

Fair Credit Reporting Act — Pitfalls for Attorneys and Creditors

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INTRODUCTION AND OVERVIEW

I.

[15.1] Scope of Chapter

Federal law provides for accuracy and fairness in reporting of credit on individuals. In that connection, Congress' most recent version of the Fair Credit Reporting Act, ("FCRA") 15 USCA §1681 et seq., was approved on November 13, 1998.

This chapter discusses the various provisions of the FCRA, its impact upon credit reporting agencies, lending institutions, and attorneys, as well as certain practical applications, and potential problem areas.

II.

[15.2] History and Policy

As commerce expands throughout this country, and the use of the internet has provided easier access and greater speed to obtain credit, the need for accuracy and fair credit reporting has become increasingly necessary. The FCRA contains the following language in its opening paragraph establishing its purpose:

§ 1681 Congressional findings and statement of purpose:

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) 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.

(b) Reasonable procedures:

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

III.
[15.3] Definitions and rules of construction under
the Fair Credit Reporting Act

The practitioner, lending institutions and reporting agencies, should pay special attention to the definitions section of the FCRA. Defenses raised in potential FCRA litigation can be based upon a definitional term. The definitions are set forth in §1681(a) as follows:

§ 1681(a) Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer report.--

(1) In general.--The term "consumer report" means any written, oral, or other communication of any 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.

(2) Exclusions.--The term "consumer report" does not include--

(A) any--

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) of this section.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, 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, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

(j) Definitions relating to child support obligations

(1) Overdue support

The term "overdue support" has the meaning given to such term in section 666(e) of Title 42.

(2) State or local child support enforcement agency

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse action.--

(1) Actions included.--The term "adverse action"--

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means--

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is--

(I) made in connection with an application that was made by, or a transaction that was

initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders.--For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(1) Firm offer of credit or insurance.--The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established--

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification--

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was--

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or insurance transaction that is not initiated by the consumer.-- The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of--

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State.--The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded communications.--A communication is described in this subsection if it is a communication--

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of--

- (A) procuring an employee for the employer; or
- (B) procuring an opportunity for a natural person to work for the employer;
- (3) that is made by a person who regularly performs such procurement;
- (4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and
- (5) with respect to which--
 - (A) the consumer who is the subject of the communication--
 - (i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;
 - (ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and
 - (iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;
 - (B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and
 - (C) the person who makes the communication--
 - (i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and
 - (ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).
- (p) Consumer reporting agency that compiles and maintains files on consumers** on a nationwide basis.--**The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:**
 - (1) Public record information.**
 - (2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.**

Obviously, the above definitions come into play in connection with § 1681(b) through §1681(u) of the Fair Credit Reporting Act. The Sections that follow are the statutory language of the remainder of the Fair Credit Reporting Act, with comments and case citations, were deemed appropriate.

IV.

[15.4] Permissible uses of credit reports.

This section deals with the permissible uses of credit reports. This particular portion of the FCRA probably creates the greatest amount of litigation. §1681(b) sets forth the permissible uses of consumer reports. It governs both the party requesting the report and the credit reporting agency furnishing the report. The following is the language of §1681(b). Following the language of §1681(b) in this chapter, a number of cases are cited which can aid the reader in identifying potential issues for violation of §1681(b) of the FCRA.

§ 1681 (b) Permissible purposes of consumer reports

(a) In general.--Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(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 extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information--

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that--

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is

requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes.--

(1) Certification from user.--A consumer reporting agency may furnish a consumer report for employment purposes only if--

(A) the person who obtains such report from the agency certifies to the agency that--

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless--

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means

If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application--

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the

power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification--

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49, or a position subject to safety regulation by a State transportation

agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations.--

(A) In general.--In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that--

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will--

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation.--Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made--

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department.--For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) Report to the congress.--Not later than January 31 of each year, the head of each agency and department of the United States Government that exercised authority under this paragraph during the preceding year shall submit a report to the Congress on the number of times the department or agency exercised such authority during the year.

(E) Definitions.--For purposes of this paragraph, the following definitions shall apply:

(i) Classified information.--The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation.--The term "national security investigation" means any official

inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer.--

(1) In general.--A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if--

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section; and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(B).--A person may receive pursuant to paragraph (1)(B) only--

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries.--Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists.--

(1) In general.--A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification.--A consumer shall notify a consumer reporting agency under paragraph (1)--

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system.--Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall--

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election.--An election of a consumer under paragraph (1)--

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency--

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system.--

(A) **In general.**--Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall--

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency--

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) **Establishment and maintenance as compliance.**--Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide.--Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited.--A person shall not use or obtain a consumer report for any purpose unless--

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to

be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Furnishing reports containing medical information.--A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.

**The following are a sampling of cases dealing with litigation under §1681 (b) of the FCRA:
Legitimate Business Purposes.**

Spence v. TRW, Inc., C.A.6 (Mich.) 1996, 92 F.3d 380 holds that consumer's filing of lawsuit against creditor, alleging false reporting of past-due debt to credit reporting agency, gave agency reason to believe that creditor had legitimate business need for copy of consumer's residential mortgage credit report, as required by Fair Credit Reporting Act, given creditor's need for report in connection with preparation of its defense.

Estiverne v. Sak's Fifth Avenue, C.A.5 (La.) 1993, 9 F.3d 1171 holds that report from check approval company was "consumer report" for purposes of FCRA and retail merchant's obtaining report for purpose of deciding whether to accept consumer's check in payment for purchase of watch was "legitimate business need"; therefore, inquiry into consumer's credit information did not constitute invasion of privacy.

Mone v. Dranow, C.A.9 (Cal.) 1991, 945 F.2d 306 holds that employer's request for credit report to determine whether former employee would be able to satisfy judgment in planned unfair competition action did not fall within lawful "business need" purpose for obtaining such report, under FCRA, as request was plainly unrelated to eligibility for credit, insurance, or employment.

Advanced Conservation Systems Inc. v. Long Island Lighting Co., E.D.N.Y. 1996, 934 F.Supp. 53, affirmed 113 F.3d 1229 holds that credit report had not been obtained under false pretenses, in violation of FCRA, when utility requested and obtained from credit reporting agency credit information on chief executive officer of contractor engaged in business of installing and servicing gas-heat equipment in area served by utility; utility had sufficient reason to inquire regarding creditworthiness of CEO, as utility was considering whether to include contractor in list of recommended contractors it made available to its customers, and given corporate structure of contractor, in which CEO was sole shareholder, there was need to examine his creditworthiness also.

Law Firm's legitimate business purpose

Korotki v. Attorney Services Corp. Inc., D.Md.1996, 931 F.Supp. 1269, affirmed 131 F.3d 135, certiorari denied 118 S.Ct. 1797, 140 L.Ed.2d 938. holds that a law firm and its attorney, who were hired by business to collect money that developer allegedly owed to business, and serve developer with papers regarding mechanic's lien, had "permissible purpose" when they acquired developer's credit report in order to obtain alternate address at which to serve developer with legal papers and did not violate FCRA; business had reason to believe that developer owed business a debt and for that reason, business was entitled to attempt to collect the debt and to hire attorney and law firm to do so.

Firm offers of credit

Yonter v. Aetna Finance Co., E.D.La.1991, 777 F.Supp. 490 holds that FCRA permitted prescreening of individual consumers listed with credit reporting agencies as long as party seeking list agrees in advance that each consumer whose name was on list after prescreening would receive offer of credit; intent to grant credit to all consumers on final list was permissible purpose for prescreening service.

See, *Swift v. First USA Bank*, found below at page 15.43.

Trans Union Corp. v. F.T.C., C.A.D.C.1996, 81 F.3d 228, 317 U.S.App.D.C. 133 holds that consumer reporting agency's use of consumer reports for target marketing would not be legitimate business purpose under catch-all provision of FCRA, which spells out purposes for which credit report may be furnished; to be "legitimate business need," consumer must have sought to initiate transaction.

V.

[15.5] Reporting requirements of the Fair Credit Reporting Act.

The FCRA also establishes certain reporting requirements for credit reporting agencies. Those requirements are identified in § 1681(c) which reads as follows:

§ 1681(c) Reporting of requirements relating to information contained in consumer reports prohibited

(a) Information excluded from consumer reports.--Prohibited items

Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

- (1) cases under Title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.
- (2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report

by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

(6) Redesignated (5)

(b) Exempted cases

The provisions of subsection (a) of this section are not applicable in the case of any consumer credit report to be used in connection with--

(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of \$150,000 or more;

(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of \$150,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal 75,000, or more.

(c) Running of reporting period

(1) **In general.**--The 7-year period referred to in paragraphs (4) and (6) of subsection (a) of this section shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.

(2) **Effective date.**--Paragraph (1) shall apply only to items of information added to the file of a consumer on or after the date that is 455 days after September 30, 1996.

(d) Information required to be disclosed

Any consumer reporting agency that furnishes a consumer report that contains information regarding any case involving the consumer that arises under Title 11, shall include in the report an identification of the chapter of such Title 11 under which such case arises if provided by the source of the information. If any case arising or filed under Title 11, is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal.

(e) Indication of closure of account by consumer

If a consumer reporting agency is notified pursuant to section 1681s-2(a)(4) of this title that a credit account of a consumer was voluntarily closed by the consumer, the agency shall indicate that fact in any consumer report that includes information related to the account.

(f) Indication of dispute by consumer

If a consumer reporting agency is notified pursuant to section 1681s-2(a)(3) of this title that information regarding a consumer who was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information.

VI.

[15.6] Investigative consumer reports.

The FCRA sets forth certain requirements when a consumer report is utilized in connection with any type of an investigation. § 1681(d) sets forth the requirements as they relate to the disclosure of investigative consumer reports and reads as follows:

§ 1681(d) Disclosure of investigative consumer reports

(a) Disclosure of fact of preparation

A person may not procure or cause to be prepared an investigative consumer report on any consumer unless--

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure **(A)** is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and **(B)** includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section and the written summary of the rights of the consumer prepared pursuant to section 1681g(c) of this title; and

(2) the person certifies or has certified to the consumer reporting agency that--

(A) the person has made the disclosures to the consumer required by paragraph (1); and

(B) the person will comply with subsection (b) of this section.

(b) Disclosure on request of nature and scope of investigation

Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1) of this section, make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) Limitation on liability upon showing of reasonable procedures for compliance with provisions
No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section.

(d) Prohibitions

(1) Certification.--A consumer reporting agency shall not prepare or furnish an investigative consumer report unless the agency has received a certification under subsection (a)(2) of this section from the person who requested the report.

(2) Inquiries.--A consumer reporting agency shall not make an inquiry for the purpose of preparing an investigative consumer report on a consumer for employment purposes if the making of the inquiry by an employer or prospective employer of the consumer would violate any applicable Federal or State equal employment opportunity law or regulation.

(3) Certain public record information.--Except as otherwise provided in section 1681k of this

title, a consumer reporting agency shall not furnish an investigative consumer report that includes information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished.

(4) Certain adverse information.--A consumer reporting agency shall not prepare or furnish an investigative consumer report on a consumer that contains information that is adverse to the interest of the consumer and that is obtained through a personal interview with a neighbor, friend, or associate of the consumer or with another person with whom the consumer is acquainted or who has knowledge of such item of information, unless--

(A) the agency has followed reasonable procedures to obtain confirmation of the information, from an additional source that has independent and direct knowledge of the information; or

(B) the person interviewed is the best possible source of the information.

VII.

[15.7] Compliance with the Fair Credit Reporting Act.

The FCRA has strict requirements for both the consumer reporting agency and the user of the credit report. §1681 (e) of the FCRA also has generated substantial litigation. Following the language of the statute, certain cases are cited which give the reader a flavor for the types of issues that have been raised in litigation concerning this particular section. Those requirements are set forth in §1681(e) which read as follows:

§ 1681(e) Compliance procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(c) Disclosure of consumer reports by users allowed

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse

action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to users and furnishers of information

(1) Notice requirement.--A consumer reporting agency shall provide to any person--

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this subchapter.

(2) Content of notice.--The Federal Trade Commission shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Federal Trade Commission prescription under this paragraph.

(e) Procurement of consumer report for resale

(1) Disclosure.--A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report--

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 1681b of this title for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of procurers for resale.--A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall--

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 1681b of this title, including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person--

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(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of consumer report to a federal agency or department.-- Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if--

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

The following are a sampling of cases which have been litigated under §1681(e).

Burden of proof

King v. MTA Bridges and Tunnels, E.D.N.Y.1996, 933 F.Supp. 220 holds that to succeed on claim under § 1681(e) of the FCRA concerning accuracy of credit reports, plaintiff must establish that (1) consumer reporting agency was negligent in that it failed to follow reasonable procedures to assure accuracy, (2) consumer reporting agency reported inaccurate information about plaintiff, (3) plaintiff was injured, (4) consumer reporting agency's negligence proximately caused the plaintiff's injury, and (5) plaintiff must show that agency failed to follow reasonable procedures in generating the inaccurate report.

Middlebrooks v. Retail Credit Co., N.D.Ga.1976, 416 F.Supp. 1013 holds that once it is shown that information contained in credit report prepared by consumer credit-reporting agency is relevant to needs of creditor and is requested for permissible purpose as defined by § 1681b of this title, court need not inquire further into reasonableness of underlying procedures adopted by agency for purpose of assuring that such information will be furnished for permissible purposes.

Cahlin v. General Motors Acceptance Corp., C.A.11 (Fla.) 1991, 936 F.2d 1151 holds that the FCRA does not make credit reporting agency strictly liable for all inaccuracies, but rather agency can escape liability if it establishes that inaccurate report was generated by following reasonable procedures.

Wiggins v. Equifax Services, Inc., D.D.C.1993, 848 F.Supp. 213 holds that term "willful," as used in FCRA provision penalizing "willful noncompliance" with acts provisions, is demonstrated by showing of knowingly and intentionally committing act in conscious disregard for rights of others.

VIII.

[15.8] Responsibilities of the consumer agency are limited under §1681(f) when the recipient of the reports are governmental agencies.

The FCRA is more permissive in connection with reporting to governmental agencies. In that connection, § 1681 (f) sets forth the language governing disclosures to governmental agencies and reads as follows:

§ 1681(f) Disclosures to governmental agencies

Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

IX.

[15.9] Requirements to consumers

The FCRA has certain requirements with respect to disclosures be made to consumers. Those requirements are set forth in §1681(g) and read as follows:

§ 1681(g) Disclosures to consumers

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: Provided, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3)(A) Identification of each person (including each end-user identified under section 1681e(e)(1) of this title) that procured a consumer report--

(i) for employment purposes, during the 2-year period preceding the date on which the request is made; or

(ii) for any other purpose, during the 1-year period preceding the date on which the request is made.

(B) An identification of a person under subparagraph (A) shall include--

(i) the name of the person or, if applicable, the trade name (written in full) under which such person conducts business; and

(ii) upon request of the consumer, the address and telephone number of the person.

(C) Subparagraph (A) does not apply if--

(i) the end user is an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title; and

(ii) the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.

(5) A record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

(b) Exempt information

The requirements of subsection (a) of this section respecting the disclosure of sources of

information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

(c) Summary of rights required to be included with disclosure

(1) Summary of rights.--A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section--

(A) a written summary of all of the rights that the consumer has under this subchapter; and

(B) in the case of a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours.

(2) Specific items required to be included.--The summary of rights required under paragraph (1) shall include--

(A) a brief description of this subchapter and all rights of consumers under this subchapter;

(B) an explanation of how the consumer may exercise the rights of the consumer under this subchapter;

(C) a list of all Federal agencies responsible for enforcing any provision of this subchapter and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from a consumer's file, unless the information is outdated under section 1681c of this title or cannot be verified.

(3) Form of summary of rights.--For purposes of this subsection and any disclosure by a consumer reporting agency required under this subchapter with respect to consumers' rights, the Federal Trade Commission (after consultation with each Federal agency referred to in section 1681s(b) of this title) shall prescribe the form and content of any such disclosure of the rights of consumers required under this subchapter. A consumer reporting agency shall be in compliance with this subsection if it provides disclosures under paragraph (1) that are substantially similar to the Federal Trade Commission prescription under this paragraph.

(4) Effectiveness.--No disclosures shall be required under this subsection until the date on which the Federal Trade Commission prescribes the form and content of such disclosures under paragraph (3).

X.

[15.10] Form of disclosures.

The FCRA establishes those requirements for the matter and form in which disclosures are made to consumers. The requirements are set forth in §1681(h) and read as follows:

§ 1681(h) Conditions and form of disclosure to consumers

(a) In general

(1) Proper identification.--A consumer reporting agency shall require, as a condition of making the disclosures required under section 1681g of this title, that the consumer furnish proper identification.

(2) Disclosure in writing.--Except as provided in subsection (b) of this section, the disclosures required to be made under section 1681(g) of this title shall be provided under that section in writing.

(b) Other forms of disclosure

(1) In general.--If authorized by a consumer, a consumer reporting agency may make the disclosures required under [FN1] 1681g of this title--

(A) other than in writing; and

(B) in such form as may be--

(i) specified by the consumer in accordance with paragraph (2); and

(ii) available from the agency.

(2) Form.--A consumer may specify pursuant to paragraph (1) that disclosures under section 1681g of this title shall be made--

(A) in person, upon the appearance of the consumer at the place of business of the consumer reporting agency where disclosures are regularly provided, during normal business hours, and on reasonable notice;

(B) by telephone, if the consumer has made a written request for disclosure by telephone;

(C) by electronic means, if available from the agency; or

(D) by any other reasonable means that is available from the agency.

(c) Trained personnel

Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

(d) Persons accompanying consumer

The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

(e) Limitation of liability

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report [FN2] except as to false information furnished with malice or willful intent to injure such consumer.

XI.

[15.11] Disputes.

The FCRA establishes certain procedures for disputes in connection with the accuracy of consumer reports. Those FCRA procedures are established in §1681(i) and read as follows:

§ 1681(i) Procedure in case of disputed accuracy

(a) Reinvestigations of disputed information

(1) Reinvestigation required.--

(A) In general.--If the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly of such dispute, the agency shall reinvestigate free of charge and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer.

(B) Extension of period to reinvestigate.--Except as provided in subparagraph (C), the 30-day period described in subparagraph (A) may be extended for not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation.

(C) Limitations on extension of period to reinvestigate.--Subparagraph (B) shall not apply to any reinvestigation in which, during the 30-day period described in subparagraph (A), the information that is the subject of the reinvestigation is found to be inaccurate or incomplete or the consumer reporting agency determines that the information cannot be verified.

(2) Prompt notice of dispute to furnisher of information.--

(A) In general.--Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer.

(B) Provision of other information from consumer.--The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

(3) Determination that dispute is frivolous or irrelevant.--

(A) In general.--Notwithstanding paragraph (1), a consumer reporting agency may terminate a reinvestigation of information disputed by a consumer under that paragraph if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information.

(B) Notice of determination.--Upon making any determination in accordance with subparagraph (A) that a dispute is frivolous or irrelevant, a consumer reporting agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the

agency.

(C) Contents of notice.--A notice under subparagraph (B) shall include--

(i) the reasons for the determination under subparagraph (A); and

(ii) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(4) Consideration of consumer information.--In conducting any reinvestigation under paragraph (1) with respect to disputed information in the file of any consumer, the consumer reporting agency shall review and consider all relevant information submitted by the consumer in the period described in paragraph (1)(A) with respect to such disputed information.

(5) Treatment of inaccurate or unverifiable information.--

(A) In general.--If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall promptly delete that item of information from the consumer's file or modify that item of information, as appropriate, based on the results of the reinvestigation.

(B) Requirements relating to reinsertion of previously deleted material.--

(i) Certification of accuracy of information.--If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the consumer reporting agency unless the person who furnishes the information certifies that the information is complete and accurate.

(ii) Notice to consumer.--If any information that has been deleted from a consumer's file pursuant to subparagraph (A) is reinserted in the file, the consumer reporting agency shall notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.

(iii) Additional information.--As part of, or in addition to, the notice under clause (ii), a consumer reporting agency shall provide to a consumer in writing not later than 5 business days after the date of the reinsertion--

(I) a statement that the disputed information has been reinserted;

(II) the business name and address of any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or of any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and

(III) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.

(C) Procedures to prevent reappearance.--A consumer reporting agency shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to this paragraph (other than information that is reinserted in accordance with subparagraph (B)(i)).

(D) Automated reinvestigation system.--Any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

(6) Notice of results of reinvestigation.--

(A) In general.--A consumer reporting agency shall provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.

(B) Contents.--As part of, or in addition to, the notice under subparagraph (A), a consumer reporting agency shall provide to a consumer in writing before the expiration of the 5-day period referred to in subparagraph (A)--

(i) a statement that the reinvestigation is completed;

(ii) a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation;

(iii) a notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the agency, including the business name and address of any furnisher of information contacted in connection with such information and the telephone number of such furnisher, if reasonably available;

(iv) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and

(v) a notice that the consumer has the right to request under subsection (d) of this section that the consumer reporting agency furnish notifications under that subsection.

(7) Description of reinvestigation procedure.--A consumer reporting agency shall provide to a consumer a description referred to in paragraph (6)(B)(iii) by not later than 15 days after receiving a request from the consumer for that description.

(8) Expedited dispute resolution.--If a dispute regarding an item of information in a consumer's file at a consumer reporting agency is resolved in accordance with paragraph (5)(A) by the deletion of the disputed information by not later than 3 business days after the date on which the agency receives notice of the dispute from the consumer in accordance with paragraph (1)(A), then the agency shall not be required to comply with paragraphs (2), (6), and (7) with respect to that dispute if the agency--

(A) provides prompt notice of the deletion to the consumer by telephone;

(B) includes in that notice, or in a written notice that accompanies a confirmation and consumer report provided in accordance with subparagraph (C), a statement of the consumer's right to request under subsection (d) of this section that the agency furnish notifications under that subsection; and

(C) provides written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 business days after making the deletion.

(b) Statement of dispute

If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Notification of consumer dispute in subsequent consumer reports

Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Notification of deletion of disputed information

Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information.

XII.

[15.12] Costs.

The FCRA also outlines amounts to be charged for certain disclosures. The amounts to be charged are set forth in §1681(j) which reads as follows:

§1681(j) states as follows:

§ 1681(j) Charges for certain disclosures

(a) Reasonable charges allowed for certain disclosures

(1) In general.--Except as provided in subsections (b), (c), and (d) of this section, a consumer reporting agency may impose a reasonable charge on a consumer--

(A) for making a disclosure to the consumer pursuant to section 1681g of this title, which charge--

(i) shall not exceed \$8; and

(ii) shall be indicated to the consumer before making the disclosure; and

(B) for furnishing, pursuant to section 1681i(d) of this title, following a reinvestigation under section 1681i(a) of this title, a statement, codification, or summary to a person designated by the consumer under that section after the 30-day period beginning on the date of notification of the consumer under paragraph (6) or (8) of section 1681i(a) of this title with respect to the reinvestigation, which charge--

(i) shall not exceed the charge that the agency would impose on each designated recipient for a consumer report; and

(ii) shall be indicated to the consumer before furnishing such information.

(2) Modification of amount.--The Federal Trade Commission shall increase the amount referred to in paragraph (1)(A)(i) on January 1 of each year, based proportionally on changes in the Consumer Price Index, with fractional changes rounded to the nearest fifty cents.

(b) Free disclosure after adverse notice to consumer

Each consumer reporting agency that maintains a file on a consumer shall make all disclosures

pursuant to section 1681g of this title without charge to the consumer if, not later than 60 days after receipt by such consumer of a notification pursuant to section 1681m of this title, or of a notification from a debt collection agency affiliated with that consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 1681g of this title.

(c) Free disclosure under certain other circumstances

Upon the request of the consumer, a consumer reporting agency shall make all disclosures pursuant to section 1681g of this title once during any 12-month period without charge to that consumer if the consumer certifies in writing that the consumer--

(1) is unemployed and intends to apply for employment in the 60-day period beginning on the date on which the certification is made;

(2) is a recipient of public welfare assistance; or

(3) has reason to believe that the file on the consumer at the agency contains inaccurate information due to fraud.

(d) Other charges prohibited

A consumer reporting agency shall not impose any charge on a consumer for providing any notification required by this subchapter or making any disclosure required by this subchapter, except as authorized by subsection (a) of this section.

XIII.

[15.13] Employment purposes.

The FCRA requirement with respect to public record information for employment purpose is set forth in §1681(k). That section states as follows:

§ 1681(k) Public record information for employment purposes

(a) In general

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall--

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

(b) Exemption for National security investigations

Subsection (a) does not apply in the case of an agency or department of the United States Government that seeks to obtain and use a consumer report for employment purposes, if the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

XIV. **[15.14] Restrictions**

The FCRA sets forth certain restrictions on investigative consumer reports. Those restrictions are set forth in §1681(l) which reads as follows:

§ 1681(l) Restrictions on investigative consumer reports

Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished.

XV. **[15.15.] User requirements.**

The FCRA sets forth requirements as concerns the users of consumer reports. §1681(m) sets forth the requirements with respect to users of consumer reports and reads as follows:

§ 1681(m) Requirements on users of consumer reports

(a) Duties of users taking adverse actions on the basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall--

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically--

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right--

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681(i) of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general.--Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate.--

(A) Duties, generally.--If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall--

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described.--An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) Information described.--Information referred to in subparagraph (A)--

(i) except as provided in clause (ii), is information that--

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include--

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on the basis of information contained in consumer files

(1) In general.--Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that--

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) Disclosure of address and telephone number.--A statement under paragraph (1) shall include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title.

(3) Maintaining criteria on file.--A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected.--**This section is not intended to affect the authority** of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

XVI.

[15.16] Civil liability for willful noncompliance.

The FCRA recognizes certain civil liability for willful noncompliance. This liability is established in §1681(n) which reads as follows:

§ 1681(n) Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter

with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or \$1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or \$1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

XVII.

[15.17] Negligent noncompliance.

The FCRA sets forth the elements of damage that may be assessed in connection with liability for negligent noncompliance. Those elements of damage are set forth in §1681(o) of the FCRA which reads as follows:

§ 1681(o) Civil liability for negligent noncompliance

(a) In general.

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

XVIII.

[15.18] Limitations- Jurisdiction

The FCRA sets forth a statute of limitation as well as establishing federal jurisdiction. The statute of limitations is typically two years as set forth in §1681(p) and jurisdiction lies in the U.S. District Courts. §1681(p) reads as follows:

§ 1681(p) Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

XIX.

[15.19] Criminal liabilities

The FCRA also establishes certain criminal liabilities for violations. Those liabilities are set forth in §1681(q) which reads as follows:

§ 1681(q) Obtaining information under false pretenses

Any 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.

XX.

[15.20] Criminal liability - employees.

The FCRA establishes certain criminal liabilities for employees of reporting agencies. Those criminal liabilities are set forth in §1681(r) which reads as follows:

§ 1681(r) Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under Title 18, imprisoned for not more than 2 years, or both.

XXI.
[15.21] Enforcement

Enforcement of the FCRA is accomplished through the Federal Trade Commission. Of course, in addition to the Federal Trade Commission, private attorneys acting as “private attorney generals” enforce the terms of the FCRA. As to the FTC’s jurisdiction to enforce the terms of the FCRA, same is established in §1681(s) of the Act which reads as follows:

§ 1681(s) Administrative enforcement

(a) Federal Trade Commission; powers

(1) Enforcement by Federal Trade Commission. Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C.A. 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)] and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof [15 U.S.C.A. 45(b)] with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter.

(2)(A) In the event of a knowing violation, which constitutes a pattern or practice of violations of this subchapter, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this subchapter. In such action, such person shall be liable for a civil penalty of not more than \$2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s-2(a)(1) of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding

brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(4) Neither the Commission nor any other agency referred to in subsection (b) of this section may prescribe trade regulation rules or other regulations with respect to this subchapter.

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under--

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], in the case of--

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) Section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

(3) the Federal Credit Union Act [12 U.S.C.A. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C.A. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C.A. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) **Authority of States.**--In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State--

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover--

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation of section 1681s-2(a) of this title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than \$1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators.--The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right--

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers.--For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending.--If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 1818 of Title 12 for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this subchapter that is alleged in that complaint.

(5) Limitations on State actions for violation of section 1681s-2(a)(1) of this title.--

(A) Violation of injunction required.--A State may not bring an action against a person under paragraph (1)(B) for a violation of section 1681s- 2(a)(1) of this title, unless--

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable.--In an action against a person under paragraph (1)(B) for a violation of section 1681s-2(a)(1) of this title, a State may not recover any

damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law. Notwithstanding the preceding, no agency referred to in subsection (b) of this section may conduct an examination of a bank, savings association, or credit union regarding compliance with the provisions of this subchapter, except in response to a complaint (or if the agency otherwise has knowledge) that the bank, savings association, or credit union has violated a provision of this subchapter, in which case, the agency may conduct an examination as necessary to investigate the complaint. If an agency determines during an investigation in response to a complaint that a violation of this subchapter has occurred, the agency may, during its next 2 regularly scheduled examinations of the bank, savings association, or credit union, examine for compliance with this subchapter.

(e) Interpretive authority

The Board of Governors of the Federal Reserve System may issue interpretations of any provision of this subchapter as such provision may apply to any persons identified under paragraphs (1), (2), and (3) of subsection (b) of this section, or to the holding companies and affiliates of such persons, in consultation with Federal agencies identified in paragraph [FN1] (1), (2), and (3) of subsection (b) of this section.

XXII.

[15.22] Child support.

FCRA also sets forth certain provisions in connection with the ability to obtain reports for child support obligations. Those provisions are set forth in §1681(s-1) which reads as follows:

§ 1681(s-1) Information on overdue child support obligations

Notwithstanding any other provision of this subchapter, a consumer reporting agency shall include in any consumer report furnished by the agency in accordance with section 1681b of this title, any information on the failure of the consumer to pay overdue support which--

(1) is provided--

(A) to the consumer reporting agency by a State or local child support enforcement agency; or

(B) to the consumer reporting agency and verified by any local, State, or Federal Government agency; and

(2) antedates the report by 7 years or less.

XXIII.

[15.23] Responsibility of those reporting to consumer reporting agencies.

The FCRA establishes certain responsibilities as to those who communicate information to reporting agencies. Those requirements are set forth in §1681(s-2) which reads as follows:

§ 1681(s-2) Responsibilities of furnishers of information to consumer reporting agencies

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if--

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

(C) No address requirement

A person who clearly and conspicuously specifies to the consumer an address for notices referred to in subparagraph (B) shall not be subject to subparagraph (A); however, nothing in subparagraph (B) shall require a person to specify such an address.

(2) Duty to correct and update information

A person who--

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

(B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

(3) Duty to provide notice of dispute

If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

(4) Duty to provide notice of closed accounts

A person who regularly and in the ordinary course of business furnishes information to a

consumer reporting agency regarding a consumer who has a credit account with that person shall notify the agency of the voluntary closure of the account by the consumer, in information regularly furnished for the period in which the account is closed.

(5) Duty to provide notice of delinquency of accounts

A person who furnishes information to a consumer reporting agency regarding a delinquent account being placed for collection, charged to profit or loss, or subjected to any similar action shall, not later than 90 days after furnishing the information, notify the agency of the month and year of the commencement of the delinquency that immediately preceded the action.

(b) Duties of furnishers of information upon notice of dispute

(1) In general

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall--

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency; and

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis.

(2) Deadline

A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 1681i(a)(1) of this title within which the consumer reporting agency is required to complete actions required by that section regarding that information.

(c) Limitation on liability

Sections 1681n and 1681o of this title do not apply to any failure to comply with subsection (a) of this section, except as provided in section 1681s(c)(1)(B) of this title.

(d) Limitation on enforcement

Subsection (a) of this section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials and the State officials identified in that section.

XXIV.

[15.24] Federal preemption and State laws.

The FCRA does not annul or affect most State laws. §1681(t) of the FCRA reads as follows:

§ 1681(t) Relation to State laws

(a) In general

Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State--

(1) with respect to any subject matter regulated under--

(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;

(B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996; or

(F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply--

(i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or

(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996);

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996); or

(3) with respect to the form and content of any disclosure required to be made under section 1681g(c) of this title.

(c) Definition of firm offer of credit or insurance

Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 1681a(l) of this title shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations

Subsections (b) and (c) of this section--

(1) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996; and

- (2) do not apply to any provision of State law (including any provision of a State constitution) that--
- (A) is enacted after January 1, 2004;
 - (B) states explicitly that the provision is intended to supplement this subchapter; and
 - (C) gives greater protection to consumers than is provided under this subchapter.

XXV.
[15.25] FBI

The FCRA also concerns itself with disclosures to the FBI. The provisions of the FCRA dealing with the FBI are found at §1681(u) which reads as follows:

§ 1681(u) Disclosures to FBI for counterintelligence purposes

(a) Identity of financial institutions

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 3401 of Title 12) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that--

- (1) such information is necessary for the conduct of an authorized foreign counterintelligence investigation;
- (2) there are specific and articulable facts giving reason to believe that the consumer--
 - (A) is a foreign power (as defined in section 1801 of Title 50) or a person who is not a United States person (as defined in such section 1801 of title 50) and is an official of a foreign power; or
 - (B) is an agent of a foreign power and is engaging or has engaged in an act of international terrorism (as that term is defined in section 1801(c) of Title 50) or clandestine intelligence activities that involve or may involve a violation of criminal statutes of the United States.

(b) Identifying information

Notwithstanding the provisions of section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that--

- (1) such information is necessary to the conduct of an authorized counterintelligence investigation; and

(2) there is information giving reason to believe that the consumer has been, or is about to be, in contact with a foreign power or an agent of a foreign power (as defined in section 1801 of Title 50).

(c) Court order for disclosure of consumer reports

Notwithstanding section 1681b of this title or any other provision of this subchapter, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director, a court may issue an order ex parte directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that--

(1) the consumer report is necessary for the conduct of an authorized foreign counterintelligence investigation; and

(2) there are specific and articulable facts giving reason to believe that the consumer whose consumer report is sought--

(A) is an agent of a foreign power, and

(B) is engaging or has engaged in an act of international terrorism (as that term is defined in section 1801(c) of Title 50) or clandestine intelligence activities that involve or may involve a violation of criminal statutes of the United States.

The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

(d) Confidentiality

No consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall disclose to any person, other than those officers, employees, or agents of a consumer reporting agency necessary to fulfill the requirement to disclose information to the Federal Bureau of Investigation under this section, that the Federal Bureau of Investigation has sought or obtained the identity of financial institutions or a consumer report respecting any consumer under subsection (a), (b), or (c) of this section, and no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall include in any consumer report any information that would indicate that the Federal Bureau of Investigation has sought or obtained such information or a consumer report.

(e) Payment of fees

The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(f) Limit on dissemination

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence

investigation.

(g) Rules of construction

Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this subchapter. Nothing in this section shall be construed to authorize or permit the withholding of information from the Congress.

(h) Reports to Congress

On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c) of this section.

(i) Damages

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of--

- (1) \$100, without regard to the volume of consumer reports, records, or information involved;
- (2) any actual damages sustained by the consumer as a result of the disclosure;
- (3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and
- (4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(j) Disciplinary actions for violations

If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(k) Good-faith exception

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(l) Limitation of remedies

Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(m) Injunctive relief

In addition to any other remedy contained in this section, injunctive relief shall be available

to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

(Cite as: 1999 WL 965449 (N.D.Ill.))

**Shelly D. SWIFT, individually and on
behalf of all others similarly situated,
Plaintiff,**

v.

FIRST USA BANK, Defendant.

No. 98 C 8238.

United States District Court, N.D. Illinois,
Eastern Division.

Sept. 30, 1999.

MEMORANDUM OPINION

KOCORAS, J.

*1 This matter is before the Court the Motion of Defendant First USA Bank to Dismiss Counts II and III of Plaintiff's First Amended Complaint. For the reasons set forth below, the motion is granted.

BACKGROUND

In August 1999, following this Court's ruling on the Motion to Dismiss of Defendants First USA Bank ("First USA"), First Credit Card Services UST ("First Credit"), and Premiere Communications, Inc. ("Premiere"), (See Swift v. First U.S.A. Bank, 1999 WL 350847 (N.D.Ill. May 21, 1999)), Plaintiff Shelley D. Swift ("Swift") filed her first amended class action complaint naming First USA as the sole Defendant. The amended complaint contains the following allegations.

First USA is a bank which issues credit cards to consumers throughout the United States. In January 1998, Swift received a credit card solicitation from Defendants in the mail. The cover letter discussed the benefits of the Platinum Connect card ("Connect Card"), which was enclosed with the letter. The letter stated in

pertinent part:

Introducing the First USA Platinum Connect card.

Whether you decide to use it as a calling card, a Pre-Approved credit card, or both, you'll receive one free hour of long distance calling.

* * *

Use your new Platinum Connect card to make all your calls AND purchases. Having one card for both your calling and credit card needs is a great convenience. Because not only is it one card to carry, it is also just one bill to pay every month.

* * *

You're Pre-Approved!

Just call 1(800) 335-2453 to activate your card today. Activating your card is simple, since you're already Pre-Approved. Just call 1(800) 335-2453 by January 30, 1998, to get your free hour of domestic long distance calling, and if you choose, to take advantage of the credit card and/or calling card features.

The card member agreement further disclosed that Premiere would provide telecommunications services in conjunction with the credit card.

Included with the solicitation was a VISA credit card which could be activated by calling a toll-free number. Swift had not applied or otherwise requested a credit card from First USA prior to receiving the solicitation in the mail, and Swift had never been a customer of First USA.

The first amended complaint now contains three counts. Count I is an alleged violation of the Truth in Lending Act, 15 U.S.C. § 1642 ("TILA"); Count II alleges that First USA violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et. seq. ("the FCRA") by improperly acquiring consumer credit reports, or for improperly using them. Count III is for an alleged violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act, 815 ILCS 505/1 et seq. ("ICFA"); and the Illinois Uniform Deceptive Trade Practices Act,

815 ILCS 510/1 et seq. ("DTPA"). First USA has moved to dismiss Count II and Count III. We shall address the legal sufficiency of each count in turn.

LEGAL STANDARD

*2 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. See *Bontkowski v. First National Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.1993). The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); *Sherwin Manor Nursing Center, Inc. v. McAuliffe*, 37 F.3d 1216, 1219 (7th Cir.1994). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. See *Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir.1992).

In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings themselves. Documents incorporated by reference into the pleadings and documents attached to the pleadings as exhibits are considered part of the pleadings for all purposes. See Fed.R. Civ.P. 10(c). In addition, "[d]ocuments that a defendant attaches to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir.1993). It is with these principles in mind that we turn to the motion

before us.

DISCUSSION

I. Count II-FCRA

First USA moves to dismiss Count II of Swift's complaint, which alleges a cause of action for violating the FCRA. Specifically, Plaintiff claims that First USA violated 15 U.S.C. § 1681b ("Section 1681b"), and seeks punitive damages under 15 U.S.C. § 1681n for First USA's alleged wilful and wanton conduct, and in the alternative § 1681o for First USA's alleged negligent conduct. In paragraph 26(e) of the complaint, Plaintiff pleads upon information and belief that First USA obtained information on Swift based upon a false pretense in violation of § 1681q.

The FCRA requires a consumer reporting agency to follow "reasonable procedures to assure maximum possible accuracy" of the data within a consumer's credit report. 15 U.S.C. § 1681e(b). The FCRA applies to the actions of consumer reporting agencies and entities requesting credit information. *Pappas v. City of Calumet City*, 9 F.Supp.2d 943, 946 (N.D.Ill.1998). Thus, any individual who negligently fails to follow the provisions of the FCRA is potentially liable for actual damages, costs, and attorney's fees. 15 U.S.C. § 1681o. In addition, any person who willfully or knowingly fails to comply with the FCRA may also be liable for punitive damages. 15 U.S.C. § 1681n.

*3 Neither party disputes that under specific circumstances a credit report may be obtained without the consent or even the knowledge of the consumer. Specifically, 15 U.S.C. § 1681b(c)(1)(B)(i) states in pertinent part that:

A consumer reporting agency may furnish a consumer report relating to any consumer ... in connection with any credit or insurance transaction that is not initiated by the consumer only if-

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of

credit or insurance;
(ii) the consumer reporting agency has complied with subsection (e) of this section; and
(iii) there is not in effect an election by the consumer ... to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

The FCRA defines a firm offer of credit as "any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer ..." 15 U.S.C. § 1681b(1).

In her amended complaint, Swift alleges that First USA violated the FCRA by:

- a. obtaining consumer credit reports ... for an illegitimate business need of evaluating the credit worthiness of potential customers in violation of 15 U.S.C. § 1681(b);
- b. obtaining consumer credit reports not in connection with any particular credit transaction and without the permission of the consumer in violation of 15 U.S.C. § 1681(b);
- c. neglecting its duty to get permission from the Plaintiff and Class members prior to obtaining and using a credit report which was not obtained in connection with any particular transaction;
- d. using the consumer reports as a method to prescreen and/or perform selective marketing of prospective customers to extending an offer of credit in violation of 15 U.S.C. § 1681;
- e. on information and belief, issuing a statement based upon a false pretense to credit reporting agencies for purposes of obtaining credit reports on consumers.

Complaint at ¶ 26.

Initially, Swift has not plead any facts showing that First USA violated the FCRA. Contrary to Swift's assertions in paragraph 26(a)--(d), First USA did not violate the FCRA by obtaining Swift's credit report to pre-screen her for a firm offer of credit. This is a perfectly legitimate

activity, which is expressly authorized by 15 U.S.C. § 1681b(c)(1)(B)(i).

Moreover, in her response brief Swift attempts to argue that First USA did not adequately provide her notice as required by the FCRA. However, a motion to dismiss addresses the adequacy of the factual allegations in the complaint, not the plaintiff's opposing brief. In her complaint, Swift does not plead that she sought to have her name excluded from lists provided to First USA, nor that the credit reporting agency that provided Swift's report to First USA failed to comply with the notice and disclosure requirements of the FCRA. In addition, we note that Swift has not provided the Court with any case law in support of her position. Therefore, on its face, Count II fails to properly plead a cause of action against First USA for a violation of the FCRA.

***4** Swift attempts to salvage Count II by claiming that because the form of the firm offer of credit from First USA (i.e. the allegedly illegal, unsolicited credit card) is improper and illegal, it follows that no firm offer of credit occurred, and First USA is culpable under the FCRA. We disagree. Even if Swift had plead any facts in her complaint giving any indication that this is what she is basing her FCRA count on, Count II still fails as a matter of law. First USA obtained her credit report for the proper purpose of pre-screening, which culminated in a firm offer of credit. Merely because First USA chose an allegedly improper means of conveying the credit offer to Swift does not mean that it failed to extend a firm offer of credit in compliance with the FCRA. Therefore, paragraph 26(a)--(d) fails to state a claim upon which relief may be granted.

Swift also claims that First USA obtained information on Swift based upon a false pretense in violation of § 1681q, although she does not explicitly cite the statutory section in her complaint. As an initial matter, pleading "upon information and belief" is patently improper and insufficient under the requirements of federal law. *Bankers Trust Co. v. Old Republic Ins. Co.*, 959

F.2d 677, 683 (7th Cir.1992). In her complaint, Swift ignored this plain rule and "on information and belief" charged First USA with obtaining her credit report under false pretenses. This is improper pleading practice and for this reason alone, paragraph 26, line e is improperly plead.

Our analysis of Swift's claim does not stop there. We also believe that absent the offending "upon information and belief" language discussed supra, Swift has failed to plead any set of facts setting forth a violation of Section 1681q. Generally, the FCRA permits consumer reporting agencies to furnish a consumer report to an entity it reasonably believes intends to use the information for one of several proper purposes. 15 U.S.C. § 1681a(1)-(3). One such permissible purpose for which an entity may obtain a consumer report is "a legitimate business need for the information in connection with a business transaction that is initiated by the consumer." 15 U.S.C. § 1681b(3)(F)(i). "The term 'legitimate business needs' and 'in connection with a business transaction' refer to the needs and objective of the person to whom the report is furnished, not the business needs about whom it is furnished." Pappas, 9 F.Supp.2d at 949 (quoting *Fernandez v. Retail Credit Co.*, 349 F.Supp. 652, 654 (E.D.La.1972)). As such, our focus is on the legitimate business need of First USA for the credit report.

In paragraph three of her first amended complaint, Swift admits that "First USA is a bank which issues credit cards to consumers throughout the United States." Swift's amended complaint further alleges that First USA improperly mailed her a credit card solicitation along with the actual card, after obtaining her credit report without her permission. Nowhere in her complaint does Swift set forth any allegations that First USA obtained her credit report for any reason other than to issue a credit card to her, which is certainly a legitimate business need of First USA. While Swift has alleged that First USA used an improper means of accomplishing its legitimate business need, this does not properly set forth a cause of action under

1681q. Instead, Swift needed to plead allegations that First USA acted under a false pretense when it obtained her credit report. Thus, her complaint fails to allege facts sufficiently setting forth the essential elements of a cause of action against First USA under Section 1681q.

*5 For these reasons, Count II of Swift's first amended complaint is dismissed.

II. Count III-ICFA and DTPA claims

Defendants move to dismiss Count III of Swift's complaint which alleges a cause of action under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. and seeks damages for violations of the ICFA and the DTPA, including punitive damages. The ICFA, in pertinent part, provides that

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact, or of the use or employment of any practice described in [the Illinois Uniform Deceptive Trade Practices Act, 810 ILCS 510/2 et. seq.] in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived, or damaged thereby.

815 ILCS 505/2. Anyone who is damaged as a result of a violation of the ICFA is allowed to bring an action against the alleged violator. 815 ILCS 505/10a.

In asserting a claim under the ICFA, a violation based on misrepresentation or fraud "must be plead with the particularity of Rule 9(b) of the Federal Rules of Civil Procedure." *Appraisers Coalition v. Appraisal Institute*, 845 F.Supp. 592, 608-09 (N.D.Ill.1994); see also *Ramson v. Layne*, 668 F.Supp. 1162, 1170 (N.D.Ill.1987). Thus, in order to state a cause of action under the ICFA, "a

complaint must set forth specific facts that show (1) a deceptive act or practice; (2) an intent by the defendant that the plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving trade or commerce." *Perona v. Volkswagen of America, Inc.*, 658 N.E.2d 1349, 1352 (Ill.App.1995) (citing *People ex rel Hartigan v. E & E Hauling, Inc.*, 607 N.E.2d 165 (Ill.1992)); see also *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 754 (Ill.1994) (same); *Siegel v. Levy Organization Development Co., Inc.*, 607 N.E.2d 194, 198 (Ill.1992) (same); *Adler v. William Blair & Co.*, 648 N.E.2d 226, 233 (Ill.App.1995). A plaintiff must "at least plead with sufficient particularity facts establishing the elements of fraud, including what misrepresentations were made, when they were made, who made the representations and to whom they were made." *Perona*, 658 N.E.2d at 1352 (citing *Board of Education of City of Chicago v. A, C & S, Inc.*, 546 N.E.2d 580, 594 (Ill.1989)). To state a claim under the ICFA, the plaintiff must establish that the defendant made a misrepresentation of material fact. See *Graphic Sales v. Sperry Univac*, 824 F.2d 576, 580 (7th Cir.1987).

Swift alleges First USA violated the ICFA and DTPA by

- a. deceiving Plaintiff and the class by obtaining credit reports, without the prospective customer's consent, in violation of 15 U.S.C. § 1681;
- *6 b. concealing from Plaintiff and the Class that Defendant had obtained credit reports pertaining to Plaintiff and the Class in order to perform pre-screening and/or target marketing, in violation of 15 U.S.C. § 1681;
- c. using the credit reports, deceptively obtained by Defendant, in order to extend unsolicited Platinum Connect cards to Plaintiff and the class; and
- d. intending that Plaintiff and the Class would rely on Defendant's omission of fact, that it obtained Plaintiff's and Class Member's credit reports, and accept Defendant's unsolicited Platinum Connect cards.

Complaint at ¶ 30.

The gravamen of the ICFA and DTPA count is that because First USA obtained Swift's credit report without her permission to perform pre-screening and offer an unsolicited credit card to her, it not only entails a violation of the FCRA, but also the ICFA and DTPA.

We believe that Swift has failed to allege violations of the ICFA or DTPA. First, Swift has not met the heightened pleading requirements. As discussed supra, Swift has not made out a cause of action under the FCRA against First USA for its alleged failure to properly obtain Swift's credit report. Thus, given that she bases her ICFA and DTPA claims on the alleged violation of the FCRA by First USA, Count III fails on this fact alone.

However, even if Swift had properly plead a FCRA claim against First USA, her ICFA and DTPA claims would still fail. Under the heightened pleading requirements for the ICFA, Swift fails to articulate with specificity exactly how First USA performed a deceptive act or practice. Nor has Swift plead an intent by First USA that Swift rely on the deception, nor that the deception occurred in the course of conduct involving trade or commerce.

Swift also has failed to plead specific facts showing which statements confuse or mislead, which employee of First USA made those statements, when they were made, or where. Swift has also not plead with specificity what damages were suffered. See *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1357 (requiring plaintiff to allege facts which support damages in excess of "a surfeit of unwanted mail"). A conclusory allegation of damages is insufficient without more factual predicate.

Finally, Swift's argument that a FCRA violation automatically gives rise to ICFA or DTPA violations is unsupported by the law. Swift cites no case law in support of this contention. In

addition, this argument is logically unsound. Moreover, the ICFA specifically requires that a private party who brings an action under it must be a "person who suffers damage as a result of a violation." 815 ILCS 505/10a. Damages have consistently been a required element. See *Duran v. Leslie Oldsmobile, Inc.*, 594 N.E.2d 1355, 1361-63 (Ill.App.Ct.1992). Swift cannot escape the damages element by alleging a FCRA violation.

For these reasons, Count III of Swift's complaint is dismissed.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss Counts II and III of Plaintiff's Complaint is granted. Count I remains pending.