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260, 263-64 (S.D.N.Y. 1994); *Edge v. Prof’l Claims Bureau, Inc.*, 64 F. Supp. 2d 115, 117 (E.D.N.Y. 1999). *See also Stonehart v. Rosenthal*, No. 01 Civ. 651 (SAS), 2001 U.S. Dist. LEXIS 11566, at *17 (S.D.N.Y. Aug. 13, 2001).

¹²³ *Duncan v. Handmaker*, 149 F.3d 424, 426 (6th Cir. 1998); *Hansen v. Morgan*, 582 F.2d 1214, 1219-20 (9th Cir. 1978); *Boothe v. TRW Credit Data*, 557 F. Supp 66, 70-71 (S.D.N.Y. 1982).

¹²⁴ *Scott v. Real Estate Fin. Group*, 183 F.3d 97, 99 (2d Cir. 1999).

¹²⁵ *Duncan*, 149 F.3d at 429.

¹²⁶ *Id.*

¹²⁷ 15 U.S.C. § 1681e(a).

¹²⁸ § 1681e(d).

¹²⁹ *See Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1273 (9th Cir. 1990) (holding a report was obtained under false pretenses when defendant falsely certified report would be used for employment purposes but plaintiff was not being considered for employment at the time).

¹³⁰ *Ippolito v. WNS, Inc.*, 964 F.2d 440, 453-54 (7th Cir. 1988).

¹³¹ § 1681n(b).

¹³² *Id.*

¹³³ § 1681o(a).

- ¹³⁴ *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 607 (7th Cir. 2005) (claiming negligence of consumer reporting agency in complying with reinvestigation requirements); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 512-13 (5th Cir. 1982) (asserting failure to comply with reasonable procedures requirement); *Wilson v. Prudential Fin.*, 475 F. Supp. 2d 48, 52 (D.D.C. 2007) (claiming failure to comply with reasonable procedures requirement), *rev'd on other grounds sub nom. Wilson v. CARCO Group, Inc.*, 518 F.3d 40 (D.C. Cir. 2008); *O'Brien v. Equifax Info. Servs., L.L.C.*, 382 F. Supp. 2d 733, 736 (E.D. Pa. 2005) (claiming failure to comply with reasonable procedures requirement); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-cv-111-Oc-10GRJ, 2003 U.S. Dist. LEXIS 26765, at *12-13 (M.D. Fla. Dec. 19, 2003) (asserting failure to notify of adverse action); *Watson v. Credit Bureau, Inc.*, 660 F. Supp. 48, 50 (S.D. Miss. 1986) (claiming failure to comply with reasonable procedures requirement).
- ¹³⁵ *Dennis v. BEH-1*, 504 F.3d 892, 895 (9th Cir. 2007); *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986).
- ¹³⁶ *Dennis*, 504 F.3d at 895.
- ¹³⁷ *Russell-Allgood v. Resurgent Capital Servs.*, 515 F. Supp. 2d 1307, 1311 (N.D. Ga. 2007).
- ¹³⁸ *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982); *Cole v. Am. Family Mut. Ins. Co.*, 410 F. Supp. 2d 1020, 1025 (D. Kan. 2006); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 834-35 (8th Cir. 1976); *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972 (M.D. Fla. 1985); *Washington v. CSC Credit Servs.*, 178 FRD 95 (E.D. La. 1998).
- ¹³⁹ *Cole*, 410 F. Supp. 2d at 1025.
- ¹⁴⁰ *Pinner*, 805 F.2d at 1265.
- ¹⁴¹ *Zamora v. Valley Fed. Savs. & Loan Ass'n*, 811 F.2d 1368, 1371 (10th Cir. 1987).
- ¹⁴² *Dalton*, 257 F.3d at 418; *Cousin v. Trans Union Corp.*, 246 F.3d 359, 369 n.15 (5th Cir. 2001).
- ¹⁴³ *Yohay v. Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 972 (4th Cir. 1987).
- ¹⁴⁴ *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).
- ¹⁴⁵ *Yohay*, 827 F.2d at 972; *Thornton v. Equifax, Inc.*, 619 F.2d 700, 705 (8th Cir. 1980); *Cousin*, 246 F.3d at 372.
- ¹⁴⁶ *Yohay*, 827 F.2d at 972; *Bakker v. McKinnon*, 152 F.3d 1007, 1009 (8th Cir. 1998).
- ¹⁴⁷ *Yohay*, 827 F.2d at 972.
- ¹⁴⁸ *Bakker*, 152 F.3d at 1009.
- ¹⁴⁹ *Boothe v. TRW Credit Data*, 557 F. Supp 66, 72 (S.D.N.Y. 1982) (case decided before statutory damages were added to the FCRA).
- ¹⁵⁰ *Millstone v. O'Hanlon Reports, Inc.* 528 F.2d 829, 834-35 (8th Cir. 1976).
- ¹⁵¹ *Nagle v. Experian Info. Solutions, Inc.*, 297 F.3d 1305, 1306-07 (11th Cir. 2002).
- ¹⁵² *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001).
- ¹⁵³ *Id.* (holding no injunctive relief allowed); *White v. First Am. Registry, Inc.*, 378 F. Supp. 2d 419, 421-24 (S.D.N.Y. 2005) (ruling FCRA does not provide for injunctive relief and collecting cases on the split of authority); *Howar v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1145-46 (N.D. Cal. 2005) (holding no injunctive relief allowed and discussing cases on the disagreement between courts). *Contra Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1081-83 (C.D. Cal. 1998) (allowing for injunctive relief).
- ¹⁵⁴ 15 U.S.C. § 1681q.
- ¹⁵⁵ *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2209 n.9 (2007).
- ¹⁵⁶ 123 F.3d 365 (6th Cir. 1997).
- ¹⁵⁷ *Id.* at 366.
- ¹⁵⁸ *Id.* at 370.
- ¹⁵⁹ *Id.*
- ¹⁶⁰ *Id.*
- ¹⁶¹ *Id.*
- ¹⁶² *Id.*
- ¹⁶³ *Id.*
- ¹⁶⁴ *Id.* at 371.
- ¹⁶⁵ *United States v. Gantley*, 172 F.3d 422, 424-25 (6th Cir. 1999).
- ¹⁶⁶ *Id.*
- ¹⁶⁷ 763 N.E.2d 42, 45 (Mass. 2002).
- ¹⁶⁸ *Id.* at 45, 49-50.
- ¹⁶⁹ *Id.* at 49.
- ¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 15 U.S.C. § 1681(a)(4) (2000).