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INTRODUCTION

Litigation to collect consumer debts has come under scrutiny by federal and state agencies and rulemakers, as well as by consumer advocates. Some practices, such as using affidavits with characteristics of robo-signing, or bringing suits on stale debt, are becoming increasingly well-documented.[1] Indeed, attorneys general of at least four states have commenced enforcement actions addressing widespread misconduct in connection with consumer collection litigations.[2]

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1. *See generally* Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259 (2011) (discussing individual courts' treatment of robo-signed affidavits and advocating use of strict proof standards); Jessica Silver-Greenberg, *Dead Soul is a Debt-Collector*, WALL ST. J. (Dec. 31, 2010), online.wsj.com/article/SB10001424052970204204004576049902142690400.html; Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J. (Nov. 28, 2010), http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html.

2. *E.g.*, Agreed Final Judgment, Tex. v. Midland Funding LLC, No. 2011-40626 (165th Dist. Ct., Harris County, Tex. Dec. 21, 2011), *available with registration at* http://www.hcdistrictclerk.com/edocs/public/ViewFilePage.aspx?Get=zHhfiEY03v1pzJpZADfLnrxieTe70/S4kKaBU8f/gWa9UY0Jbr1bcBpnBjEfx2HvTQ9KVzoqL+q3LMPPnO7UFf71QUfgcSc/KwtYkp92VC0zM54UlXiWe5Tvn9n2ElpY44+jr1OWnig=; Andrew Tangel & Alejandro Lazo, *California Sues JPMorgan Over Debt Collection Tactics*, L.A. TIMES (May 9, 2013), http://www.latimes.com/business/la-fi-harris-jpmorgan-20130510,0,624352.story (reporting that California's attorney general filed suit alleging that JPMorgan used a strategy to "blitz California courts" with lawsuits based on incomplete information, which was "rubber-stamped by low-level employees"); Jonathan D. Glater, *N.Y. Claims Collectors of Debt Used Fraud*, N.Y. TIMES (July 23, 2009), http://www.nytimes.com/2009/07/23/business/23cuomo.html?_r=1 (reporting that New York's attorney general filed suit to vacate thousands of default judgments entered in collection cases); Press Release, Office of the Minn. Att'y Gen., Attorney General Lori Swanson Charges One of the Nation's Largest "Debt Buyers" with Defrauding Minnesota Courts and Citizens by Filing "Robo-Signed" Affidavits (Mar. 28, 2011), *available at* http://www.ag.state.mn.us/consumer/pressrelease/110328debtbuyers.asp.

Such attention is welcome, but it does not change the fact that records of such litigation and the resulting judgments are public records that are routinely collected by consumer reporting agencies and used to calculate credit scores. Consumer reporting agencies have a heightened duty to insure the accuracy of public records used in consumer reports for employment purposes.[3] Unfortunately, that duty does not extend to consumer reports used for other matters. The appearance of a bankruptcy filing, collection suit, or judgment in a credit file can mean a reduction in a credit score of as much as 150 points, adversely affecting the consumer's eligibility for future credit, insurance, employment, and housing.[4] Although consumers have the right to dispute information contained in their credit files, consumers who choose to exercise that right face a number of obstacles.

Some obstacles may arise from the structure and language of the Fair Credit Reporting Act (FCRA)[5] itself. For example, although the FCRA limits the reporting of a "civil suit" to seven years from the date of filing, it permits the reporting of a paid judgment entered in that same suit for up to seven years after the judgment is filed.[6] Time restrictions on the reporting of unpaid judgments, as well as paid and unpaid tax liens, may be more difficult to determine.[7] Moreover, some courts consider public records to be reliable,[8] and protect reporting agencies from liability for reporting them, even when the records are incomplete or confusing.[9]

In addition, common preclusion doctrines and other procedural rules designed to protect the finality of judgments may limit consumers' access to the courts to challenge credit reports containing unfavorable collection judgments. For example, the *Rooker-Feldman* doctrine, which generally prevents federal district courts from reviewing state court judgments, has been used to bar FCRA claims

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3. 15 U.S.C. § 1681k (2006) (CRAs must notify consumer regarding use of potentially negative information or maintain "strict procedures" to insure public records are "complete and up to date").

4. *See* Sarah Davies, Vantage Score Solutions, LLC, Introduction to the Vantage Score Model: Ways Consumer Credit Scores are Impacted and Methods for Score Improvement (2012) at 13, http://money.umd.edu/files/12_Davies.pdf (discussing the negative impact of various events on a person's credit Vantage score); *see also* Les Christie, *How Foreclosure Affects Your Credit Score*, CNNMONEY (Apr. 22, 2010), *available at* http://money.cnn.com/2010/04/22/real_estate/foreclosure_credit_score (reporting average drops in FICO credit score from the reports of negative information).

5. 15 U.S.C. §§ 1681-1681x (2006 & Supp. 2011).

6. *See* FED. TRADE COMM'N, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT 56 (2011) [hereinafter 40 YEARS OF EXPERIENCE], *available at* http://www.ftc.gov/os/2011/07/110720fcrareport.pdf.

7. 15 U.S.C. § 1681c(a)(2) (2006 & Supp. 2011); *see* CHI CHI WU & ELIZABETH DEARMOND, NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING 201 (7th ed. 2010); Danshera Cords, *Lien on Me: Virtual Debtors Prisons, the Practical Effects of Tax Liens and Proposals for Reform*, 49 U. LOUISVILLE L. REV. 341, 360-62 (2011).

8. *See* Henson v. CSC Credit Servs., 29 F.3d 280, 285 (7th Cir. 1994) (holding that consumer reporting agency cannot be liable for reporting inaccurate information obtained from a public record absent prior notice of the inaccuracy).

9. WU & DEARMOND, *supra* note 7, at 141.

regarding allegations that unfair debt collection practices were employed to obtain a state court judgment.[10]

This Article explores the impact that some of the contemporary practices in consumer debt collection litigation may have on credit reporting and scoring. In doing so, it will pay particular attention to available data regarding the use of unfair collection practices in such litigation, and will consider whether consumer reports of such litigation unfairly burden consumers' ability to obtain future housing, employment, insurance, or credit.

Part I of this Article begins with a brief discussion of the mechanics of consumer reporting and the statutory framework the FCRA provides. The discussion will draw heavily from three recent reports regarding the industry: the Federal Trade Commission's (FTC) 2012 report on its ongoing study of credit reporting accuracy,[11] the FTC's 2011 report summarizing its staff interpretations of the FCRA,[12] and a 2012 report regarding key features of the FCRA published by the Consumer Financial Protection Bureau (CFPB).[13] Part I will pay particular attention to the practices and obligations of consumer reporting agencies in connection with the reporting of information collected from public records. Part II will examine some of the data collected from recent studies of collection practices,[14] including data contained in a 2013 report by the FTC on the debt buying industry.[15] Part III will consider what this data means for consumers wishing to challenge reports containing public records resulting from consumer debt collection litigation. It will also highlight some of the obstacles consumers face at the intersection of the Fair Debt Collection Practices Act (FDCPA)[16] and the FCRA. Finally, Part IV will consider several alternatives to relieve some of

10. *See* Ellis v. CAC Fin. Corp., 6 F. App'x 765 (10th Cir. 2001); *see also* Laychock v. Wells Fargo Home Mortg., 399 F. App'x 716, 718-19 (3d Cir. 2010) (holding that *Rooker-Feldman* barred FCRA claims in federal suit seeking damages in connection with alleged wrongful foreclosure).

11. FED. TRADE COMM'N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (2012) [hereinafter ACCURACY STUDY], *available at* http://ftc.gov/os/2013/02/130211factareport.pdf.

12. *See* 40 YEARS OF EXPERIENCE, *supra* note 6, at 56.

13. CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA (2012) [hereinafter KEY DIMENSIONS], *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

14. *See* LEGAL AID SOC'Y ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 1, 9 (2010) [hereinafter DEBT DECEPTION], *available at* http://www.urbanjustice.org/pdf/publications/cdp_24may10.pdf (finding 94.3% of cases brought by debt buyers in New York Civil Court resulted in default judgments); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2012); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 296 (2011) (finding 39.46% of collection cases commenced by debt buyers in Dallas County resulted in default judgments).

15. FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY (2013) [hereinafter DEBT BUYING INDUSTRY], *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf.

16. 15 U.S.C. §§ 1692-1692p (2006 & Supp. 2011).

the burden on consumers who were subjected to abusive collection tactics in litigation.

I. CREDIT REPORTING AND ITS REGULATION UNDER THE FCRA

A. The Process of Credit Reporting

Modern credit reporting plays an increasingly important role in consumers' lives. Three national consumer reporting agencies (CRAs) maintain files on more than 200 million Americans[17] in what has recently been described as a highly automated, multi-billion dollar "ecosystem."[18] This system also includes numerous smaller CRAs and their subscribers, who may be resellers of information or other users of the reports, as well as private and public furnishers of information, which include creditors, retailers, employers, and collection agencies as well as consumers.[19] Credit reports, and scores generated with information contained in them, are used by lenders to make decisions about whether to grant credit, and at what price it will be offered.[20] Reports and scores are also used by insurers and others who engage in risk-based pricing, as well as by employers and landlords, to make decisions about consumers' eligibility for employment, insurance, and housing, all of which can have lasting, and often expensive, consequences on the consumers involved.[21]

The FRCA was originally enacted in 1970 to protect consumers in this process by promoting accuracy, fairness, and efficiency in the collection, reporting, and use of sensitive consumer information.[22] It accomplishes these goals by regulating the content of consumer reports, the procedures used to gather information contained in them, and the conduct of parties distributing, obtaining, and using them.[23]

A general understanding of the consumer reporting process is helpful to understanding the application of the FCRA, which is discussed in more detail below. In short, the process begins with the delivery of information to the CRAs from large financial institutions, debt buyers, and others who are known as

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17. Equifax Information Services LLC (Equifax), TransUnion LLC (TransUnion) and Experian Information Solutions Inc. (Experian). *See* ACCURACY STUDY, *supra* note 11, at 2; KEY DIMENSIONS, *supra* note 13, at 2-3.

18. *See* KEY DIMENSIONS, *supra* note 13, at 6-7.

19. *See* ACCURACY STUDY, *supra* note 11, at 2-3.

20. *See id.*

21. *See id.* at 5-6; DEBT BUYING INDUSTRY, *supra* note 15, at iv (noting distinction between *credit* reports and other consumer reports governed by the FCRA); KEY DIMENSIONS, *supra* note 13, at 6 & n.a.

22. *See* 40 YEARS OF EXPERIENCE, *supra* note 6, at 1.

23. *See generally* KEY DIMENSIONS, *supra* note 13, at 6. The statutory name of these reports is "consumer reports," which are defined as "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" credit, insurance, or employment. 15 U.S.C. § 1681a(d)(1) (2006 & Supp. 2011).

"furnishers."[24] Information relating to credit cards, mortgages, auto loans, and other consumer loans and accounts is reported as "trade lines."[25] Furnishers transmit the information electronically in a standard format and update it regularly.[26]

In addition to trade line information, CRAs also obtain information from collection agencies regarding accounts placed for collection and public records regarding bankruptcies, civil judgments, and tax liens.[27] Unlike the trade line information, which is supplied by a variety of sources, most public record information comes to CRAs from a single private entity, LexisNexis Risk Data Retrieval Services LLC (LNRDRS).[28] LNRDRS gathers federal court information, including bankruptcy information, from PACER, the court's electronic case management system.[29] It also provides state and local court information and other records from as many as 12,000 different government offices.[30]

Because record-keeping policies and practices vary from state-to-state, the Fourth Circuit's description of one CRA's process of collecting records from the 250 civil and district courts in Virginia is illustrative.[31] The Supreme Court of Virginia operates a shared case management system with clerks of local courts using a uniform system for recording judgments.[32] The system displays only the most recent disposition in each case without displaying the prior history. If a judgment is vacated after it is recorded, the system no longer records the judgment and instead records only that the disposition was vacated.[33] According to the Fourth Circuit, one national CRA, Equifax, "never" directly collects public records information,[34] but uses LNRDRS, which uses independent contractors to conduct in-person interviews in all of the 120 circuit courts. In some courts, the contractors may review paper records; in others, they may use the court's computer and case management system; and in others, they may obtain only a weekly summary of the dockets. LNRDRS' methods to obtain records from the state's district courts varied over the years from a bulk feed system, to a "webscrape" program, to in-person collection.[35]

LNRDRS reports that it obtains and reports approximately 30% of the information electronically, and the remaining 70% from independent contractors who gather the information manually and enter it into an electronic form for

24. 15 U.S.C. § 1681s-2 (2006 & Supp. 2011).
25. *See* KEY DIMENSIONS, *supra* note 13, at 8.
26. *See id.* at 14.
27. *See id.* at 8; ACCURACY STUDY, *supra* note 11, at 3.
28. *See id.* at 17.
29. *See id.*
30. *See id.*
31. *See* Soutter v. Equifax Info. Servs., LLC, No. 11-1564, 2012 WL 5992207, at *1 (4th Cir. Dec. 3, 2012).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

LNRDRS, which in turn delivers it to the CRAs.[36] The CRAs then compile the information they receive from private furnishers and LNRDRS before organizing it in consumer files through a matching process.[37] From those files, they generate the consumer reports for creditors, employers, insurers, and others known as "users."[38]

B. Regulating the Content of the Credit Reports

One of the primary ways in which the FCRA protects consumers' private financial information is by regulating the content of reports. For example, section 605 limits the types of information that may be included in a consumer report and the length of time such information may be reported.[39] Public records such as civil suits, civil judgments, and records of arrest can be reported for no more than seven years "or until the governing statute of limitations has expired, whichever is the longer period."[40] There is, however, no requirement that the litigation be closed prior to reporting.[41] Similarly, tax liens paid more than seven years prior to the consumer report may not be reported, although bankruptcy cases may be reported for up to ten years.[42]

Although section 605 is drafted in terms of what may not be included, other provisions require that consumer reports *must* contain certain items. For example, section 605A requires a consumer reporting agency to include a "fraud alert" upon request of a consumer or a consumer representative who believes she has been the victim of fraud or other crime such as identity theft.[43] Likewise, upon the request of an "active duty military consumer," reporting agencies must include "an active duty alert" in the consumer's file.[44] CRAs are also required to include notices when the consumer voluntarily closes a credit account or disputes information appearing on the report.[45] Separate provisions of the Act govern the consumer dispute process and will be discussed in more detail in Part I.D below, after first discussing the standards that apply to collection and communication of information contained in a consumer report.

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36. *See* KEY DIMENSIONS, *supra* note 13, at 17.

37. *See id.* at 22-23.

38. *See id.* at 13 fig.2 (chart explaining flow of information through consumer reporting system).

39. *See* 15 U.S.C. § 1681c (2006 & Supp. 2011).

40. 15 U.S.C. § 1681c(a)(2). The governing statute of limitations may permit reporting of an unpaid civil judgment obtained in a state court for as long as twenty years. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 34.001 (West Supp. 2012) (providing that writs of execution may become dormant after ten years but may be valid for a total of twenty years if proper steps are taken).

41. *See* Zahran v. TransUnion Corp., No. Civ. 01C1700, 2003 WL 1733561, at *5 (N.D. Ill. Mar. 31, 2003).

42. 15 U.S.C. § 1681c(a)(1); *see* Cords, *supra* note 7, at 341 (highlighting problems in uniform reporting of tax liens).

43. 15 U.S.C. § 1681c-1(a)(1).

44. *Id.* § 1681c-1(c)(1).

45. *Id.* § 1681s-2(a)(3), (4) (2006 & Supp. 2011).

C. *"Maximum Possible Accuracy"*

Consumer reporting agencies must "follow reasonable procedures to assure maximum possible accuracy" of the information contained in the report.[46] The massive volume of information flowing through the system presents a number of challenges to CRAs, which take steps to insure that accurate data is appropriately attributed to the correct consumer.[47] For example, national CRAs routinely screen new furnishers and closely scrutinize data they furnish to prevent against fraud or other improprieties with the data.[48] Then they take steps to insure that the data is matched to the appropriate consumers.[49] Similarities in names and other identifying information present additional challenges.[50]

An agency's procedures are generally considered reasonable when the information reported is accurate.[51] It is generally reasonable for a consumer reporting agency to rely on the accuracy of information contained in public records. Indeed, at least one court has held that even when the information obtained from the public record turns out to be *inaccurate*, the CRA is protected from liability when reporting it "as a matter of law."[52]

In contrast, "strict procedures" are required to insure that adverse public record information is current as of the date of reporting when the report is to be used for employment purposes.[53] CRAs must also verify adverse public information contained in an investigative report within 30 days of furnishing it.[54] Still, only "reasonable procedures" are required when reporting public records information for other purposes.[55] Whether accurate records can nevertheless be misleading, such as when they are incomplete, is an open question in some jurisdictions.[56]

Nevertheless, inaccuracies occur. The FTC reports that 26% of those who participated in its accuracy study found at least one material error.[57] Material errors are errors in categories that are used to generate a credit score, e.g., trade lines, collections and public records.[58] The majority of material errors identified

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46. *Id.* § 1681e(b) (2006 & Supp. 2011).
47. *See* KEY DIMENSIONS, *supra* note 13, at 21.
48. *Id.*
49. *See* ACCURACY STUDY, *supra* note 11, at 2-3.
50. *See* KEY DIMENSIONS, *supra* note 13, at 21.
51. *See generally* McPhee v. Chilton Corp., 468 F. Supp. 494 (D. Conn. 1978); Austin v. BankAmerica Serv. Corp., 419 F. Supp. 730 (N.D. Ga. 1974).
52. *E.g.*, Henson v. CSC Credit Services, 29 F.3d 280, 282 (7th Cir. 1994).
53. *See* 15 U.S.C. § 1681k(a)(2).
54. *Id.* § 1681d(d)(3) (2006).
55. *See id.* § 1681i.
56. *Compare* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984) (holding that technically accurate information may also be misleading in such a way to trigger inquiry regarding reasonableness of procedures used by agency) *with* Dennis v. BEH-1, LLC, 520 F.3d 1066 (9th Cir. 2008) (holding that plaintiff must establish inaccuracy of information before examining reasonableness of procedures).
57. ACCURACY STUDY, *supra* note 11, at i.
58. *See id.* at 12, 17-18.

occurred in trade lines and collections.[59]

In May 2012, the *Columbus Dispatch* published a multi-part series regarding errors in consumer credit reporting.[60] After reviewing nearly 30,000 complaints filed with the FTC over thirty months, reporters found that almost a quarter of them related to errors in reporting credit card, car loan, or mortgage debt. Other complaints arose from errors in reporting when information regarding one consumer was mixed with or linked to information relating to another consumer because of similarities in name, age, or other identifying information.[61] Other reported errors related to incorrect personal information about the consumer, such as name, date of birth, address, or other identifying information.[62] Among the more troublesome errors consumers found in their credit reports related to court judgments, which are among those the FTC may consider material.[63]

There are a number of ways in which errors can occur in reporting public record information. They can occur at the source, such as when a court clerk mistakenly records a dismissal as a judgment for a landlord or when a vendor mistakenly interprets the content of a public record.[64] Errors can also be made by the CRA when it fails to update public records in a timely fashion,[65] or when it improperly mixes or merges files containing information of persons other than the consumer.[66] Although public records disputes may occur less frequently than other types of disputes, they not only may occur with greater frequency among certain groups of consumers,[67] but also may adversely affect credit scores more severely than other types of errors.[68]

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59. *See id.* at iv, 51.

60. Jill Riepenhoff & Mike Wagner, *Dispatch Investigation—Credit Scars: Bad Judgments*, COLUMBUS DISPATCH (May 9, 2012), www.dispatch.com/content/stories/local/2012/05/09/bad-judgments.html [hereinafter *Bad Judgments*]; Jill Riepenhoff & Mike Wagner, *Dispatch Investigation—Credit Scars*, COLUMBUS DISPATCH (May 6, 2012), www.dispatch.com/content/stories/local/2012/05/06/credit-scars.html [hereinafter *Credit Scars*].

61. *Credit Scars*, *supra* note 60.

62. *Id.*

63. *See* ACCURACY STUDY, *supra* note 11, at 17-18.

64. *E.g.*, Dennis v. BEH-1, LLC, 520 F.3d 1066, 1068 (9th Cir. 2008).

65. *See* Soutter v. Equifax Info. Servs., LLC, No. 3:10cv107, 2011 WL 1226025, at *1-3 (E.D. Va. 2011) (granting class certification to persons whose credit reports continued to show unpaid judgments more than 30 days after such judgments were "satisfied, appealed, or vacated"), *rev'd on other grounds* No. 11-1564, 2012 WL 5992207, at *1-2 (4th Cir. Dec. 3, 2012) (holding that class plaintiff failed to satisfy "typicality" requirement). Other problems associated with public records involve multiple reporting of a single event, as when a creditor continues to report a delinquent account after it obtains a judgment regarding it or fails to adequately identify the parties to lawsuit. *See* Robert Avery, Paul Calem, Glenn Canner & Raphael Bostic, *Overview of Consumer Data and Credit Reporting*, FED. RES. BULL. 71 (2003).

66. WU & DEARMOND, *supra* note 7, at 121-24.

67. *See* ACCURACY STUDY, *supra* note 11, at 61-62 (noting that non-white and older participants displayed more derogatory public records than other participants in the study).

68. *See* Davies, *supra* note 4, at 13; Christie, *supra* note 4.

D. Consumer Disputes and the Duty to Reinvestigate

Although a reasonable standard applies to protect CRAs from liability regarding public records at the initial collection stage, the FCRA imposes additional obligations on CRAs once a consumer disputes the information.[69] In these circumstances, the FCRA requires CRAs to conduct a "reasonable reinvestigation" of the disputed information or delete the item from the file.[70] When the consumer disputes the accuracy of information to the CRA, the CRA must contact the furnisher who is also obligated to investigate the dispute.[71] In some circumstances, the furnisher of information may be liable to the consumer for supplying false or misleading information, although it is doubtful that such liability could be imposed on a public entity supplying the information.[72]

Courts examining CRAs' procedures for reinvestigation appear to apply a more rigorous standard than the one associated with the original report.[73] As a result, CRAs failing to carry out the reasonable reinvestigation of disputed information—even information obtained from a public record—may be subject to liability for negligent and willful conduct.[74] Yet, despite these standards, the practices actually employed by the CRAs in handling consumer disputes may resemble more of a rubber stamp than a reinvestigation.[75]

The dispute process is operated through e-OSCAR, an electronic system owned by four major consumer reporting agencies and operated by the Consumer Data Industry Association (CDIA), which also serves as a trade association for consumer reporting agencies nationwide.[76] Employing a highly mechanized process that translates detailed consumer disputes into two- or three-digit codes, the CRAs resolve some disputes internally; when they do not, they transfer the codes to the furnishers who may verify the trade line as accurate, modify it as requested by the consumer, or delete it because of fraud.[77] Although the CFPB reports that about 60% of accounts are modified in some way following a dispute,

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69. 15 U.S.C. § 1681i.

70. *Id.* § 1681i(a)(1)(A) (2006 & Supp. 2011).

71. *Id.* § 1681i(a)(2)(A) (2006 & Supp. 2011) (requiring CRA to notify furnisher after receiving notice of consumer dispute); 15 U.S.C. § 1681s-2(b) (2006 & Supp. 2011) (generally requiring furnisher to conduct investigation after notice from CRA and to report its results).

72. *See* 15 U.S.C. § 1681s-2(b)(1)(A)-(D) (2006 & Supp. 2011). *See generally* Hammond v. Citibank, N.A., No. 2:10-CV-1071, 2011 WL 4484416, at *5, *13 (S.D. Ohio Sept. 27, 2011) (holding that the *Rooker-Feldman* doctrine is not a bar to claims related to using robo-signed affidavits, but dismissing FCRA claims because consumer failed to satisfy procedural hurdles regarding dispute).

73. For example, CRAs cannot simply rely on the original source for its reinvestigation where the consumer has provided information that might undermine the source's credibility. *See, e.g.*, Pinner v. Schmidt, 805 F.2d 1258, 1262 (5th Cir. 1986).

74. 15 U.S.C. § 1681o (2006) (negligent noncompliance); 15 U.S.C. § 1681n (2006 & Supp. 2011) (willful noncompliance).

75. See Chi Chi Wu, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports*, 14 N.C. BANKING INST. 139, 163-65 (2010).

76. *See* KEY DIMENSIONS, *supra* note 13, at 31.

77. *See id.* at 31-32.

it cautions that is impossible to determine a causal effect because many furnishers automatically update accounts or trade lines with the most recent information available upon receipt of a dispute.[78] The FTC found that only 36.9% of disputed accounts were modified and resulted in a score change.[79] Indeed, there is some evidence that CRAs do little more than transmit a coded dispute to furnishers who simply verify the existence of the account without any independent review.[80]

Because CRAs generally receive public record information from LNRDRS and not the original source of the records, the CRAs transmit the coded dispute to LNRDRS for review.[81] Upon receipt of the dispute, LNRDRS sends a "data collector" to the original source who reports back to LNRDRS that the status of the record is either: (1) unchanged from the original; (2) updated; or (3) unable to verify.[82] Neither LNRDRS nor the data collector examines the underlying public record to verify its content or the appropriateness of its connection to the consumer.[83]

Before examining some of the particular problems consumers have in disputes regarding accuracy and completeness of public records, this Article will consider the creation of one category of public records—court records regarding litigation to collect consumer debts.

II. DEBT COLLECTION LITIGATION

Just as the economic downturn led to an upsurge in the number of foreclosures and bankruptcies, it also led to an increase in the amount of debt collection litigation.[84] An Indiana study estimated that the number of civil collection cases increased more than 50% between 2005 and 2009.[85] In 2008, all "suits on debt" amounted to 78% of the civil cases filed in Dallas County[86] and just over 72% of

78. *See id.* at 33.

79. *See* ACCURACY STUDY, *supra* note 11, at 40.

80. *40 Million Mistakes: Is Your Credit Report Accurate?* (James Jacoby & Michael Karzis, 60 Minutes, CBS News Feb. 10, 2013), *available at* http://www.cbsnews.com/8301-18560_162-57567957/40-million-mistakes-is-your-credit-report-accurate/; Wu, *supra* note 75, at 161-66. At least one nCRA maintains that once it conveys the consumer dispute to the furnisher through the e-OSCAR, it not only satisfies its obligation to use a reasonable procedure to insure maximum possible accuracy, but also satisfies its obligations for reinvestigation. *See* Burke v. Experian Information Solutions, Inc., 2011 WL 1085874, at *n.4 (E.D. Va. Mar. 18, 2011).

81. *See* KEY DIMENSIONS, *supra* note 13, at 35.

82. *See id.*

83. *See id.*

84. *See* Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J. (Nov. 28, 2010), http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html; Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES (July 12, 2010), http://www.nytimes.com/2010/07/13/business/13collection.html?pagewanted=all&_r=0.

85. Fox, *supra* note 14, at 369.

86. *See* Spector, *supra* note 14, at 273 & n.95 (explaining that the term "suits on debt" is a broad category of debt cases that includes consumer collection cases among others).

the 2007 civil cases in the state of Kansas.[87] In the few jurisdictions that differentiate between commercial and consumer collection cases, it is estimated that consumer collection cases account for somewhere between 40% to 95% of civil cases filed.[88] In New York City Civil Courts, it is estimated that nearly 300,000 consumer collection cases—approximately 50% of the total—were filed each year between 2006 and 2008 and more than 240,000 were filed in 2009.[89] This Part examines available data regarding collection litigation and suggests that issues relating to the litigation may hold consequences long after the case is closed.

A. Outcomes in Collection Litigation

1. Default Judgments

Conventional wisdom is that most consumer collection litigation results in the collectors' favor.[90] In some jurisdictions, that is true. For example, in New York City one estimate is that debt buyers won nearly 95% of the cases they filed, a majority of which were closed with a default judgment.[91] Data collected from other courts indicate a range in default judgment rates from a low of 39% in Dallas County, Texas,[92] to 45% in Cook County, Illinois,[93] to 61% in Indiana.[94]

Generally, a defendant's failure to respond to the lawsuit after proper service triggers the default judgment.[95] Industry representatives attribute default judgments to conscious decisions by consumers who may wish to avoid additional expenses associated with contesting a debt they acknowledge is due.[96] This narrative of the "deadbeat" debtor may be true in some cases, but it is not true for

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87. *See id.* at 278-79.

88. Ameet Sachdev, *Debt Collectors Pushing to Get Their Day in Court*, CHI. TRIB. (June 8, 2008), http://articles.chicagotribune.com/2008-06-08/news/0806080066_1_debt-collectors-court-papers-pushing.

89. DEBT DECEPTION, *supra* note 14, at 6 & n.57 (2006-2009 figures); *see* TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (2010), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf (reporting 2009 numbers); JANET RAY KALSON & ROBERT MARTIN, N.Y.C. BAR ASS'N, REPORT BY THE CIVIL COURT AND CONSUMER AFFAIRS COMMITTEES IN SUPPORT OF INTRO. 0660-2007, at 1 (2009), *available at* www.nycbar.org/pdf/report/Consumer_Debt.pdf.

90. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 7 (2009) [hereinafter GAO REPORT] *available at* http://www.gao.gov/new.items/d09748.pdf; THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 207388, CONTRACT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 2 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ctvlc01.pdf.

91. DEBT DECEPTION, *supra* note 14, at 1.

92. *See* Spector, *supra* note 14, at 296.

93. GAO REPORT, *supra* note 90, at 41.

94. Fox, *supra* note 14, at 377.

95. *E.g.*, FED. R. CIV. P. 55.

96. *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010) (noting that industry representatives attribute low

all consumers.[97] Some may choose not to appear because they mistakenly believe there can be no legal consequences if the account is not theirs, or if they have no income to satisfy a judgment.[98] A landmark study in the 1960s indicated that a sizeable number of consumers failed to appear in collection litigation because of a mistaken belief that an agreement with the creditor or its attorney finally resolved the matter and discontinued the court proceedings.[99] That is what happened to Anne Vitale, an Ohio lawyer, who was served with a collection case for a debt that was not hers.[100] Ms. Vitale contacted the plaintiff's attorney, who ultimately agreed that the debt was not hers. Ms. Vitale believed the matter to be closed, until she discovered the entry of a default judgment on her credit report nearly two years later.[101]

A default judgment may also be entered without the defendant's knowledge that she has been sued, after what is colloquially known as "sewer service."[102] Indeed, the occurrence rate of default judgments under such circumstances was so high in New York City that the Administrative Office of the New York City Civil Courts issued a number of directives designed to ensure the integrity of the judgments issued by the court.[103] In 2009, New York's Attorney General commenced criminal actions against collectors and those they employed as a result of misconduct in connection with service of debt collection cases.[104] More recently, a federal court certified a class of New York consumers against whom default judgments were entered between the years of 2006 and 2010.[105]

In some jurisdictions, default judgments may be entered after notice and appearance when, for example, a defendant fails to respond in a timely fashion to

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consumer participation in collection litigation to consumers' awareness of futility of dispute), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

97. *See* DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 205 (1974).

98. *See* Fox, *supra* note 14, at 355-57 (discussing the story of one client who came to clinic for help after being served petitions in two lawsuits to collect consumer debt).

99. CAPLOVITZ, *supra* note 97, at 205.

100. *See Bad Judgments*, *supra* note 60.

101. *Id.* Similar facts were the basis of the plaintiffs' claims of unfair collection practices in McCammon v. Bibler, Newman & Reynolds, P.A., 493 F.Supp.2d 1166, 1168 (D. Kan. 2007).

102. *See* Fox, *supra* note 14, at 376 n.134.

103. Civ. Ct. of N.Y.C., Chief Clerk's Memorandum CCM-186A, Default Judgments and Time Barred Debt in Consumer Credit Actions (June 1, 2010), *available at* www.nycourts.gov/courts/nyc/SSI/directives/CCM/CCM186A.pdf; Civ. Ct. of N.Y.C., Chief Clerk's Memorandum CCM-186, Default Judgments and Time Barred Debt in Consumer Credit Actions (May 13, 2009), *available at* www.nycourts.gov/courts/nyc/SSI/directives/CCM/CCM186.pdf; Civ. Ct. of N.Y.C., Advisory Notice AN-9, Consumer Debt Cases: CPLR § 3015(e); Validation; Allocutions of Stipulations (June 21, 2008), *available at* www.nycourts.gov/courts/nyc/SSI/directives/AN/consumerdebt.pdf; Civ. Ct. of N.Y.C., Chief Clerk's Memorandum CCM-176, Additional Notice on Consumer Credit Actions (Apr. 1, 2008), *available at* www.nycourts.gov/courts/nyc/SSI/directives/CCM/CCM176.pdf.

104. Glater, *supra* note 2.

105. Sykes v. Mel Harris & Assocs., 285 F.R.D. 279, 294 (S.D.N.Y. 2012).

discovery or to appear for a mediation or other pre-trial setting.[106] Still others may be attributable to the defendant's belief that the plaintiff has the wrong person or to the defendant's inexperience with the court system.[107]

Customs and practices may also differ across jurisdictions, resulting in differing treatment of otherwise similar situations. For example, in some jurisdictions a defendant's handwritten letter to a judge may be accorded sufficient legal significance to constitute an appearance that prevents the entry of a default judgment.[108] In another, a communication that does not comply with the rules of procedure might be given no legal effect, resulting in a default judgment.[109]

2. Other Forms of Disposition

Although default judgments may be the most common way collection cases are resolved, the Dallas County study found—somewhat surprisingly—that most cases were resolved by a dismissal without prejudice to re-filing.[110] Of the cases in which the plaintiffs accomplished service on the consumer defendant, 51.25% were dismissed without a final adjudication.[111] In cases in which the consumer appeared, the dismissal rate jumped to 57.8%.[112] And in cases in which an attorney appeared on the consumer's behalf, dismissals occurred in 72.7% of the cases.[113]

There are a number of conclusions that could be drawn about the meaning of these numbers. One is that dismissal occurs after payment or another negotiated resolution of the dispute.[114] Another, more nefarious conclusion, is that the higher rate of dismissal that occurs after the defendant's appearance, with or without counsel, is caused by the collectors' lack of evidence. As a result, when the collector faces the possibility of actually litigating the case, it may

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106. Among the cases examined in connection with the study of collection litigation discussed in Spector, *supra* note 14, were several in which "default judgments" were entered after the defendant appeared, but prior to the case being called for trial (on file with author).

107. *See* CAPLOVITZ, *supra* note 97, at 7-8, 53, 205 (discussing factors contributing to high rates of default); Fox, *supra* note 14, at 355 (describing circumstances surrounding consumer's request for legal services); *see also* Hilliard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357, 359 (1990).

108. *See* Spector, *supra* note 14, at 288 (discussing defendants' appearances in Dallas County). Additional data obtained in the Dallas litigation study, but not discussed in Spector, *supra* note 14, is on file with the author.

109. *See* Fox, *supra* note 14, at 382.

110. *See* Spector, *supra* note 14, at 296.

111. *Id.*

112. *Id.*

113. *Id.*

114. Indeed, close examination of the Dallas County files that are the subject of the Dallas study in Spector, *supra* note 14, revealed that six of the cases in which the disposition occurred without prejudice revealed that the parties reached an agreement. There was no indication that an attorney assisted the defendants in the negotiation of these agreements, a factor which likely would have led to the inclusion of provisions prohibiting the parties from further litigation on the merits.

choose to dismiss rather than to litigate, a practice some courts have found may amount to an unfair collection practice.[115]

Courts have begun to examine judgments obtained by debt collectors, whether obtained by default or otherwise, to determine whether they result from unfair collection practices used in the litigation process.[116] Two principal areas of concern are discussed in the following section: suits on stale debts and suits without credible, legitimate, evidence to support the underlying claim.

B. Judgments Resulting from Unfair Collection Practices

1. Suits on Stale Debt

Limitations on suits to enforce contracts or collect debts vary from state to state. In some states, statutes of limitations are self-executing and prevent the commencement of litigation to enforce a time-barred debt.[117] In other states, a statute of limitations may be used only as a defense and may be waived if not timely raised.[118] The FTC takes the position that even suggesting that a stale debt can be enforced in court is a violation of the FDCPA. In January 2012, it announced a $2.5 million settlement with one of the nation's largest debt buyers, which required the company, Asset Acceptance Corp., to notify consumers that it would not sue for time-barred debt. The settlement also required the company to notify consumers before reporting debts to CRAs.[119]

Clearly, if filing or threatening to file a time-barred suit is an unfair practice, a judgment obtained on time-barred debt is also tainted.[120] However, in those states where limitations may be used only defensively, judgments entered on time-

115. *E.g.*, Kuria v. Palisades Acquisition XVI, LLC, 752 F.Supp.2d 1293 (N. D. Ga. 2010); *see* Wood v. Midland Funding, LLC, No. 2:12-cv-2703-KOB, 2013 WL 360146, at *1, 5 (N.D. Ala. Jan. 29, 2013) (denying defendant's motion for summary judgment where there was evidence of a strategy and policy of "scattershot litigation" designed to coerce consumers into paying a debt not owed or to receive a judgment against them); Webb v. Midland Funding, LLC, No. 2:12-cv-2920-KOB, 2013 WL 360151 (N.D. Ala. Jan. 29, 2013). *But see* Bandy v. Midland Funding, LLC, No. 12-00491-KD-C, 2013 WL 210730 (S.D. Ala. Jan. 18, 2013) (dismissing for failure to state a claim where the basis of plaintiff's claim was an allegation regarding defendant's intention to pursue litigation).

116. *See, e.g.*, Nikkel v. Wakefield & Assocs., Inc., No. 10-cv-02411-PAB-CBC, 2011 WL 4479109 (D. Colo. Sept. 26, 2011).

117. *E.g.*, N.C. GEN. STAT. § 58-70-115(1), (4) (2013) (making it unlawful for a debt collector to file suit on a debt that is barred by limitations).

118. *See* TEX. R. CIV. P. 94 (requiring a defendant to "set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense"); TEX. R. CIV. P. 90 (establishing waiver when defects are not raised in writing before judgment). *But see* Naranjo v. Universal Sur. Co., 679 F. Supp. 2d 787 (S.D. Tex. 2010) (denying summary judgment on FDCPA claims where the underlying allegation was a judgment on a stale claim).

119. *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million for Alleged Consumer Deception*, FED. TRADE COMM'N (Jan. 30, 2012), http://www.ftc.gov/opa/2012/01/asset.shtm.

120. *See* Naranjo v. Universal Sur. Co., 679 F. Supp. 2d 787, 795 (S.D. Tex. 2010) (holding that the plaintiff stated a claim for unfair collection practices on the basis of collector's conduct in obtaining and attempting to enforce judgment based on debt it knew was time-barred).

barred debts are more than a theoretical possibility. Even if the age of the debt does not put it outside the state's statute of limitation, it may be difficult to verify an older debt, causing proof problems in litigation.[121]

2. Lack of Evidence of Underlying Debt and Use of Robo-Signing

The FTC's recent study of nine major debt buyers established that fewer than 50% acquire the name of the original creditor, fewer than 40% obtain information regarding finance charges and fees, and just 35% obtain information regarding the date of the plaintiff's default.[122] Contractual terms between the debt seller and debt buyer may further restrict the debt buyer from providing information regarding the underlying debt to the consumer.[123] Moreover, the older the debt is, the less likely the debt buyer will have accurate information about the underlying debt and who owns it.[124] While this may present problems for collectors' ability to comply with the verification requirements under the FDCPA,[125] the lack of accurate information about the underlying debt presents even greater problems for consumers in litigation.

Statistics from the Dallas County study indicate that more than 95% of cases filed by debt buyers failed to include evidence of any of the principal features of the debt, whether or not they acquired the information when they purchased the debt.[126] In January 2012, a state judge in New York sanctioned a debt collector for engaging in frivolous litigation after obtaining a judgment absent evidence that it was entitled to collect the debt it sued to enforce.[127] Even more troubling is the use of affidavits that suggests an effort to manufacture evidence to support a claim where no legitimate evidence may exist, a practice that has come to be known as "robo-signing."[128] In 2011, the Attorney General of the State of Texas settled a lawsuit with one debt buyer after alleging it used false affidavits in thousands of cases to mislead the courts into entering default judgments.[129] In

121. DEBT BUYING INDUSTRY, *supra* note 15, at 44-49.

122. *Id.* at 34-35.

123. *Id.* at 26.

124. *Id.* at 42.

125. 15 U.S.C. § 1692g (2006).

126. Spector, *supra* note 14, at 291-92. *See* DEBT BUYING INDUSTRY, *supra* note 15, at 35 (finding that only 30% of debt buyers in the study acquired information concerning interest rate charged on accounts).

127. Midland Funding LLC v. Wallace, No. 1788-08, slip op., 2012 WL 29074, at *4-5 (N.Y. Civ. Ct. Jan. 5, 2012).

128. *See* DEBT DECEPTION, *supra* note 14, at 14, 27 n.102; Ben Schott, *Robo-Signers*, SCHOTT'S VOCAB (Oct. 6, 2010, 10:00 am), http://schott.blogs.nytimes.com/2010/10/06/robo-signers/ (defining "robo-signers" as a "nickname for those who processed large numbers of foreclosure affidavits); David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES (Oct. 31, 2010), http://www.nytimes.com/2010/11/01/business/01debt.html?pagewanted=all&_r=0.

129. *See* Plaintiff's Original Petition and Application for Temporary and Permanent Injunction, Tex. v. Midland Funding LLC, No. 2011-40626, (165th Dist. Ct., Harris County, Tex. July 8, 2011); Agreed Final Judgment, Tex. v. Midland Funding LLC, No. 2011-40626, (165th Dist. Ct., Harris County, Tex. Dec. 28, 2011), *available with registration at* http://www.hcdistrictclerk.com/edocs/public/ViewFilePage.aspx?

September 2012, a federal judge certified a class of consumers who claimed a lack of credible, admissible evidence had been used to obtain judgments against them in state court.[130]

III. Challenges for Consumers: Where the FCRA Intersects the FDCPA

The story of Anne Vitale, the Ohio lawyer who learned about a default judgment entered against her two years after the fact when she tried to borrow money to purchase a home, is situated at the crossroads where the FCRA intersects the FDCPA. For Anne Vitale, intervention by an attorney from the Attorney General's office was needed to help navigate a path out of danger.[131] For others, like Jason Dennis,[132] who challenged a report of long-settled landlord-tenant litigation, or Donna Soutter,[133] who challenged a report of an erroneous judgment that was later vacated, the filing of a lawsuit may be necessary,[134] although its outcome may be uncertain.

Consumers initiating such lawsuits over reporting public records face a number of challenges that can leave them feeling like they've suffered the effects of a one-two punch. The first punch comes from inconsistent standards courts apply to determine the accuracy of public records. Part III.A examines the applications of these standards and finds that whether the court considers the information "technically accurate," or sufficiently incomplete or misleading to trigger an agency's duties under section 611 to reinvestigate, may also depend on the application of complex state or local rules governing the record-keeping. Part III.B examines the second punch. It comes from inconsistent application of the *Rooker-Feldman* doctrine, which some courts have held deprives them of jurisdiction to consider FCRA challenges to reports of state court judgments.

A. The First Punch: Determining Accuracy of Public Records Under the FCRA

As discussed in Part I above, section 607 requires a CRA to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[135] In general, an agency's procedures are considered reasonable—and not subject to scrutiny under section

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130. Sykes v. Mel Harris & Assocs., 285 F.R.D. 279, 282-85 (S.D.N.Y. 2012).

131. *See supra* notes 101-02 and accompanying text.

132. Dennis v. BEH-1, LLC, 520 F.3d 1066, 1068 (9th Cir. 2008).

133. Soutter v. Equifax Info. Servs., LLC, No. 11-1564, 2012 WL 5992207, at *1-2 (4th Cir. Dec. 3, 2012).

134. *See Bad Judgments*, *supra* note 60 ("Consumers faced with inaccuracies that they can't erase essentially have two options: live with it or file a lawsuit.").

135. 15 U.S.C. § 1681e(b).

611—unless the consumer makes a *prima facie* case that reported information is inaccurate.[136] In a minority of jurisdictions, an agency's conduct is considered reasonable under section 607 even when the consumer proves that "technically accurate" information is also incomplete or misleading.[137] In those jurisdictions, incomplete or misleading reports are also insufficient to trigger a reasonable investigation under section 611, much less the stricter standards required under section 613 when public records are reported for employment purposes.[138]

The majority approach, articulated in *Kouropoulos v. Credit Bureau, Inc.*,[139] considers the likelihood that reported information, although "technically accurate" can also be incomplete or misleading.[140] Nevertheless, whether or not public records are accurate may rest on interpretations of state law or a plaintiff's technical compliance with pleading rules imposed on the FCRA's statutory dispute system. The Seventh Circuit's decision in *Henson v. CSC Credit Services*,[141] and the Ninth Circuit's decision in *Dennis v. BEH-1, LLC*,[142] provide examples.

In *Henson*, plaintiff challenged a consumer report indicating that he owed a money judgment.[143] The court examined the contents of the clerk's docket entry regarding the judgment and found it incorrectly applied to the plaintiff despite the fact that the court had "rendered" judgment against a co-defendant only.[144] Despite the inaccuracy, the court held that the CRA could not be liable under section 607 as "a matter of law . . . for reporting inaccurate information obtained from a court's Judgment Docket, absent prior notice from the consumer that the information may be inaccurate."[145]

Lack of liability under section 607 did not, however, necessarily protect a CRA from liability under section 611.[146] The court held that once the consumer satisfied its burden of providing the CRA with notice of a potential inaccuracy of a public record, section 611 would require the CRA to conduct an investigation that might involve more than simply verifying accuracy of the original source.[147]

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136. *See Dennis*, 520 F.3d at 1069 (finding that 15 U.S.C 1681e and 1681i require *prima facie* showing of inaccuracy).

137. WU & DEARMOND, *supra* note 7, at 111-12.

138. *See infra* notes 164-69 and accompanying text.

139. Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 42 (D.C. Cir. 1984) (holding that technically accurate information may also be misleading in such a way to trigger inquiry regarding reasonableness of procedures used by agency).

140. *Id.*; *see also* Valentine v. First Advantage Saferent, Inc., 2009 WL 4349694, at *8 (C.D. Cal. 2009).

141. 29 F.3d 280 (7th Cir. 1994).

142. 520 F.3d 1066 (9th Cir. 2008).

143. 29 F.3d at 283.

144. *Id.* at 282.

145. *Id.* at 285.

146. *Id.* at 286-87.

147. *Id.* The court cited Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986), in which the Fifth Circuit held that the CRA acted unreasonably under section 611 when its only effort at investigation was to contact the employee of the creditor with whom the consumer claimed to have a dispute.

Whether or not the investigation would be reasonable under the circumstances is then left to the trier of fact.[148]

As in *Henson*, the *Dennis* court considered a state court clerk's inaccurate record of the disposition of a case.[149] In 2002, after Dennis' landlord sued him for unlawful detainer, Dennis agreed to pay nearly $3000 in exchange for an agreement that no judgment would be entered against him. The parties filed a written stipulation with the court. Unfortunately, however, a clerk inaccurately recorded the stipulation as "Court Trial Concluded–Judgment Entered."[150] Two months later, after Dennis paid the agreed amount, the court's record accurately reflected that a dismissal disposed of the lawsuit.[151]

Experian subsequently prepared a credit report containing the erroneous initial entry on the court's docket, that a "Civil Claim judgment" had been entered against Dennis.[152] After Dennis exercised his rights under the FCRA and disputed the report, Experian hired a third-party vendor to investigate. The vendor obtained a copy of the written stipulation from the court that confirmed Dennis' claim, but apparently did not read or understand its meaning because the vendor told Experian that the original report was correct. Apparently relying solely on the information from the vendor, Experian informed Dennis that its report was accurate and refused to make any changes.[153]

Like the plaintiff in *Henson,* Dennis asserted a claim under section 607 and a claim under section 611 for the failure to conduct a "reasonable reinvestigation to determine if the disputed information is accurate."[154] On the first issue, the court determined that the report of a "judgment" was inaccurate because, contrary to the court's records, the parties agreed that no judgment was entered.[155] Although, the court refused to hold Experian strictly liable for the error, it returned the case for trial on the issue of the reasonableness of the procedures used in its initial report of the information.[156] The court noted that at trial Experian would be free to argue the reasonableness of its procedures, including the issue of the reasonableness of relying on a court's records, even though they were *inaccurate.*[157]

However, just as in *Henson*, the *Dennis* court held that once the consumer provided such notice to a CRA, section 611 imposed an independent obligation to conduct a reasonable reinvestigation.[158] Reasonable procedures sufficient to

148. 29 F.3d at 287.
149. 520 F.3d at 1069.
150. *Id.* at 1068.
151. *Id.*
152. *Id.*
153. *Id.*
154. Dennis also asserted a number of claims under state law. *Id.*
155. 520 F.3d at 1070.
156. *Id.* at 1069-70.
157. *Id.*
158. *Henson*, 29 F.3d at 285-96; *Dennis*, 520 F.3d at 1070.

satisfy the CRA's obligations under section 607 would not insulate it from liability under section 611; simply verifying the existence of the erroneous information was not enough to satisfy its obligations.[159] The court held that to satisfy that obligation, the CRA must examine court records with "reasonable diligence" and found that overlooking documents in the court file expressly supporting the consumer's assertions, "falls far short of this standard."[160] As a result, more than six years after the state court made an erroneous entry on its docket, the *Dennis* court, on its own motion, held that Experian acted negligently in fulfilling the duty of reasonable reinvestigation under section 611.[161]

Although *Dennis* appears to represent a victory for consumers by imposing a stricter standard of reasonableness under section 611 than exists under section 607, any widespread benefits for consumers may be elusive so long as courts apply a "technical accuracy" standard to the underlying report. Indeed, such an approach is contrary to the plain language of section 611, which requires a reinvestigation "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."[162] By limiting the consumer's right to require a reinvestigation under section 611, courts deprive consumers of the ability to insist that CRAs consider additional information to avoid an incomplete or misleading result.[163]

The harsh effects of this approach can be seen in *Haro v. Shilo Inn*, in which an Oregon federal court granted a CRA's motion for summary judgment in connection with a report obtained for employment purposes.[164] The report included the record of a dismissal of a charge that the plaintiff had failed to register as a sex offender.[165] The plaintiff asserted a claim under section 607 alleging that the CRA failed to maintain reasonable procedures by failing to report the reason for the dismissal—that the entire case had been a matter of mistaken identity. He also asserted a claim under section 613 which required either the use of "strict procedures" or prior notice when adverse public record information is used in a report for employment purposes.[166]

Although the existence of the charge and its subsequent dismissal could not be disputed, the court reasoned that, because the plaintiff "failed to contest the accuracy of the information reported,"—i.e., that the charge was dismissed—he could not make the "prima facie showing of inaccurate reporting" necessary to

159. 520 F.3d at 1070-71.

160. *Id.*

161. The court held that a fact question nevertheless remained on the issue of whether the conduct was willful. *Id.* at 1071.

162. 15 U.S.C. § 1681i(a)(1)(A) (emphasis added).

163. *See* WU & DEARMOND, *supra* note 7, at 111-14 (noting also that this approach fails to weed out unverifiable information appearing on a consumer's report).

164. 2009 WL 2252105, (D. Or. Jul 27, 2009).

165. *Id.*

166. 15 U.S.C. § 1681k.

trigger the credit reporting agency's duty to reinvestigate under section 611.[167] The court also dismissed the plaintiff's claims under section 613 on the same ground, despite the different standards the statute imposes in employment situations and despite the nature of the reported information and the likelihood it could, and did, adversely impact the plaintiff's employment.[168]

An Arkansas federal district court applied similar reasoning in *Taylor v. Tenant Tracker, Inc.* holding.[169] It held that records of convictions of an unknown third party appearing on the plaintiff's credit report were "technically accurate" even though they did not relate to the plaintiff,[170] a result that ignores the plain language of section 607(b) requiring the accuracy of information "concerning the individual about whom the report relates."[171] Bound by precedent, the *Taylor* court noted similarities with *Wilson v. Rental Research Servs., Inc.*,[172] in which a district court granted the CRA's motion for summary judgment, holding that the technical accuracy of the records relating to prior eviction activity involving persons other than the plaintiff precluded an inquiry into the reasonableness of the procedures used to gather and report them.[173] On appeal, a panel of the Eighth Circuit reversed and adopted the more nuanced balancing approach articulated in *Koropoulos v. Credit Bureau, Inc.*[174] It weighed the potentially misleading nature of the reported information—e.g., mistaken reports regarding the consumer's prior eviction or criminal activity—against the availability of more complete or accurate information and the burdens placed on credit reporting agencies for acquiring it.[175] Ultimately, the panel decision in *Wilson* was vacated and a split decision *en banc* had the effect of reinstating the district court's dismissal of the case using the technical accuracy test.[176]

Acknowledging the unfairness of such a decision, the *Taylor* court was nevertheless bound by *Wilson* and granted the agency's motion for summary judgment under section 611 holding that the duty of reinvestigation could not be triggered by a "record . . . devoid of any evidence suggesting that the report itself—of someone other than the plaintiff—was 'technically inaccurate.'"[177]

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167. *Id.* at *3. *Contra* Houston v. TRW Information Servs, Inc., 707 F. Supp. 689 (S.D.N.Y. 1989) (holding that a credit report of a state court judgment two years after it had been vacated was inaccurate).

168. Haro v. Shilo Inn, 2009 WL 2252105 at *3; *see supra* notes 56-67 and accompanying text (discussing requirements for reporting public record information in connection for employment purposes).

169. No. 4:10CV00282 BSM, 2011 WL 5402388 (E.D. Ark. Nov. 4, 2011).

170. *Id.* at *4.

171. 15 U.S.C. § 1681e(b) (2006 & Supp. 2011).

172. Wilson v. Rental Research Servs., Inc., 165 F.3d 642 (8th Cir. 1999) (applying balancing test to reverse grant of summary judgment for the defendant), *vacated on rehearing en banc*, 206 F.3d 810 (8th Cir. 2000) (resulting in reinstatement of district court's order granting summary judgment on technical accuracy standard).

173. *Taylor*, 2011 WL 5402388 at *3.

174. Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir.1984).

175. *See Wilson*, 165 F.3d. at 646-47 (citing Koropoulos, 734 F. 2d at 42).

176. Wilson v. Rental Research Servs., Inc., 206 F.3d 810 (8th Cir. 2000).

177. *Taylor*, 2011 WL 5402388 at *4.

Fortunately, a majority of courts reject this approach.[178]

A reasonable person might think that a report of being "involved with" a scam, means something other than a report that someone is a "victim" of a scam.[179] Courts recognizing that the additional information provided in the second clause makes the first clause misleading, reject the "technical accuracy" standard.[180] They adopt the approach first articulated in *Koropoulos*,[181] which is also consistent with the language and intent of the statute.[182] The balancing test requires more than simply transmitting information provided by a furnisher or vendor of public records once the consumer provides the CRA with notice of the error. The more misleading the information or the greater the degree of harm it causes (and the degree of effort needed to correct it), the greater the responsibility of the CRA to correctly report it.[183]

Despite the widespread applicability of this approach, CRAs are resistant to it. Sandra Cortez's five-year struggle with TransUnion is an example that was featured in a recent investigative report regarding credit-reporting errors.[184] It is also the subject of *Cortez v. TransUnion, LLC*, a Third Circuit case in which the court unequivocally rejected TransUnion's argument that it acted reasonably in simply transmitting correct information about a person other than the person who was the subject of the report.[185]

Sandra Jean Cortez's problems began with a credit report TransUnion sent to a Colorado car dealership with whom she was negotiating.[186] Prior to visiting the dealership, Cortez, who was born in Chicago in 1944 and had never traveled outside of the country, checked her TransUnion credit report.[187] She did not find any significant adverse information and learned that her credit score was considered high, about 760.[188] The report TransUnion sent in response to the dealership included the correct identification and credit information that Cortez had obtained, but it also contained a "Hawk Alert" which indicated "a match" with a person by the name of "Cortes, Sandra Quintero."[189] Sandra Quintero

178. *Id.*; *see, e.g.*, Cortez v. TransUnion, LLC, 617 F.3d 688 (3d Cir. 2010) (report containing government alert that person with name similar to plaintiff's was on government list of persons believed to be threats to security); Price v. TransUnion, L.L.C., 839 F. Supp. 2d 785 (E.D. Pa. 2012) (finding CRA's conduct unreasonable where plaintiff put CRA on notice multiple times, over multiple years that accounts placed on her report were not hers).

179. *See* Pinner v. Schmidt, 805 F.2d 1258, 1263 (5th Cir. 1986).

180. *E.g., id.*

181. 734 F.2d 37 (D.C. Cir. 1984). *See supra* note 59 and accompanying text.

182. *See* WU & DEARMOND, *supra* note 7, at 111-13 & 2012 Supp. at 40-41.

183. *See* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 45 (D.C. Cir. 1984).

184. *See* Jill Riepenhoff & Mike Wagner, *Dispatch Investigation—Credit Scars: Car-buyer flagged as Terrorist*, COLUMBUS DISPATCH (May 9, 2012), http://www.dispatch.com/content/stories/local/2012/05/07/car-buyer-flagged-as-terrorist.html [hereinafter *Flagged as Terrorist*].

185. *See* 617 F.3d 688, 708-11 (3d Cir. 2010).

186. *Id.* at 696.

187. *Id.* at 697.

188. *Id.*

189. *Id.* at 699.

Cortes, born in 1971, was identified as a person whose name appeared on a Treasury Department list of persons considered to be a threat to the national security or economy and with whom American citizens were prohibited from doing business.[190]

The dealership's finance manager insisted that Cortez remain at the dealership while he investigated the report.[191] After more than six hours during which Cortez confirmed her birthdate and previous addresses, she was allowed to leave and purchase the car she had chosen, but not until the dealership concluded that she was not the person who against whom the security alert had been issued.[192]

Over the course of the next several weeks, Cortez contacted TransUnion several times, by phone and in writing, to have the "match" removed from her credit report.[193] After several weeks, Cortez received a form letter from TransUnion indicating that its records showed that the disputed alert did not currently appear on her credit report. She then visited the dealership for confirmation, requesting it order a new report from TransUnion.[194] It did so and provided her with a copy. Although it did not contain the phrase "Hawk Alert," it contained a "High Risk Fraud Alert," which also referred to the Treasury Department's watch list.[195] Cortez visited government websites to learn more information about the list and continued to try to correct the report with TransUnion, but more than a year later, a report ordered by a landlord indicated that she was a "match" with someone on the Treasury Department's list.[196]

Eventually, Cortez filed suit and a jury found that 1) TransUnion negligently failed to follow reasonable procedures to assure maximum possible accuracy in producing Cortez's credit report and 2) that it willfully failed to reasonably investigate her dispute and correct it on subsequent reports.[197] On appeal, TransUnion argued that its credit report was accurate because it "simply included the information furnished by the government" and that by indicating a "match," it indicated only a "possible match" rather than an "exact match."[198] The court rejected this argument and refused to draw any meaningful distinction between information CRAs obtain from government records and information obtained from any other source.[199] In both circumstances, the court explained, the CRA "collects such information . . . . summarizes it, and reports it to those who will

190. *Id.* at 696-97. The court discusses the "patchwork" of legal authority relating to the list of persons known as "Specially Designated Nationals" maintained by the Treasury Department's Office of Foreign Assets Control (OFAC's SDN list). *Id.* at 698-99, 701-03. In short, American citizens and businesses are prohibited from doing business with persons identified on OFAC's SDN list. *Id.* at 697.

191. *Id.* at 697-98.

192. *Id.*

193. *Id.* at 699.

194. *Id.* at 700-01.

195. *Id.* at 701.

196. *Id.* at 700-01.

197. *Id.* at 705.

198. *Id.* at 709.

199. *Id.*

subsequently rely on the resulting reports in making consumer credit decision."[200]

The court then turned to TransUnion's responsibilities under section 611 and affirmed the jury's determination that TransUnion failed to reasonably reinvestigate Cortez's dispute, and that it failed to note the existence of the dispute in her file. It found TransUnion's argument that it had no ability to change the list to be "disingenuous at best," especially in light of testimony at trial that it was the company's policy to investigate disputes regarding the government list only after the consumer sued.[201]

Sandra Cortez ultimately prevailed. The court held TransUnion responsible for reporting erroneous information purporting to come from a public record as well as for the failure to adequately investigate it.[202] As difficult as the dispute was for Sandra Cortez, consumers disputing a consumer report containing information about collection litigation they believe is the result of unfair practices may face additional hurdles. Indeed, as discussed below, they may find themselves without a forum in which to hear their dispute.

B. The Second Punch: Rooker-Feldman

A judicial doctrine known as the *Rooker-Feldman* doctrine generally prevents federal courts from looking behind state court judgments and has been used to bar a consumer's inquiry into the circumstances surrounding the entry of a state court judgment, even where the consumer alleges that unfair debt collection practices were employed to obtain it.[203]

The doctrine takes its name from a pair of Supreme Court cases decided more than sixty years apart. The first is *Rooker v. Fidelity Trust Co.*[204] The plaintiffs filed suit in federal district court to set aside a decision of the Indiana Supreme Court on the ground that enforcement of the Indiana statute that was the subject of the case would violate the contract and due process clauses of the Constitution.[205] The district court dismissed the suit, and in a direct appeal the Supreme Court affirmed, holding that the district court correctly determined that the relief sought by the plaintiff would serve to invalidate an otherwise valid state court judgment. Construing the applicable statutes governing jurisdiction of the federal courts, the Court found that federal review of state court judgments was

200. *Id.* at 710.

201. *Id.* at 713-715.

202. *Id.* at 714.

203. *See* Laychock v. Wells Fargo Home Mort., 399 Fed. App'x 716, 718-19 (3d Cir. 2010); Kropelnicki v. Siegel, 290 F.3d 118, 128-29 (2d Cir. 2002); Ellis v. CAC Financial Corp., 6 Fed. App'x 765, 769-70 (10th Cir. 2001); Bryant v. Gordon & Wong Law Group, P.C. 681 F. Supp. 2d 1205 (E.D. Cal. 2010).

204. 263 U.S. 413 (1923).

205. *Id.* at 149-50.

available only by direct appeal to the United States Supreme Court.[206]

The second case is *District of Colum. Ct. of App. v. Feldman*,[207] in which plaintiffs sought waivers from the D.C. Court of Appeals to sit for D.C. bar examination. The court of appeals, which served as the highest court within the jurisdiction and the entity responsible for licensing lawyers, denied their requests. Plaintiffs filed separate suits in federal district court challenging the court of appeals' decisions as unconstitutionally denying them equal protection under the law and both sought orders permitting them to sit for the bar examination.[208]

The district court dismissed both cases for lack of subject matter jurisdiction on the ground that the decision to deny the waivers was a "judicial act," over which it did not have jurisdictional authority. The district court reasoned that if it were to accept jurisdiction and grant the relief sought, it would be setting aside the decision of the District of Columbia's highest court, something it was not able to do.[209] The appellate court reversed on the ground that the decision to deny the waivers was administrative, not judicial, and could properly be considered by the federal district court.

Justice Brennan, writing for the Supreme Court, reversed and remanded the case to the district court. He agreed that the disposition of the requests for the waivers was a judicial act, not an administrative one. Because the plaintiffs sought relief in the form of an injunction that would have the effect of setting aside that decision, their claims were "inextricably intertwined" with the court's decision and therefore outside of the jurisdiction of the district court.[210]

However, Justice Brennan also found that the plaintiffs raised other claims that did not require setting aside the decision. Both cases, he wrote, also raised general challenges to the constitutionality of state rules governing admission to the bar that were well within the jurisdiction of district court. Those claims, he reasoned, were properly before the district court and he remanded for their consideration.[211]

In 2005, more than twenty years after *Feldman*, the Supreme Court refined the doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*,[212] limiting its applicability only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[213] The next year, the Court cautioned lower courts to apply the doctrine

206. *Id.* at 150.
207. 460 U.S. 462 (1983).
208. *Id.* at 468-69.
209. *Id.* at 470.
210. *Id.* at 487.
211. *Id.* at 487-88.
212. 544 U.S. 280 (2005).
213. *Id.* at 284.

more narrowly.[214]

After *Feldman*, courts applied *Rooker* and *Feldman* broadly in a wide variety of cases,[215] including cases brought by consumers to challenge debt collectors' use of unfair practices in connection with obtaining or enforcing state court judgments against them.[216] For example, in *Ellis v. CAC Financial Corp.*, the Tenth Circuit applied an expansive approach in holding that although plaintiffs did not "expressly seek" to overturn an underlying state court judgment, the district court lacked jurisdiction over plaintiff's claims relating to the collector's conduct in the state litigation, among other things, "improper assignments" and perjury.[217]

After *Lance,* however, federal courts examining challenges to litigation tactics in collection cases have generally applied *Rooker-Feldman* more narrowly, carefully parsing the plaintiff's claims to determine whether the claims arise out of injuries caused by a state court judgment or out of conduct, although related, which is nevertheless separate.[218] *Hammond v. Citibank, N.A.*, is a recent example.[219] Hammond asserted violations of the FDCPA and the FCRA arising out of a default judgment foreclosing his home mortgage.[220] He claimed the judgment was the product of robo-signing.[221] Rejecting defendants' attempt to conflate plaintiff's claims with the remedy it sought, the *Hammond* court instead focused its attention on the "the source of the injury."[222] Because the source of the injury under the FDCPA and FCRA was defendant's alleged fraudulent conduct in the litigation, and not the judgment that resulted from the litigation, the court determined that it had the jurisdiction to consider the claims.[223] Claims of fraud in procuring the state court judgment were therefore outside the scope of *Rooker-Feldman.*[224]

More recently, in *Solis v. Client Services, Inc.*,[225] a district court applied

214. *See* Lance v. Dennis, 546 U.S. 459, 466 (2006).

215. *See* Dustin E. Buehler, *Jurisdiction, Abstention, and Finality: Articulating a Unique Role for the Rooker-Feldman Doctrine*, 42 SETON HALL L. REV. 553, 561 (2012) (distinguishing between three doctrines used by federal courts to avoid interference with state court litigation).

216. *E.g.*, Ellis v. CAC Financial Corp., 6 Fed. App'x 765 (2001). *See also* Dickerson v. Bates, 287 F. Supp. 2d 1251 (D. Kan. 2003) (affirming dismissal for lack of jurisdiction in case raising, among other things, claims of fraud in procurement of eviction judgment).

217. *Ellis*, 6 Fed. App'x at 769.

218. *See, e.g.*, McCammon v. Bibler, Newman & Reynolds, P.A., 493 F. Supp. 2d 1166 (D. Kan. 2007); *but see, e.g.*, Williams v. Cavalry Portfolios Servs., LLC., No. SACV 10-00255 JVS(ANx), 2010 WL 2889656 (C.D. Cal. July 20, 2010); Bryant, 681 F. Supp. 2d at 1208 (holding that *Rooker-Feldman* doctrine barred plaintiff's claim "inherently challenging" entry of default judgment and garnishment order arising from it).

219. No. 2:10-CV-1071, 2011 WL 4484416 (S.D. Ohio Sept. 27, 2011).

220. *Id.* at *1.

221. *Id*; *see also supra* note 129 and accompanying text.

222. *Hammond*, 2011 WL 4484416, at *1.

223. *Id.* at *6-8.

224. *Id.* at *4-5.

225. No. 11-23798-CIV, 2013 WL 28377 (S.D. Fla. Jan. 2, 2013).

Rooker-Feldman to to bar only the portion of a plaintiff's claims seeking an order vacating a default judgment entered by a state court in a credit card collection case.[226] However, the court also held that the doctrine did not bar other bar claims related to defendant's alleged misconduct in the litigation for which there were independent remedies.[227]

Courts generally agree that *Rooker-Feldman* permits examination of an underlying judgment where a plaintiff claims it was procured by fraud, as in *Hammond* where the plaintiff provided evidence of fraud in connection with a robo-signed affidavit.[228] However, not all claims relating to misconduct in collection litigation involve fraud.[229] Intent, which is an essential element of a claim for fraud, is unnecessary to most claims under the FDCPA.[230] As a result, a consumer's FDCPA claim that a judgment was procured with merely unfair, misleading or deceptive conduct may not be enough to prevent application of *Rooker-Feldman.*[231] Indeed, the extent to which *Rooker-Feldman* continues to bar non-fraudulent conduct related to procuring an underlying judgment remains an open question.[232]

IV. Potential Strategies

Consumers wishing to dispute credit reports of state court judgments face a number of challenges that consumers challenging trade line information do not face. Protection provided to CRAs offers little incentive to improve methods of collecting and reporting public record information. Some state and local jurisdictions have already implemented measures to relieve the burdens of

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226. *Id.* at *1.

227. *Id.* at *4; *see also* Smith v. LVNV Funding, LLC, No. 11 C 1814, 2011 WL 2560234 at *2-3 (N.D. Ill. June 28, 2011) (holding that although *Rooker-Feldman* was not a bar to plaintiff's challenges regarding a debt collector's conduct, res judicata served the same purpose).

228. *E.g.*, Todd v. Weltman, Weinberg & Reis Co., L.P.A. 434 F.3d 432 (6th Cir. 2006) (holding claims regarding filing of false affidavit not barred); *Hammond*, 2011 WL 4484416, at *14 (holding claims related to use of robo-signed affidavits not barred, but dismissing FCRA claims because consumer failed to satisfy procedural hurdles regarding dispute).

229. *Cf.* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) (acknowledging that liability for statutory violations can occur absent defendant's specific intent and holding that defendant's statement in foreclosure litigation could be the basis for liability under FDCPA despite defendant's good faith mistake regarding law's applicability).

230. *See* Robert J. Hobbs, Nat'l Consumer Law Ctr., 1 Fair Debt Collection 171-72 (7th ed. 2011) (noting that strict liability is the "general pattern" used by the FDCPA).

231. *See, e.g., Bryant*, 681 F. Supp. 2d at 1208 (applying *Rooker-Feldman* in absence of fraud allegations where "net effect" of claims would be to invalidate state court judgment).

232. *Compare* Cavalry Portfolios Servs., LLC, 2010 WL 2889656 at *5 (holding plaintiff's claims regarding default judgment were barred) *and* Kelley v. Med-1 Solutions, LLC, 548 F.3d 600 (7th Cir. 2008) (holding claims of unfair practices in seeking attorneys' fees in state collection cases were barred), *with* Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006) (*Rooker-Feldman* not a bar to claims of filing false affidavits) *and* McCammon v. Bibler, Newman & Reynolds, P.A., 493 F. Supp. 2d at 1171 (holding claims for injuries resulting from unfair practices rather than judgment not barred).

collection litigation on consumers.[233] For example, in Maryland, rules of procedure have been revised to enhance the integrity of the underlying collection litigation and, hopefully, to prevent the entry of judgments procured as a result of unfair practices.[234] Policy makers should also consider changes to the FCRA to provide additional protections. There are a number of alternatives available for improving the current system of credit reporting to provide fair and accurate information and to prevent the harm that results from the one-two punch of reporting litigation that is the result of unfair collection practices. Among them are the following, which are discussed more fully below:

- Restrictions on type and timing of information reported
- Imposition of more rigorous standards for reporting public records having a potentially adverse effect on the consumer
- Elimination of the "technical accuracy" test
- Enhancement of CRAs' duty to reinvestigate under section 611
- Limitations on use of default judgments in calculation of credit scores

A. Restrict Type and Timing of Information Reported

Restricting or prohibiting the reporting of certain public records, such as civil filings until after final disposition,[235] or unpaid tax liens[236] would eliminate much of the hardship faced by consumer/victims of unfair collection practices when attempting to assert their dispute rights under the FCRA. An example of a restriction regarding the reporting of certain public records is found in California's Civil Code section 1785.13, which prevents the reporting of an eviction case unless the landlord is the prevailing party.[237] This provision might serve as a model to limit the reporting of other forms of litigation unless the disposition is unequivocally adverse to the consumer. Doing so would undoubtedly prevent inaccuracies caused by subsequent appeals or orders vacating judgments and reduce the time, effort and expense devoted to attempts to correct

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233. *See* DEBT BUYING INDUSTRY, *supra* note 15, at 6 & n.30.

234. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-306(a)(3) (West 2012). As noted above, new rules have also been implemented in the New York City Civil Court. *See supra* note 111 and accompanying text.

235. *See, e.g.*, CAL. CIV. CODE § 1785.13 (West 2010).

236. *See* Cords, *supra* note 7, at 344 (proposing FCRA be changed to remove unpaid tax liens from consumer reports seven years after they become unenforceable).

237. CAL. CIV. CODE § 1785.13 ("(3)Unlawful detainer actions, unless the lessor was the prevailing party. For purposes of this paragraph, the lessor shall be deemed to be the prevailing party only if (A) final judgment was awarded to the lessor (i) upon entry of the tenant's default, (ii) upon the granting of the lessor's motion for summary judgment, or (iii) following trial, or (B) the action was resolved by a written settlement agreement between the parties that states that the unlawful detainer action may be reported. In any other instance in which the action is resolved by settlement agreement, the lessor shall not be deemed to be the prevailing party for purposes of this paragraph.").

reports containing outdated public record information.[238] It might also serve to provide relief to consumers who are victims of unfair collection practices involving the filing of scattershot litigation with no intent to pursue it to trial.[239]

Restrictions on timing, as well as subject matter, might also reduce disputes regarding reports of judgments later vacated or dismissed on appeal. Requiring waiting periods of thirty or forty-five days before a CRA may report a court judgment would serve a similar purpose to California's eviction rules and also eliminate the need for careful scrutiny of the contents of the records.

B. Expand Existing Requirement Relating to Public Records Having a Potentially Adverse Effect

Policy makers should consider expanding existing requirements regarding report of public records that have a potentially adverse effect to cover all types of reports, not only those used for employment purposes. Congress already recognized the danger that adverse pubic information can have when used for employment purposes.[240] Certainly, the impact that inaccurate public records can have when used for purposes of determining eligibility for public and private housing can be just as severe.[241]

Expansion of the requirement that "strict procedures" be used in collecting and communicating public record information might provide the necessary incentive for CRAs to employ more rigorous matching criteria when preparing reports, or take additional steps before reporting convictions involving serious crimes or public records relating to foreclosure. It would also go a long way toward preventing a lengthy dispute process that often can be resolved only through litigation.[242]

C. Abolish the "Technical Accuracy" Test

Lawmakers should abolish the "technical accuracy" test. Whether through regulations implementing the statute, or by amendment to the statute itself, rejection of the "technical accuracy" test would provide a single, uniform and fair standard across jurisdictions that would allow courts to avoid absurd results. By enabling consumers to challenge the incomplete or misleading, but otherwise accurate reports, lawmakers might also provide incentives for CRAs to achieve the "maximum possible accuracy" required by the statute.[243]

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238. *See supra* notes 143-62 and accompanying text (discussing *Dennis* case and its origin in a 2002 court error, not finally decided until 2008).

239. *See supra* notes 170-79 and accompanying text.

240. 15 U.S.C. § 1681k (West 1998).

241. *See supra* notes 165-69, 172-74 and accompanying text (discussing *Haro*, *Taylor*, and *Wilson*).

242. *See supra* notes 172-74, 185-203 and accompanying text (discussing *Cortez* and *Wilson*).

243. *See generally* 15 U.S.C. § 1681e(b).

D. Enhance CRAs' Duty to Reinvestigate under Section 611

Lawmakers should consider enhancing CRAs' duty to reinvestigate dispute claims, and provide clear guidance regarding the steps necessary to accomplish that duty. For example, certain additional steps might be required when reinvestigating adverse public records, especially where the record being reinvestigated involves serious criminal offenses or conduct involving moral turpitude. For example, insuring the complete disposition of some arrests might avoid problems like those at the heart of the *Haro* case.[244] Similarly, requiring enhanced verification or matching procedures might avoid reports that a consumer's name "matches" the name of a third party on a government watch list.[245]

E. Limit Use of Default Judgments in Calculation of Credit Scores

Even if lawmakers choose not to limit the reports of certain types of records[246] they should encourage credit scoring entities to reduce the weight attached to default judgments of any kind, particularly ones entered in collection cases. Unlike, a judgment entered after a trial on the merits, the legal or preclusive effect of a default judgment may be difficult to determine.[247] Widespread reports of unfair practices and fraud in the procurement of those default judgments provide additional reasons to question their reliability. Whether the value assigned to default judgments is reduced or completely eliminated, CRAs and credit scoring entities must properly account for their unique nature to adequately protect consumers.

V. CONCLUSION

The intersection of the FDCPA and the FCRA can be dangerous for consumers. Contemporary practices in consumer debt collection litigation have resulted in large numbers of default judgments, many of which are the product of deceptive, unfair, misleading and fraudulent practices. These judgments are public records that are routinely reported on consumers' credit reports, and which can have a significant adverse effect on a consumer's eligibility for credit, housing, insurance and employment. This Article has highlighted the primary obstacles consumers face when challenging a report of a default judgment. In doing so, it has also suggested some strategies for improving the reporting of public records and relieving some of the difficulties consumers face. The strategies suggested are not a cure-all, however, but rather a starting point for further discussion, research, and action.

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244. *See supra* notes 165-69, and accompanying text.

245. *Cf. Cortez*, 617 F.3d at 697-98.

246. *See supra* notes 233-37, and accompanying text.

247. *See generally* 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4442 (2d ed. 1987).