2003 WL 25491307 (C.A.4) (Appellate Brief)
United States Court of Appeals, Fourth Circuit.

Linda JOHNSON, Plaintiff-Appellee,
v.
MBNA AMERICA BANK, N.A., Defendant-Appellant,
and
Experian Information Solutions, Inc., et al, Defendants.

No. 03-1235.
July 25, 2003.

Appeal from the United States District Court for the District of Virginia (Richmond Division) the Honorable Richard L. Williams, Presiding Case No. 02-CV-523

Brief of Plaintiff-Appellee

Leonard A. Bennett, 12515 Warwick Boulevard, Suite 201, Newport News, Virginia 23608, (757) 930-3660.

Richard J. Rubin, 1300 Canyon Road, Santa Fe, New Mexico 87501, (505) 9834418.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 16

ARGUMENT OF LAW 21

I. Standard of Review 21

II. Introduction 21

A. Congress Enacted the FCRA as One Component of its Overall Plan to Strengthen the Free Market Economy By Insuring the Flow and Availability of Accurate Credit Information 21

B. Congress Adopted The 1996 FCRA Amendments With The Express Purpose To Improve The Accuracy of Credit Reporting By Bringing Furnishers Of Information Within The Statute 24

III. The Bank Did Not "Conduct an Investigation With Respect to the Disputed Information" 27

A. The Ordinary and Common Meaning of the Statutory Language Establishes the Substantive Component of the Bank's Duty to Investigate 27

B. The Plain Meaning of "Investigation" Demonstrates That Congress Rejected The Bank's Contention That Its § 1681s-2(b) Duties Are "Limited" and "Minimal" 29

C. The Bank's Misplaced Reliance on Other Sections of the FCRA Cannot Nullify the Plain Language of § 1681 s-2(b)(1) 31

D. Federal Jurisprudence Applying the Parallel CRA Duty to Investigate Unanimously Confirms the Error of The Bank's Position 37

E. Congress Focused the Furnisher's Investigation on the Substantive Standard of Completeness and Accuracy of the Disputed Information 40

F. The Federal Trade Commission Agrees That Merely "Verifying Information in the Computerized File Does Not Constitute an 'Investigation' " Under § 1681 s-2(b) 42

IV. Ascertaining Whether the Bank Did "Conduct an Investigation With Respect to the Disputed Information" Resolves All Other Issues Presented 45

V. The Bank Falsely Reported to the CRAs the "Results of the Investigation" 53

CONCLUSION 59

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 60

CERTIFICATE OF SERVICE 61

ADDENDUM 62

TABLE OF AUTHORITIES

Cases

Adams v. Dole, 927 F.2d 771 (4th Cir. 1991) 32

Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978) 47, 56

Betts v. Equifax Credit Information Services, Inc., 245 F.Supp.2d 1130 (W.D.Wash. 2003) 41

Brady v. Credit Recovery Company. Inc., 160 F.3d 64 (1st Cir. 1998) 45

Bruce v. First U.S.A. Bank, N.A., 103 F.Supp.2d 1135 (E.D.Mo. 2000) 41

Bryant v. TRW, Inc., 689 F.2d 72 (6th Cir. 1982) 58

Burnstein v. Saks Fifth Avenue & Co., 208 F.Supp.2d 765 (E.D.Mich. 2002) 39

Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151 (11th Cir. 1991) 39

Curtis v. Trans Union, LLC, 2002 WL 31748838 (N.D. Ill. December 9, 2002) 42

Cushman v. Trans Union Corp., 115 F.3d 220 (3rd. Cir. 1997) .. 34, 39, 48

Dalton v. Capital Associated Industries, Inc., 257 F.3d 409 (4th Cir. 2001) 55, 56

Dennis v. Columbia Colleton Medical Center, Inc., 290 F.3d 639 (4th Cir. 2002)..... 21

Ditty v. CheckRite, Ltd., Inc., 973 F.Supp. 1320 (D.Utah 1997) . 45

Estate of Cowart v. Nichols Drilling Co., 505 U.S. 469 (1992)... 27, 33

Fischl v. General Motors Acceptance Corp., 708 F.2d 143 (5th Cir. 1983) 56

Grenier v. Equifax Credit Information Services, 892 F.Supp. 57 (D.Conn. 1995) 34

In re Hance, 181 B.R. 184 (Bankr.M.D.Pa. 1993) 53

Hardin v. Ski Venture, Inc., 50 F.3d 1291 (4th Cir. 1995)..... 47, 49

Henson v. CSC Credit Services, 29 F.3d 280 (7th Cir. 1994)..... 39

Igen International, Inc. v. Roche Diagnostics GMBH, 335 F.3d 303, 2003 WL 21542340 (4th Cir. July 9, 2003) 49

Kolibash v. Committee on Legal Ethics of the West Virginia Bar, 872 F.2d 571 (4th Cir. 1989) 33

Lane v. United States, 286 F.3d 723 (4th Cir. 2002)..... 31

Mallard v. United States District Court, 490 U.S. 296 (1989)..... 27

Matter of Sommersdorf, 139 B.R. 700 (Bankr.S.D.Ohio 1991)... 45

Mourning v. Family Publication Service, Inc., 411 U.S. 356 (1973) 23, 56

Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057 (9th Cir. 2002) 24, 25

Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003) 56

Ollestad v. Kelley, 573 F.2d 1109 (9th Cir. 1978) 42

Olwell v. Medical Information Bureau, 2003 WL 79035 (D.Minn. January 7, 2003) 42

Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986) 39, 52

Price v. City of Charlotte, 93 F.3d 1241 (4th Cir. 1996)..... 50

Rivera v. Bank One, 145 F.R.D. 614 (D.P.R. 1995) 45

Rosmer v. Pfizer, 263 F.3d 110 (4th Cir. 2001) 32

Sayers v. General Motors Acceptance Corp., 522 F.Supp. 835 (W.D.Mo. 1981) 56

Scott v. United States, 328 F.3d 132 (4th Cir. 2003) 28

Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3rd Cir. 1990) 47

Smith Drug, Inc. v. F.T.C., 741 F.2d 1146 (9th Cir. 1984) 55

South Atlantic Ltd. Partnership v. Riese, 284 F.3d 518 (4th Cir. 2001) 21

Sterling Drug, Inc. v. F.T.C., 741 F.2d 1146 (9th Cir. 1984) 55

Stevenson v. TRW Inc., 987 F.2d 288 (5th Cir. 1993) 39

Stilner v. Beretta U.S.A. Corp., 74 F.3d 1473 (4th Cir. 1996) (en banc) 40

Swoager v. Credit Bureau of Greater St. Petersburg, 608 F.Supp. 972 (M.D.Fla. 1985) 34

TRW Inc. v. Andrews, 534 U.S. 19(2001) 31

Trans Union Corp. v. Federal Trade Commission, 245 F.3d 809 (D.C. Cir. 2001) 22

United States v. Srnsky, 271 F.3d 595 (4th Cir. 2001) 38

Vasquez-Garcia v. Trans Union de Puerto Rico, 222 F.Supp.2d 150 (D.P.R. 2002) 25

Yelder v. Credit Bureau of Montgomery, L.L.C., 131 F.Supp.2d 1275 (M.D.Ala. 2001) 35

Young v. Equifax Credit Information Services, Inc., 294 F.3d 631 (5th Cir. 2002) 38

Federal Statutes

Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r 21, 23, 56

Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (P.L. 104-208) (Sept. 30, 1996) 25

Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f 23, 48, 56

Fair Credit Billing Act, 15 U.S.C. § 1666(a)(3)(B)(ii)	39
Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u)	passim
Federal Trade Commission Act, 15 U.S.C. § 45	42, 55
Truth in Lending Act, 15 U.S.C. §§ 1601-1667e	23, 39, 47, 48, 56
Federal Regulatory and Congressional Material 16 C.F.R. Part 600	42
116 Cong. Rec. 36570 (1970)	58
Federal Reserve Board Official Staff Commentary on Regulation Z, 12 C.F.R. Part 226, Supp. I	48, 53
Federal Reserve Board Regulation Z, 12 C.F.R. Part 226, §§ 226.01 et seq	39, 48
Federal Reserve Board Regulation B, 12 C.F.R. Part 202, §§ 202.01 et seq	48
S. Rep. 103-209, 103d Cong., 1st Sess. (1993)	22, 24
S. Rep. 104-185, 104th Cong., 1st Sess. 49 (1995)	26, 33
Miscellaneous	
Restatement of Torts (Second), §§ 529, 551	55
Anthony Rodriguez, Fair Credit Reporting, § 3.9, p. 74 (5th ed. 2002)	38
Webster's New Universal Unabridged Dictionary (2d ed. 1983)	28, 54

ISSUES PRESENTED FOR REVIEW

1) Whether the plain language of the Fair Credit Reporting Act (FCRA) that a furnisher of credit information "shall conduct an investigation with respect to the disputed information" requires a meaningful inquiry into the validity of the dispute.

2) Whether a furnisher of credit information that reports that it "verified" the disputed information, yet only makes a superficial inquiry into the validity of the dispute, violates the FCRA requirement to "report the results of the investigation" to the consumer reporting agency.

STATEMENT OF THE CASE

Plaintiff-Appellee Linda Johnson, f/k/a Linda Slater (hereinafter "Ms. Johnson") sued Defendant-Appellant MBNA America Bank (hereinafter "the Bank") in three suits filed against the three national consumer reporting agencies (CRAs). (J.A. 18-73). She alleged that the defendants willfully or negligently failed to comply with the FCRA when they persisted in erroneously reporting Ms. Johnson's husband's delinquent credit card account as her own. (J.A. 18-73).

The claims against the CRAs were settled, and the three suits were consolidated. (J.A. 107, 110). The case proceeded to jury

trial against the Bank for its failure to comply with its statutory duties as a furnisher of credit information under § 1681s-2(b) to investigate the disputed information and to report the results of that investigation to the CRAs. (J.A. 763).

The jury found that the Bank negligently failed to comply with the FCRA and awarded actual damages. (J.A. 784). It ruled for the Bank on the claim of willful noncompliance. (J.A. 784).

The Bank moved for judgment as a matter of law pursuant to Fed.R.Civ.P. 50. (J.A. 787). The district court denied the Bank's motion (J.A. 1008) with an oral explanation of its reasoning from the Bench. (J.A. 1001-06). The Bank timely filed its notices of appeal. (J.A. 966, 1009). Any award of costs, expenses, and attorney's fees are deferred to the conclusion of post-trial motions and this appeal. (J.A. 964).

STATEMENT OF FACTS

Linda Johnson Marries Edward Slater

Ms. Johnson married Edward N. Slater on March 2, 1991. (J.A. 603). Both had been married previously. (J.A. 603). Mr. Slater and Ms. Johnson never shared a bank account or a credit card account. (J.A. 604). Ms. Johnson was never aware of any credit cards that Mr. Slater had. (J.A. 605).

After just over one year of marriage, under circumstances when others might have abandoned the relationship entirely, they moved to separate bedrooms in their home and became "roommates." (J.A. 604). From then until May 18, 2001, when Ms. Johnson moved from their home, they maintained separate finances, their own separate businesses, and separate lives. (J.A. 605).

Ms. Johnson changed her name to Linda Slater when she married Mr. Slater. (J.A. 623). Once she divorced Mr. Slater on September 12, 2002, she returned to using her maiden name, Linda Johnson. (J.A. 112, 604).

Ms. Johnson had her own Fleet and Discover credit cards that she regularly used. (J.A. 606). Mr. Slater had his own post office box both before and during their marriage, and neither of them "bother[ed] with" each other's mail. (J.A. 607-08).

The Bank Duns Ms. Johnson For Payment of Mr. Slater's Debt

Ms. Johnson's first contact with the Bank occurred in December 2000 when she received a collection call from a Bank representative who claimed that she was late on her payments. (J.A. 608). Ms. Johnson explained to the Bank employee that she did not have an account with the Bank, never used a credit card from the Bank, and did not owe the Bank any money. (J.A. 608). The caller asked her if she knew Mr. Slater, and Ms. Johnson answered that she did. (J.A. 609). The caller then informed Ms. Johnson that Mr. Slater had filed personal bankruptcy and that "because your name was on this account, you are now responsible for $17,000." (J.A. 609).

Ms. Johnson never had or used a credit card with the Bank. (J.A. 606, 614, 617). She never signed a credit application or any documents with the Bank. (J.A. 617). Not a single document produced by the Bank contained her signature. (J.A. 619). She also never saw or received any statements from the Bank. (J.A. 607).

On January 16, 2001, the Bank's collector called Ms. Johnson a second time. (J.A. 298-99, 610-11). She again explained that the debt was not hers, that she was not responsible for it, and that she would not pay it. (J.A. 610). She did, however, give the collector all the personal information that the collector requested, including her business mailing address, trusting that by "cooperating it would all be straightened out." (J.A. 610-11).

Ms. Johnson Confronts Mr. Slater

The December 2000 collection call from the Bank was the first time that Ms. Johnson became aware of this credit card. (J.A. 610). This call was also when she first learned that Mr. Slater had filed bankruptcy. (J.A. 610).

Ms. Johnson confronted Mr. Slater immediately after the first collection call with what she had been told about the credit card account and his bankruptcy; as a result of that conversation, she decided to move from their home. (J.A. 609). However, the Bank's insertion of Mr. Slater's bad credit card debt on her credit reports prevented her from getting financing for a condominium that she located to buy. (J.A. 611). It even prevented her from renting an apartment, since landlords also check credit reports. (J.A. 616).

Ms. Johnson Hires a Lawyer and Disputes The Debt

Ms. Johnson then requested her three credit reports. (J.A. 612). The Bank was reporting the credit card debt as her own individual account with a delinquent balance of just over $18,000. (J.A. 253, 270). As a result, she sought an attorney and retained Mr. James Carter to represent her. (J.A. 612, 643).

On February 27, 2001, when Ms. Johnson and Mr. Carter met at his office, the attorney telephoned the Bank and spoke with a representative. (J.A. 299-301, 612, 644-45). Mr. Carter informed the representative that Ms. Johnson needed to clear up her credit report because she otherwise had perfect credit and the Bank's listing of the delinquent credit card account as hers was preventing her from getting financing for a new residence. (J.A. 301, 647). Mr. Carter explained that Ms. Johnson had never seen or used the Bank's credit card, that she had never received a statement, and that she was not responsible for the disputed account. (J.A. 645). Mr. Carter asked whether the Bank had an application or any other documentation indicating that Ms. Johnson had ever wanted to avail herself of an account with the Bank. (J.A. 645). He also asked whether the Bank had any documentation indicating that she had ever used the account or had any information linking Ms. Johnson to its account. (J.A. 645). Mr. Carter testified that the representative did not provide any of the requested documentation or information and that the Bank had still not done so nearly two years later by the time of trial. (J.A. 646).

When Mr. Carter spoke to the Bank again on April 11, 2001, he was told that the Bank did not have a credit application on this account or other documentation. (J.A. 648). He was then "amazed" to be informed that it was therefore the Bank's position that Ms. Johnson had the "impossible" burden to prove the negative that she did not owe the debt. (J.A. 648). Ine Bank representative's notes of that conversation confirmed Mr. Carter's memory, stating "IT WLD BE UP TO CH TO PRVE MBNA WS REPRTNG WRNG NT MBNA PRVNG RGHT." ["It would be up to the cardholder to prove MBNA was reporting wrong, not MBNA proving right."] (J.A. 302).

Mr. Carter then wrote to Mr. Frank Lee, the owner of the mortgage company where Ms. Johnson's financing of her condominium purchase was stalled because of the Bank's negative credit report entry. (J.A. 239, 650, 654). The letter summarized in detail Ms. Johnson's dispute and the events since she was first contacted by the Bank. (J.A. 239). Mr. Carter also stated in the letter that because Ms. Johnson had never applied for the credit, had never used the credit card, and had never signed any document subjecting herself to be financially responsible for the account, and because the Bank could produce no contract obligating Ms. Johnson to pay the account, the Bank could not survive a motion to dismiss if it ever filed suit to collect. (J.A. 239). Mr. Carter further requested Mr. Lee to forward this dispute to the CRAs for verification and expressed his confidence that the Bank and the CRAs "will be forced to abandon their claim" once apprised of the absence of any basis for holding Ms. Johnson liable. (J.A. 239).

The Bank Processes The Dispute

Michael Lee, the son of the mortgage company owner and the mortgage broker who was assisting Ms. Johnson, did indeed mail the dispute letter to the CRAs. (J.A. 239). The CRAs received the letter and initiated the FCRA dispute verification process with the Bank. (J.A. 275-279, 280283). Specifically, the CRAs sent to the Bank a CDV form, the Consumer Dispute Verification form that is the "standardized and accepted procedure within the consumer credit reporting industry for investigating and verifying consumer's disputes." (J.A. 276). The CDVs summarized Ms. Johnson's dispute for the Bank alternatively as "CONSUMER STATES BELONGS TO HUSBAND ONLY," "NOT HIS/HERS," and "WAS NEVER A

SIGNER ON ACCOUNT. WAS AN AUTHORIZED USER." (J.A. 278, 283).

The Bank personnel who "process" the account disputes transmitted by CRAs are called "credit reporting specialists." (J.A. 662). These employees handle approximately 250 such disputes per day. (J.A. 664, 671, 672). The Bank employs 12 "credit reporting specialists." (J.A. 667).

The Bank maintains its computer records and notes of each account on what it calls the CIS (Customer Information System or Screen). (J.A. 115, 683). In performing their duties, the credit reporting specialists are limited to viewing only the CIS itself. (J.A. 664, 671). This process is called the "desk top procedures." (J.A. 665, 672). These employees do not look beyond this CIS desk top screen and therefore "never pull documents like old billing statements, canceled check payments, or credit card applications." (J.A. 664, 671).

The three credit reporting specialists who received the CDVs acknowledged that they fully understood the substance of Ms. Johnson's dispute. (J.A. 666, 668, 671, 673). Nevertheless, in accordance with the desk top procedure, the credit reporting specialist who responded to the Equifax CDV testified that she only "verified the balance and also provided additional derogatory information on this account." (J.A. 663).

The credit reporting specialist who responded to the Experian CDV testified that she "verified to Experian [the] identity of this account" because the "CIS records showed [Ms. Johnson] was the only person listed on the account." (J.A. 671). Accordingly, the CDV returned to Experian stated its response from the Bank in full as "VERIFIED AS REPORTED." (J.A. 278).

Similarly, the credit reporting specialist replying to the Trans Union CDV "confirmed that [Ms. Johnson] was an individual on this account" by verifying that the name and address being reported to the CRA were me same as "the name and address on the CIS records for this account." (J.A. 673). Accordingly, the CDV that the Bank returned to Trans Union stated in full "VERIFIED AS REPORTED." (J.A. 281, 283).

After receiving the CDVs back from the Bank, the CRAs each rejected Ms. Johnson's dispute and continued reporting the credit card account as Ms. Johnson's own individual delinquency on her credit reports. (J.A. 251, 269-70, 281q). Indeed, by the time of trial, the account was still a blemish on her credit reports. (J.A. 616, 621, 622, 656). Ms. Johnson continued to be unable to get conventional financing to buy her condominium and was forced into a non-conforming loan that added several percentage points to the interest and cost her $225 more each month. (J.A. 654-58). Paying the higher interest, she finally purchased her new residence and moved from the house with Mr. Slater. (J.A. 604-05, 621). Ms. Johnson also described how the experience with the Bank made it impossible for her "to get on with my life" and caused her such distress that she would find herself crying during work. (J.A. 615-16).

Ms. Johnson Was Not Obligated To Pay Mr. Slater's Debt

The account was opened on December 20, 1987, in the name of Edward N. Slater. (J.A. 115, 124). The CIS records showed that the account was an individual one without a co-applicant: the credit reporting specialist who personally handled Ms. Johnson's Trans Union dispute stated that the account was an individual one based on the code "N" in the appropriate field on the first page of the CIS and that if the account "had two co-applicants, that field would be labeled 'Y'." (J.A. 673-74). The credit reporting specialist who handled the Experian CDV confirmed that "there was an 'N', the letter 'N', in the CIS field for credit report indicator." (J.A. 671-72). This specialist, a fifteen year employee of the Bank, testified that she did "not know who at MBNA has the authority to change this indicator." (J.A. 672).

The Bank could not produce any application for the account. (J.A. 597, 648, 695-97). The CIS has no entry for Ms. Johnson's social security number and date of birth. (J.A. 115). This personal information constitutes two of the four items that the Bank's desk top procedures designate as relevant to confirm the identity of a card holder. (J.A. 665). The Bank's collection manager tried to explain the omission of the social security number on the basis that it might have been illegible on the application (that Ms. Johnson testified that she never submitted and that the Bank did not have). (J.A. 704). Mr. Slater's social security number is the only social security number in the CIS. (J.A. 709).

As noted above, Ms. Johnson testified that she was unaware of the credit account until dunned for payment, had never used the credit card, and had never signed an application or any other document. (J.A. 606, 610, 614, 617, 619). The Bank produced from microfilm during discovery (Plaintiff's Exhibit 11) all of the available checks and the MBNA "access checks" used to pay the monthly statements. (J.A. 307-431). These payments were made regularly until Mr. Slater filed for bankruptcy. (J.A. 721). Every payment check was signed by Mr. Slater; each check was written on his own personal account or the account of his company, Slater Mfg. & Sales, Inc.; the name Linda Slater appeared printed only on the nine "access checks" that were created in conjunction with the disputed account and that Mr. Slater used to pay when he did not write a personal or business check; each "access check" also was signed by Mr. Slater; and Ms. Johnson did not sign a single payment. (J.A. 307-431).

Over the years when the account was active, the comments on the CIS reflect various conversations with the cardholder; every one until Mr. Slater filed bankruptcy refers to the caller as Mr. Slater by name or "he" or "h," an abbreviation that the collection manager testified means that the caller was male. (J.A. 116, 117, 123, 124, 708).

The Bank's Co-Applicant Claim, Rejected in Any Event By The Jury, Was Built on A Single Data Entry And Was Inconsistent With ??e Account Code

To support its claim that Ms. Johnson must have been contractually obligated as a co-applicant on the account, the Bank relied exclusively on the CIS, which states that on June 10, 1991, the last name of the already existing secondary name on the account was changed due to marriage. (J.A. 116, 683-84, 686). This June 10, 1991, entry was the initial evidence on the CIS that the Bank claimed linked Ms. Johnson to the account. (J.A. 597-98).

This reference to a name change was based on a telephone call. (J.A. 598, 705-07). Ms. Johnson testified that she did not make that change, not only because she was unaware of the account, but also because when she notified creditors of her name change after her marriage, she did so in writing. (J.A. 623). The Bank contended that it was Mr. Slater--"the primary" person on the credit card--who made that call. (J.A. 598). The collection manager agreed. (J.A. 706).

In providing the defense testimony to explain the history of the CIS and its significance, the collection manager referred to the events that flow from the June 10, 1991 name-change entry to further support the Bank's contention: the monthly statements that then were issued in both Mr. Slater's and Ms. Johnson's names and the addition of Ms. Johnson as the primary when Mr. Slater's name was deleted on December 12, 2000, upon his filing for bankruptcy. (J.A. 687-88, 708). When asked what safeguards, if any, the Bank maintained to catch a mistake if the critical input of Ms. Johnson's name had been initially entered erroneously, the collection manager conceded that he knew of none: he first stated, "I would assume that there is some safeguard in place not to confuse it" (J.A. 708-09); when pressed by the district judge for an answer, he stated, "I am not familiar with what the safeguard is, no, Your Honor." (J.A. 709).

Neither the collection manager or any other witness for the Bank ever attempted to explain why, if Ms. Johnson were indeed a co-applicant, the CIS "Y" code for an account with co-applicants was not present here and instead the CIS clearly showed an "N" code for an individual account. (J.A. 671-72, 673-74).

The District Court Instructs The Jury

The following is the district court's entire jury charge on the substantive claim presented on appeal:
The plaintiff, Linda Johnson, is suing the defendant, MBNA America Bank, N.A., for damages alleging that the defendant negligently and willfully violated the Fair Credit Reporting Act, 15 U.S.C. section 1681. The plaintiff claims that the defendant violated the Fair Credit Reporting Act because she claims that after receiving notice from three credit reporting agencies that the plaintiff was disputing the identity and balance of an MBNA account[, t]he defendant failed to review all of the information provided by the credit reporting agencies, failed to investigate the plaintiff's disputes, and failed to report back to the agencies the result its investigation. The defendant denies that it violated any provision of the Fair Credit Reporting Act. The defendant claims that it reviewed all of the information provided by the credit reporting agencies, investigated the plaintiff's disputes, and reported back to the these agencies the results of an investigation. The plaintiff

claims first, that the defendant negligently failed to comply with the Fair Credit Reporting Act in failing to review all of the information provided by Experian, Equifax and TransUnion; failing to conduct a reasonable investigation of her disputes, and failing to accurately report back to these agencies the result of its investigation. To establish her claim that the defendant negligently failed to comply with the Fair Credit Reporting Act the plaintiff must establish the following elements by a preponderance of the evidence: One, that the defendant negligently failed to, A, conduct an investigation with respect to the disputed information B, review all relevant information provided by the consumer reporting agencies; or C, report the results of the investigation to the consumer reporting agencies; and two, that the plaintiff was damaged; and three, that the negligence of the defendant proximately caused the damage suffered by the plaintiff.

Your verdict will be for the defendant if you find that the plaintiff fails to establish any one of the three elements.

Negligence as used in these instructions means the failure to do something which a reasonably prudent person would do, or the doing of something which a reasonably prudent person would not do under the circumstances which you find existed in this case.

It is for you to decide what a reasonably prudent person would do or not do under the circumstances as they existed in this case. In other words, you must determine whether the defendant's investigation of the disputed information was reasonable. The term "proximate cause" as used in these instructions means that there must be a connection between the conduct of the defendant that the plaintiff claims was negligent and the damage complained of by the plaintiff, and that the act that is claimed to have produced the damage was a natural and probable result of the negligent conduct of the defendant.

The Fair Credit Reporting Act is not required, does not require that credit card account records, including original applications, be kept in any particular form; however, the law does prohibit MBNA from maintaining its record in such manner as to consciously avoid knowing that information it is reporting is accurate.

A corporation may act only through natural persons as its agents or employees, and in general any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

If a corporation has established a standard of procedure for the accomplishment of an act, it is relevant to proving that it acted in a specific instance in conformance with that standard of procedure. And here again, you have heard evidence that everybody is getting electronic now days, and it is up to you to decide whether that is a reasonable way to conduct your business or not. (J.A. 763-65, 770-71).

The jury agreed that the Bank negligently failed to comply with the FCRA and awarded Ms. Johnson actual damages. (J.A. 784). The jury ruled for the Bank on the claim of willful noncompliance. (J.A. 784).

SUMMARY OF ARGUMENT

Congress Amended the FCRA in 1996 to Compel the Bank's Meaningful Participation in the FCRA Dispute Resolution Process

Congress amended the FCRA in 1996 to require that those who furnish credit information to CRAs actively participate in the formal FCRA dispute resolution process. Specifically, Congress mandated that as part of the response to a consumer's dispute challenging the "completeness or accuracy of any item of information in a consumer's file," the furnisher "shall conduct an investigation with respect to the disputed information" and "shall report the results of the investigation to the consumer reporting agency."

The Bank Failed to "Investigate" the Disputed Information

As the trial amply demonstrated, the Bank did virtually nothing, and certainly nothing of substance, in response to Ms. Johnson's dispute here. Consistent with its argument to the district court that there is no "qualitative component" in the

operative statutory language, the Bank candidly admits that its response to Ms. Johnson's dispute was "limited" and "minimal." Indeed, the Bank did precisely what every relevant authority has admonished is insufficient to meet the statutory command to "investigate" "disputed information": it declined to look into the merits of the question and instead simply confirmed that the very information that the consumer was challenging was being faithfully repeated, computer to computer, to the CRA as the Bank was erroneously maintaining it.

The Bank continues to claim that this mere parroting of the information in the computer record that itself is the subject of the dispute meets the Congressional standard that it "shall conduct an investigation with respect to the disputed information." To achieve this alchemy, the Bank breached the cardinal rule of statutory interpretation: not once in its Brief does it examine the ordinary, common meaning of what is an "investigation." An "investigation" is a "careful search; detailed examination; systemic inquiry." An "investigation" is not a "minimal" or "limited" inquiry but one of substance. Accordingly, the Bank did not conduct an "investigation" as the FCRA requires. The reason for this failure is that the Bank's "desk top procedures," the relevant institutional protocols, affirmatively prevented its employees from performing any such inquiry.

In accordance with established Circuit jurisprudence, no further examination of Congressional intent is appropriate where, as here, the meaning of the statutory language is plain and unambiguous. Nevertheless, the Bank attempts to establish ambiguity where none exists based on a professed dichotomy between a CRA's admittedly qualitative duty to perform a "reasonable investigation" and the putative "minimal" furnisher investigative duty. The purported distinction does not exist. The Bank bases this argument on two other sections of the FCRA that do not address the FCRA's investigation procedure. An accurate comparison of the parallel investigation sections of the statute reinforces the plain language analysis and contradicts the Bank's claim.

The Bank Falsely Reported to the CRAs the Results of its Efforts

Even if the Bank were correct that Congress's mandate that it "shall conduct an investigation with respect to the disputed information" permitted simply a "limited" and "minimal" confirmation of the disputed information itself, it still would not meet its burden to nullify the jury verdict. The jury also found that the Bank breached its obligation to "report the results of the investigation to the consumer reporting agency."

The Bank reported back to the CRAs that it had "verified as reported" the disputed information. The Bank's thesis is that it was not obligated to undertake a "qualitative" inquiry into the truth of Ms. Johnson's dispute and therefore did not do so. Therefore, the Bank cannot credibly deny that its "report" that it had in fact "verified" the disputed information was necessarily false.

The Bank's contradictory position was apparent to the jury and is obstructive of Congress's decision in 1996 that furnishers must assist CRAs in resolving consumers' disputes. If the Bank truly believed that it was free to avoid making a substantive inquiry into the merits of Ms. Johnson's dispute, then at a minimum its reply to the CRAs must explain the "results of the investigation" in a manner that does not affirmatively misstate the scope and results of its "minimal" inquiry.

The Bank could have reported truthfully, and consistent with its own professed view of its role under the FCRA, that its "investigation" revealed that its computer was faithfully reporting the challenged information to the CRAs and that otherwise it had no records to sustain or contradict the consumer's dispute. In that event, it would have complied at least with the FCRA mandate to report the results of the investigation. In addition, that truthful report would not have misled the CRAs to believe that the Bank had undertaken a qualitative process and had made a qualitative decision. Then, the CRAs could have evaluated Ms. Johnson's dispute and taken appropriate action as required by the FCRA: if the disputed "information is found to be inaccurate or incomplete or cannot be verified," the CRA "shall promptly" delete or modify the consumer report.

The only information that the CRAs had when they disallowed Ms. Johnson's dispute was the misinformation provided to them by the Bank. if the Bank had complied with the FCRA's requirement that it "report the results of the investigation," the CRAs would have been compelled to delete the erroneous report. Ms. Johnson then would have received her mortgage loan at the favorable rate that she had earned as a result of her own responsible and positive credit history. The financial institution for whose loan she otherwise qualified would have been able to keep a good customer, and the free market economy based on the flow of accurate and reliable information would have performed as Congress intended to foster by enacting the FCRA. Instead, the Bank's misconduct here thwarted the proper functioning of the credit reporting system, to the detriment of all

concerned.

ARGUMENT OF LAW

I. Standard of Review

This Court reviews the denial of the Bank's motion for judgment as a matter of law *de novo* "follow[ing] the same standards as a Rule 56 motion for summary judgment." *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639, 644-45 (4th Cir. 2002). The Bank's challenge to the jury instructions is reviewed for abuse of discretion. *South Atlantic Ltd. Partnership v. Riese*, 284 F.3d 518, 530 (4th Cir. 2002).

II. Introduction

A. Congress Enacted the FCRA as One Component of its Overall Plan to Strengthen the Free Market Economy By Insuring the Flow and Availability of Accurate Credit Information

Congress enacted the FCRA in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (CCPA), the plenary regulation of the national consumer credit industry. Consumer credit has expanded nearly three hundred fold in the last sixty years and is now one of the largest sectors of the national economy. Growing from six billion dollars at the end of World War II, outstanding consumer credit debt rose to 116 billion dollars in 1970 when Congress enacted the FCRA and by 1993 reached over 700 billion dollars. S. Rep. 103-209, 103d Cong., 1st Sess. 2-3 (1993). The Federal Reserve Board now reports that this figure has reached 1.759 trillion dollars.[1]

To support this phenomenal level of activity, the consumer reporting industry in 1993 maintained 450 million credit files on more than 110 million individuals and processed almost 2 billion pieces of data per month. *Id.*, at 3. Most recently, statistics from just one of the three major CRAs show that it maintains reports on 190 million Americans, virtually the entire adult population of the country, and processes between 1.4 and 1.6 billion items of information each month. *Trans Union Corp. v. Federal Trade Commission*, 245 F.3d 809, 812 (D.C. Cir. 2001). In view of the demonstrated potential for error in operating this informational maze, Congress adopted the FCRA with the explicit recognition that the health of the consumer banking system is "dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. § 1681(a)(1).

A recurring theme at the heart of the CCPA is that the dissemination of accurate credit information is essential to maintain the vitality of the credit granting system for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose that credit grantors be in the best position to make reliable credit granting decisions, the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, Title I of the CCPA (TILA), establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." 15 U.S.C. § 1601(a). In addition to the FCRA and TILA, Congress has included a further self-help checking mechanism within the CCPA as Title VII, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (ECOA), providing yet another information sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action taken, such as credit denial. 15 U.S.C. § 1691d.

The Supreme Court succinctly stated this guiding principle of this Congressional philosophy thirty years ago in its initial and seminal teaching under the CCPA: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973). The 1996 amendments to the FCRA were adopted with the recognition that credit decisions made in ignorance or without the benefit of accurate information, whether made by credit grantors or consumers, undermine the vitality of the consumer economy.

B. Congress Adopted The 1996 FCRA Amendments With The Express Purpose To Improve The Accuracy of Credit Reporting By Bringing Furnishers Of Information Within The Statute

Unfortunately, despite the intent and best efforts of Congress in adopting the FCRA, accurate information was not being consistently provided by the consumer reporting system to its credit granting clientele. In the deliberations that culminated with enacting the 1996 amendments, Congress was presented with the staggering statistic that nearly half of all consumer reports (48%) maintained by the three major CRAs contain inaccurate information. S. Rep. 103-209, *supra*, at 3. By 1996, Congress was poised to reform and strengthen the credit reporting system that it had left essentially untouched for twenty-five years. *Id.* at 2.

Before 1996 furnishers of information to consumer reporting agencies were outside the scope of the FCRA. *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002). Despite the central role that these entities played as the primary source of the data which the CRAs collected and disseminated, furnishers were essentially immune from federal oversight. The 1996 amendments eliminated that privileged status.

Before 1996 furnishers were under no federal duty to report accurate information to the CRAs, to respond to or investigate a consumer's dispute, or to assist the CRAs in their duty to investigate the completeness or accuracy of the information which the furnisher itself provided. *Vasquez-Garcia v. Trans Union de Puerto Rico*, 222 F.Supp.2d 150, 154 (D.P.R. 2002). This omission was significant and frustrating since the reporting agencies themselves were bound to maintain the accuracy of their reports [§ 1681e(b), which remains unaltered] and investigate a consumer's dispute that the information is incomplete or inaccurate. § 1681i (West 1982). Consistent with the absence of furnisher obligations, the FCRA permitted consumers to file civil actions only against a "consumer reporting agency or user of information" which violated the Act. §§ 1681n and 1681***o***, historical and statutory notes; *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d at 1060. In addition to this federal immunity, the Act pre-empted, and continues to pre-empt, certain state law tort claims against furnishers absent "malice or willful intent to injure." § 1681h(e).

In 1996 Congress amended the FCRA. Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (P.L. 104-208) (Sept. 30, 1996). Among the changes made to the FCRA are two which are relevant here. First, Congress enacted an entirely new section, codified in § 1681s-2, imposing on furnishers of information detailed and specific responsibilities, including those in subsection (b) which the jury found the Bank violated here. Second, Congress expanded and revamped the consumer dispute resolution process of § 1681i, including enacting § 1681i(a)(2), which compels the CRA to promptly notify the furnisher of disputed information and triggers the furnisher's corresponding duties under § 1681s-2(b).

The Senate Report accompanying the legislation confirms this limited FCRA coverage before 1996 and the effect of the amendments on furnishers:

> Currently, the FCRA contains no requirements applying to those entities which furnish information to consumer reporting agencies. Section 413 imposes certain obligations upon those furnishers of information to consumer reporting agencies. The Committee believes that bringing furnishers of information under the provisions of the FCRA *is an essential step in ensuring the accuracy of consumer report information.*

S. Rep. 104-185, 104th Cong., 1st Sess. 49 (1995) (emphasis added).

III. The Bank Did Not "Conduct an Investigation With Respect to the Disputed Information"

A. The Ordinary and Common Meaning of the Statutory Language Establishes the Substantive Component of the Bank's Duty to Investigate

Congress established the Bank's duty to investigate Ms. Johnson's dispute and defined the question presented by this case using the following language in § 1681s-2(b)(1):

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

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

The Bank departed from the established canons of statutory interpretation when it argued the meaning of the operative term of the statute without examining the actual language that Congress adopted. *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language"). No principle is more firmly enshrined in the methodology of statutory analysis than where the language employed by Congress is clear, the text controls and no further inquiry is permitted. *Estate of Cowart v. Nichols Drilling Co.*, 505 U.S. 469, 475 (1992). This Court recently reaffirmed these principles, while also identifying the specific flaw in the Bank's approach: "When examining statutory language, we generally give words their ordinary, contemporary, and common meaning." *Scott v. United States*, 328 F.3d 132, 139 (4th Cir. 2003) (Citations omitted).

In accordance with its "ordinary, contemporary, and common meaning," an "investigation" is a "careful search; detailed examination; systemic inquiry." Webster's New Universal Unabridged Dictionary, p. 966 (2d ed. 1983). By its own admission, and consistent with the jury's verdict, the Bank conducted no such substantive examination of the disputed information. Instead, its employees followed their instructions to confine their examination of the disputed information to the "desk top procedures." As shown above, these "desk top procedures" permit the credit reporting specialists to view only the CIS and prohibit them from looking beyond their CIS computer screen.

Therefore, the credit reporting specialists simply confirmed that the CIS contained the information that the Bank was reporting to the CRAs. This procedure consciously ignored the merits of Ms. Johnson's complaint and merely begs the question of the validity of the dispute. Unremarkably and predictably, the "desk top procedures" resulted in the Bank validating nothing of substance and proved only that the challenged information was being reported to the CRAs as the Bank was erroneously maintaining it. As stated by the district court, the Bank's behavior "removes all meaning from the word 'investigate.' " (J.A. 1003).

B. The Plain Meaning of "Investigation" Demonstrates That Congress Rejected The Bank's Contention That Its § 1681s-2(b) Duties Are "Limited" and "Minimal"

The Bank does not defend its misconduct or challenge the jury's verdict on the basis of an examination of the ordinary and common meaning of operative term "investigation." It does not claim that the "desk top procedures" permit, or that it performed, a "careful search," a "detailed examination," or a "systemic inquiry" "with respect to the disputed information." The Bank has ignored this conventional method of ascertaining Congressional intent, and as a result its conclusion is naturally groundless.

The linchpin of the Bank's argument instead is its single unexamined and conclusory proposition that the duty established by § 1681s-2(b)(1)(A) to "conduct an investigation with respect to the disputed information" is "minimal" and "very limited" with "no qualitative element." (Brief of Appellant, pp. 9, 15, 23, 28). To craft this proposition, the Bank recites in the first section of its Argument of Law the text of § 1681s-2(b)(1) and then states that the duties that Congress thereby created are "limited." (Brief of Appellant, p. 23). The Bank supports this statement with no analysis of the meaning of the language and instead substitutes the required critique of the definition of the words used with the statement that its conclusion is "clearly" the case. *Id.*

If Congress so "clearly" intended that its use of the phrase "conduct an investigation with respect to the disputed information" meant a "minimal" and "limited" examination with "no qualitative element," then the Bank at least would have presented an accepted definition that equated an "investigation" with the perfunctory and superficial inquiry consciously avoiding the merits of the dispute that it performed here. It has not done so. The Bank's bare assertion, with this critical omission of any discussion of the meaning of the plain language, is not simply a failure of persuasion but also a violation of this Court's prevailing tenets of statutory analysis.

The Bank's avoidance of the plain meaning of an "investigation" is patent. In a striking summary of its view of the elements of § 1681s-2(b), the Bank states:

> Congress required that furnishers, upon receiving notice of a dispute from a consumer reporting agency, conduct an "investigation," whereby it [sic] must simply review all relevant information that was provided by the agency and report back the results of its [sic] investigation, notifying all other agencies to whom the furnisher provided information and that compile credit files on a nationwide basis about any information found to be incomplete or inaccurate. (Brief of Appellant, p. 30).

This synopsis unabashedly eliminates any utility for § 1681s-2(b)(1)(A)'s stated duty to investigate. Instead, the Bank reduces the separate duty to investigate to simply a duty to review and verify the contents of the CRA's transmittal. Thus, the Bank's view of § 1681s-2(b) is that § 1681s-2(b)(1)(A), with its separately stated duty to investigate, has no role or import and therefore is a functional nullity. If the Bank's failure to examine the plain meaning of the statutory term were not sufficient evidence of the insubstantiality of its argument, its rendering of the section under scrutiny superfluous, with no effect whatsoever, surely eliminates any credibility that might remain. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (citations and internal quotes omitted); *Lane v. United States*, 286 F.3d 723, 731 (4th Cir. 2002).

C. The Bank's Misplaced Reliance on Other Sections of the FCRA Cannot Nullify the Plain Language of § 1681s-2(b)(1)

The Bank tries to create ambiguity where none exists and then wishes to resolve this phantom confusion contrary to the statute's plain language. Its circular tautology fails at each level of inspection.

First, it is axiomatic, as presented above, that when the plain language analysis reveals an unambiguous result, "a court's inquiry is at an end." *Rosmer v. Pfizer*, 263 F.3d 110, 117 (4th Cir. 2001). Here, the Bank would use a tertiary interpretative aid to create the alleged ambiguity that then would justify its premature resort to that tertiary aid, without even first consulting the secondary source of legislative history. *Adams v. Dole*, 927 F.2d 771, 774 (4th Cir. 1991) (if ambiguous statutory language is not first clarified by resort to the legislative history, then "traditional tools of statutory construction are employed"). This maneuver eviscerates the primacy of the plain language doctrine. This Court reached this same conclusion in the similar context where it disallowed a litigant's attempted use of the secondary aid of legislative history to create the initial ambiguity: "Statutory analysis cannot operate as a post-hoc justification for permitting legislative history to trump the plain meaning of the text." *Rosmer*, 263 F.3d at 118.

Second, as articulated in *Adams*, even if the Bank had presented any basis for finding ambiguity in the statutory language itself, one would first be obliged to consult the legislative history. That history, summarized in Section II above, leaves no doubt that Congress intended its amendments in 1996 to "bring [] furnishers of information under the provisions of the FCRA [as] an essential step in ensuring the accuracy of consumer report information." S. Rep. 104-185, *supra*, at 49. The legislative history refutes the Bank's contention that § 1681s-2(b)(1) has no substantive ingredient; as the district court observed in denying the Rule 50 motion: "There would be no point in having the statute, and the requirement of an investigation, if there was no qualitative component to the investigation." (J.A. 1002).

Third, the provisions where the Bank finds the supposed conflict are not parallel, and indeed are unrelated to the provision under scrutiny. To be sure, the use of the same words in different parts of same statute does evince a Congressional intent that the terms share the same meaning. *Estate of Cowart*, 505 U.S. at 479. The doctrine of *in pari materia* also favors t??e comparison that the Bank misdirects here. *Kolibash v. Committee on Legal Ethics of the West Virginia Bar*, 872 F.2d 571, 573 (4th Cir. 1989). The Bank does not actually apply these rules because their application to the parallel CRA investigation provision, as addressed in the next section, confirms the correctness of the ruling below.

Rather than inspect § 1681i(a)(1), the CRA investigation provision corresponding to the furnisher's duty under § 1681s-2(b)(1), the Bank focuses on § 1681e(b), which imposes the duty on a CRA initially to "follow reasonable procedures

to assure maximum possible accuracy of the information" in any report that it prepares. The Bank argues that this provision demonstrates Congress's intent that the investigation that CRAs conduct--admittedly containing a qualitative component--should be different from a furnisher's investigation which should contain no qualitative element of reasonableness. (Brief of Appellant, p. 24).

The Bank does not explain why this standard of care for a CRA when initially preparing a report should be exported to the investigation process. The federal courts have reached the opposite conclusion and explicitly do not permit this exportation: the § 1681e(b) "reasonable procedures to assure maximum possible accuracy" standard does not inform the CRA's duty to investigate under § 1681i(a)(1). The Third Circuit and the district courts that have expressed an opinion have refused to engraft the § 1681e(b) initial report standard onto the § 1681i(a) investigation provision because to do so "would render the two sections largely duplicative of each other" in violation of the rule that to avoid any result that would "render statutory language superfluous, meaningless, or irrelevant." *Cushman v. Trans Union Corp.,* 115 F.3d 220, 225 (3rd Cir. 1997); *accord, Swoager v. Credit Bureau of Greater St. Petersburg,* 608 F.Supp. 972, 974-75 (M.D.Fla. 1985); *Grenier v. Equifax Credit Information Services,* 892 F.Supp. 57, 59 (D.Conn. 1995); *Yelder v. Credit Bureau of Montgomery, L.L.C.,* 131 F.Supp.2d 1275, 1281 (M.D.Ala. 2001).

The Bank's argument illustrates the wisdom of not accepting an invitation to compromise the integrity of the statute as Congress wrote it in order to accommodate the narrow, immediate needs of an individual litigant. One unintended consequence of accepting the Bank's argument for a substantive link between § 1681e(b) and § 1681i(a) is to disrupt an otherwise settled body of law and thereby create uncertainty for the CRAs.

The other section to which the Bank refers is even more attenuated. The Bank claims that the provision in § 1681i(a)(5)(C) requiring CRAs to "maintain reasonable procedures designed to prevent the reappearance" of previously deleted information also shows that the element of reasonableness is absent from § 1681s-2(b)(1). As with its reference to § 1681e(b), there is in fact no logical linkage. These two provisions represent important prophylactic measures that Congress established to protect consumers and the credit industry from deficiencies that can be readily anticipated and prevented. They have no hidden meaning, and there is no basis whatsoever to support the Bank's position that they signal an oblique Congressional message waiting to be discovered to alter the plain meaning of the remainder of the statute.

To suggest, as the Bank does, that the use of the word "reasonable" in these sections portends that Congress intended no "reasonable" standard of conduct in any other provision of the law where that term is absent is impertinent. The Bank's logic would inflict upon the remaining sections of this law a standard of "unreasonable" conduct. Indeed, this logic militates in favor of the adoption of an "unreasonable investigation" standard to test compliance with § 1681s-2(b)(1).

The Bank clearly disapproves of the lower court's explanation (J.A. 1002-03) that one rationale to conclude than an element of reasonableness is a component of § 1681s-2(b)(1) is that § 1681***o*** predicates liability on "negligent" noncompliance, a standard based on the "reasonably prudent person;" however, the Bank does not explain its basis for that disapproval other than repeating its discredited linkage theory. (Brief of Appellant, p. 37). Perhaps the explanation for the Bank's omission of a cogent critique of the lower court's impeccable reasoning is that the Bank itself embraced the same standard, and foreclosed any objection, when it proffered its own jury instruction conceding the "reasonably prudent person" language. (J.A. 465).

D. Federal Jurisprudence Applying the Parallel CRA Duty to Investigate Unanimously Confirms the Error of The Bank's Position

Section 1681i(a)(1) establishes the duty of CRAs to investigate a consumer's dispute using virtually the identical operative terms as § 1681s-2(b)(1):

> If the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly of such dispute, the agency shall reinvestigate free of charge and record the current status of the disputed information....

The Bank summarily dismisses the extensive body of law which interprets § 1681i(a) and on which the district court also relied because, according to the Bank, "Section 1681i(a) simply does not apply to furnishers." (Brief of Appellant, p. 34). Section 1681i(a) of course does not apply to furnishers, but that difference cannot operate as a self-fulfilling nullification of the doctrine of *in pari materia* and the rule that the same words in a statute are interpreted the same.

Congress drafted § 1681i(a)(1) and § 1681s-2(b)(1) in the same statute imposing on CRAs and furnishers the same duty to investigate the same consumer dispute of the "completeness or accuracy" of reported information. The link between the two sections is unequivocal not simply because of Congress's use of the same language. *See, e.g., United States v.Srnsky*, 271 F.3d 595, 602 (4th Cir. 2001) (applying rule to "nearly identical language"). When Congress amended the FCRA in 1996 to add the furnisher's duty to investigate, it amended former § 1681i(a) (West 1983) to add current § 1681i(a)(2)(A). Section 1681i(a)(2)(A) now requires a CRA to provide to the furnisher notification of the dispute that then triggers the furnisher's duty to investigate, as expressly referenced in the first clause of § 1681s-2(b)(1). Sections 1681i(a) and 1681s-2(b) do not merely employ the same language and are not even simply *in pari materia;* they are inextricably joined as a result of the 1996 amendments by textual cross reference creating one as a condition precedent to the other. *Young v. Equifax Credit Information Services, Inc.*, 294 F.3d 631, 639-40 (5th Cir. 2002); *see*, Anthony Rodriguez, Fair Credit Reporting, § 3.9, p. 74, notes 157-59 and accompanying text (5th ed. 2002).

The Bank's summary dismissal of the parallel § 1681i(a) jurisprudence is baseless. That case law confirms the absence of any basis for the Bank's current position. Every federal court, including the four Circuit Courts that have opined on the question, has rejected the Bank's instant contention that an "investigation" is not substantive. Specifically, this federal jurisprudence holds that an FCRA investigation cannot ignore delving into the merits of the dispute, may not simply confirm that the very information that the consumer is challenging is being faithfully repeated to the CRA, and instead must consult primary or outside sources as necessary to reach a substantive determination. *Cushman*, 115 F.3d at 224-26 (investigation insufficient when "merely parroting information"); *Henson v. CSC Credit Services*, 29 F.3d 280, 286-87 (7th Cir. 1994) (explaining when an investigation must "verify the accuracy of the initial source of information"); *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) (same); *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1160 (11th Cir. 1991) (need for "uncovering additional facts that provide a more accurate representation about a particular entry"); *Pinner v. Schmidt*, 805 F.2d 1258, 1262 (5th Cir. 1986) (appropriate to interview multiple witnesses).[2]

E. Congress Focused the Furnisher's Investigation on the Substantive Standard of Completeness and Accuracy of the Disputed Information

If there were any basis to reject the ordinary meaning of the statutory language and to conclude that the phrase "conduct an investigation with respect to the disputed information" is sufficiently ambiguous to encompass a "minimal" and "very limited" review with "no qualitative element," then further analysis would be appropriate. *Stilner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996) (en banc). Since there is no such basis, the remaining indicia of Congressional intent simply confirm the initial conclusion.

The Bank asserts that in contrast to § 1681s-2(a), § 1681s-2(??) contains no element of accuracy. (Brief of Appellant, p. 37). Not only is the Bank in error because the text of § 1681s-2(b)(1) includes an accuracy component, but Congress actually established the focus of the § 1681s2(b)(1)(A) investigation on whether the furnisher "finds that the information is incomplete or inaccurate." The fourth and final duty that § 1681s-2(b)(1) mandates is as follows:

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

The text of § 1681s-2(b) unambiguously includes an accuracy requirement. In addition, Congress emphasized with this language that the ultimate objective of the furnisher's investigation is to determine whether the consumer's dispute is valid.

Section 1681s-2(b)(1) begins with its reference to the CRA's notice to the furnisher of the substance of the consumer's dispute under § 1681i(a)(2)(A) ("all relevant information") and concludes with the mandate that the furnisher provide a

report of the results to each CRA, using the identical language ("completeness and accuracy") that is the starting point for the dispute process under § 1681i(a). Determining the substance and validity of the consumer's dispute is the sole function and purpose o?? furnisher's investigation.

In the short history of § 1681s-2(b) litigation, each district court, in addition to the court below, that has been presented with the Bank's proposition that a furnisher need only parrot the disputed information and need not inquire into primary or outside sources has rejected it. Each court has held that the furnisher's § 1681s-2(b)(1)(A) duty requires a substantive inquiry in order to ascertain the validity of the consumer's dispute under this statutory standard of completeness and accuracy. *Bruce v. First U.S.A. Bank, N.A.,* 103 F.Supp.2d 1135, 1143-44 (E.D.Mo. 2000); *Betts v. EquifaxCredit Information Services, Inc.,* 245 F.Supp.2d 1130, 1135-36 (W.D.Wash. 2003); *Olwell v. Medical Information Bureau,* 2003 WL 79035, *5 (D.Minn. January 7, 2003); *Curtis v. Trans Union, LLC,* 2002 WL 31748838, *4-6 (N.D. Ill. December 9, 2002).

F. The Federal Trade Commission Agrees That Merely "Verifying Information in the Computerized File Does Not Constitute an 'Investigation' " Under § 1681s-2(b)

Congress has entrusted the Federal Trade Commission (FTC) with primary responsibility for governmental enforcement of the FCRA. § 1681s. Any violation of the FCRA "shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C. § 45(a)] and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof [15 U.S.C. § 45(b)]...." § 1681s(a)(1). The FTC regularly brings enforcement actions pursuant to that authority and has issued interpretive guidance regarding various aspects of the statute's requirements. 16 C.F.R. Part 600. In light of the its key role administering the FCRA, courts have found it appropriate to defer to the FTC's analysis of the statute's provisions. *See, e.g. Ollestad v. Kelley,* 573 F.2d 1109, 1111 (9th Cir. 1978).

The Bank attempts to bolster its position by relying on an FTC publication. (Brief of Appellant, pp. 23, 28). That publication merely recites the statutory language. It adds nothing to the Bank's lack of analysis and failure to parse the statutory terms. Nevertheless, the Bank thereby acknowledges the FTC's central role in administering the FCRA and the importance of the Commission's views.

Therefore it is significant in confirming the plain meaning of § 1681s2(b)(1)(A) that the FTC has taken the enforcement position that merely "verifying information in the computerized [furnisher] file does not constitute an 'investigation' for purposes" of § 1681s-2(b). In its most important furnisher compliance litigation to date, the FTC filed suit against and entered into a Consent Decree with Performance Capital Management, Inc. (PCM), a furnisher of credit information subject to § 168??-2. (Complaint, ¶ 7).[3] Among the FTC's allegations was that upon receiving a CDV form from a CRA, "it is the practice of PCM to compare the name, address, and information in PCM's computer database with the information provided on each consumer dispute verification form. Where the two match, PCM reports that is has verified as accurate the information in its file." (Complaint, ¶ 12). The Complaint continues that "verifying information in the computerized PCM file does not constitute an 'investigation' for purposes of Section 623(b) [§ 1681s-2(b)]." (Complaint, ¶ 13).

The Consent Decree remedied this noncompliance with § 1681s-2(b) with entry of the following injunction enjoining PCM from:

> B. failing to properly investigate consumer disputes, as required by Section 623(b) of the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b), when consumer reporting agencies refer disputes to the defendant pursuant to Section 611(a)(2), 15 U.S.C. § 1681i(a)(2). In order to comply with Section 623(b) when a consumer disputes the accuracy of information reported by the defendant to a consumer reporting agency, defendant shall either verify the information with the original account records within the time period set forth in the Fair Credit Reporting Act or take all necessary steps to delete the information from the files of all consumer reporting agencies to which the information was reported. In any situation where the defendant either knows that no original records exist, or is informed by the original creditor that no records exist, the defendant shall, within five business days after receiving the consumer dispute, notify all consumer reporting agencies to which the information has been provided that the information is to be deleted from the file of the consumer who has disputed the account;....

Consent Decree, Order, Section II.[4]

This FTC enforcement action is significant for reasons in addition to dramatically illustrating under identical facts as presented here the government's interpretation of the sole substantive issue that the Bank is raising. The FTC Complaint alleges that PCM's credit reporting is "part of its collection activity" on the underlying debts. (Complaint, ¶ 7). Others agree. *Rivera v. Bank One,* 145 F.R.D. 614, 623 (D.P.R. 1993) (a creditor's report of a credit card debt to a CRA is a "powerful tool designed, in part, to wrench compliance with payment terms from its cardholder"); *Matter of Sommersdorf,* 139 B.R. 700, 701 (Bankr.S.D.Ohio 1991); *Ditty v. CheckRite, Ltd., Inc.,* 973 F.Supp. 1320, 1331 (D.Utah 1997).

Other consumers might have paid the non-existent debt under the pressure of the inaccurate credit report obstructing Ms. Johnson's mortgage loan and condominium purchase. Ms. Johnson might have done so herself had the debt been more modest. The salient point is that the Bank's misconduct here not only compromises the integrity of the national credit reporting system but also can be seen as a violation of applicable standards of conduct in the collection of disputed debts. *Compare, e.g., Brady v. Credit Recovery Company, Inc.,* 160 F.3d 64 (1st Cir. 1998).

IV. Ascertaining Whether the Bank Did "Conduct an Investigation With Respect to the Disputed Information" Resolves All Other Issues Presented

If the Bank is correct that § 1681s-2(b)(1)(A)'s mandate that a furnisher "conduct an investigation with respect to the disputed information" means a "minimal" and "limited" examination with "no qualitative element," then the district court's ruling to the contrary on the Rule 50 motion would be an error of law. In that event, however, as shown in the succeeding section, the judgment still should be affirmed on the basis of the jury's verdict that the Bank breached its obligation pursuant to § 1681s-2(b)(1)(C) to "report the results of the investigation to the consumer reporting agency."

If the Bank is incorrect with regard to this central question of the meaning of a § 1681s-2(b)(1)(A) "investigation with respect to the disputed information," then the Bank's other arguments necessarily are also without merit. These purportedly separate arguments merely re-phrase this primary issue or are otherwise dependent on its resolution. In every case, the arguments are therefore either redundant or insubstantial, or both.

The Bank's claim that the jury was not empowered to judge the "reasonableness" of its investigation is foreclosed by the answer to the primary question. The Bank builds its position solely on the stated premise that "as established above, there is clearly no qualitative element for investigations...." (Brief of Appellant, p. 28). The Bank offers no other perspective than that already discussed.

The Bank criticizes the trial court's adoption of a tort approach but does not appear to assign error separate from its central contention. (Brief of Appellant, 35-36). The Bank's proffer of its own "reasonably prudent person" instruction in any event limits the scope of its criticism. *See* section II(C), *supra.*

More important, this Court years ago confirmed the district court's "statutory tort" analogue (J.A. 985) in *Barber v. Kimbrell's, Inc.,* 577 F.2d 216, 225 (4th Cir. 1978). *Barber* reached its conclusion in the context of TILA, which imposes "strict liability" without the FCRA's explicit § 1681***o*** negligence standard. *Smith v. Fidelity Consumer Discount Co.,* 898 F.2d 896, 898 (3rd Cir. 1990). *A fortiori,* application of tort principles to the FCRA is irreproachable. Accordingly, the district court's rejection of the Bank's invitation to comment to the jury on specific evidence or give informational instructions, and its adaptation of the FCRA to the standard negligence charge, are unimpeachable. *Hardin v. Ski Venture, Inc.,* 50 F.3d 1291, 1294-96 (4th Cir. 1995).

The Bank's final assertion addressing federal record keeping requirements (Brief of Appellant, pp. 38-40) also begs the central question of the scope and meaning of a furnisher's "investigation" duty. So long as an "investigation" entails more than a "rubber stamping," as the district court held (J.A. 990), by employees who, as the evidence below showed, spend less than two minutes per review [*compare, Cushman,* 115 F.3d at 222 (six minutes per review)], the Bank's position regarding record keeping is mooted by the myriad of evidence that supported Ms. Johnson's position and that the Bank refused to consider.

Even the Bank's reference to the federal minimum two-year record rule and TILA Regulation Z (J.A. 33) is in error. Regulation Z, 12 C.F.R. § 226.25(a), addresses retention of records showing "evidence of compliance with" TILA, that is, the records dealing with law's disclosure, credit card dispute, and similar Regulation Z requirements. Federal Reserve Board Official Staff Commentary on Regulation Z, 12 C.F.R. Part 226, Supp. 1, § 226.25(a)(1) (TILA Commentary). Perhaps the Bank intended to refer to the ECOA's minimum 25 month record retention requirement for credit applications [Regulation B, 12 C.F.R. § 202.12(b)], which is tied to the ECOA's two year statute of limitations. 15 U.S.C. § 1691e(f).

Nonetheless, the Bank has not explained how a federal minimum record retention regulation of any duration could serve as a cap on its own record keeping policy. The only reference to this claim is in the heading of its brief; otherwise the Bank presents no supporting argument. (Brief of Appellant, p. 38). Accordingly, Ms. Johnson has nothing to which to respond.

The Bank has also failed to identify any legal error. It insisted below on both an instruction and evidence to inform the jury of the two-year retention rule. (J.A. 534, 725, 729, 730). The district court accepted the collection manager's testimony but refused to also read a jury instruction to that same effect. (J.A. 696, 730). The trial court's decision to avoid unnecessary comment and unwarranted emphasis was neither error nor an abuse of discretion. *Hardin*, 50 F.3d at 1294-95. And having not argued the point in its brief, the Bank has abandoned the issue. *Igen International, Inc. v. Roche Diagnostics GMBH*, 335 F.3d 303, __, 2003 WL 21542340, *3 (?? Cir. July 9, 2003).

The district court itself drafted and charged the jury, without objection (J.A. 725-31), with the following instruction: "The Fair Credit Reporting Act...does not require that credit card account records, including original applications, be kept in any particular form; however, the law does prohibit MBNA from maintaining its record in such manner as to consciously avoid knowing that information it is reporting is accurate." (J.A. 770). The Bank's complaint about record keeping and the accuracy of the CIS is inconsistent both with the jury verdict and with this instruction that is now the law of this case.

If the Bank intends a different assignment of error from the record retention issue by its reference to proximate causation, it is asserting a sufficiency of the evidence claim despite the overwhelming evidentiary support for the jury's verdict that the account was not Ms. Johnson's. The Bank cannot meet that "hefty burden." *Price v. City of Charlotte*, 93 F.3d 1241, 1249-50 (4th Cir. 1996).

The only evidence that supported the Bank's claim that Ms. Johnson was a co-applicant liable for Mr. Slater's debt flowed from the computer entry on June 10, 1991. The jury was entitled to disbelieve that evidence ??or several reasons. One reason is the absence on the CIS of a "Y" code for co-applicants and instead the presence of the "N" code for an individual account. This code is all the evidence that is necessary to support the jury's conclusion. Even the credit reporting specialists did not know how to change these codes or who could do so, showing that the account was Mr. Slater's alone since 1987.

The CIS further suggested that the Bank employee who took Mr. Slater's telephone call on June 10, 1991, made a mistake. If Mr. Slater asked the Bank to add Ms. Johnson as an authorized credit card user (not contractually liable), the entry designating Ms. Johnson as a responsible party was in error. On this point, the Bank presented no evidence of any safeguards protecting against such an error and was forced to admit that it had none.

In the absence of any other evidence, the Bank expected the jury to believe that Ms. Johnson had a joint credit card with Mr. Slater before they were married (and apparently before they had met) when the uncontroverted evidence showed that they scrupulously maintained separate credit cards after they were married. No jury needs to accept such nonsense, and certainly the failure to do so does not meet the "hefty burden" that the Bank now carries.

Once the June 10, 1991, entry was impeached, the subsequent evidence, all of which flowed automatically from the changes made at that time, fell like the proverbial house of cards that it was. The monthly statements and the "access checks" naturally contained Ms. Johnson's name printed on them. These computer-generated documents showed only that the computer was acting in conformity with the information already in the computer. They are probative of nothing other than the initial erroneous entry.

Further demonstrating how the contents of a telephone call can be misinterpreted are the Bank's entries from the two conversations with Ms. Johnson in December 2000 and January 2001. Ms. Johnson gave the collector personal information

trusting that by "cooperating it would all be straightened out." The Bank sought an inference that the presence of Ms. Johnson's personal information on the CIS and the fact that Ms. Johnson wanted to straighten the matter out meant apparently that she acknowledged that she had been a co-applicant years earlier. The right of the jury to reject that inference is patent under these facts. The CIS shows that in December 2000 the collector did not even bother to enter that there had been a conversation with Ms. Johnson, noting instead only the information gained through that contact. (J.A. 124-27).

The Bank asks what documents it could have reviewed to learn the truth. (Brief of Appellant, p. 39). The question itself underscores the Bank's refusal to recognize that an investigation is not limited to documents and could have included interviewing Ms. Johnson. *Pinner,* 805 F.2d at 1262; J.A. 989-90.

Nevertheless, one answer to the question is the Bank could have reviewed the payment checks that it produced in discovery and helped confirm Ms. Johnson's claim. Another set of documents are the signed credit card receipts or sales slips that the Bank never produced. Those receipts, if signed by Ms. Johnson, would have been strong evidence supporting the Bank. Indeed, such signed receipts could have substituted for a signed credit application to establish her liability for the account. The Bank could have used any such signed receipts in this dispute and in the collection case that it should have brought when it learned that Ms. Johnson would not pay a debt she denied and it determined nevertheless to continue pursuing her. *See, e.g., In re Hance,* 181 B.R. 184, 186-87 (Bankr.M.D.Pa. 1993) (signed sales slips substitute for missing original signed security agreement). Indeed, the "access checks"--had she signed them--would have served that purpose since they are the "credit document" and therefore the functional equivalent of a sales slip or credit card receipt in an open-ended, credit card account as here. *See,* TILA Commentary § 226.8-(1-3) and 226.8(a)(2) and (3). Once they were produced, the "access checks" only confirmed that Ms. Johnson never used the account.

V. The Bank Falsely Reported to the CRAs the "Results of the Investigation"

Regardless of whether the Bank violated § 1681s-2(b)(1)(A) when it failed to "conduct an investigation with respect to the disputed information," the jury also found that the Bank violated § 1681s-2(b)(1)(C). That provision establishes the furnisher's third duty to "report the results of the investigation" to the CRA. Here, the Bank reported that it had "verified as reported" the disputed information. That statement was false, both objectively and by the Bank's own acknowledgment of its procedures, and therefore violated § 1681s-2(b)(1)(C).

To "report" is "to give an account of." Webster's New Universal Unabridged Dictionary, *supra,* p. 1534. The noun "result" in the singular means "consequence; outcome." *Id.,* p. 1545. "Verify" means "to prove to be true by demonstration, evidence, or testimony." *Id.,* p. 2030.

Since the Bank asserted that its § 1681s-2(b)(1)(A) investigation has no "qualitative component" and set up its desk top procedures in accordance with that minimalist claim, it could not give a qualitative accounting of the consequences of that investigation. The Bank admittedly did not do a substantive review of Ms. Johnson's dispute. It had no basis therefore to state the outcome in a substantive manner.

The Bank had a number of alternatives to accurately report the results of the investigation. It might have stated that its computer was faithfully reporting the challenged information to the CRAs and that otherwise it had no records to sustain or contradict the consumer's dispute. It might have stated that it believed that it was under no duty to conduct a qualitative investigation and therefore could not declare whether the disputed information was complete or accurate. Significantly, Congress used the plural "results" to describe what it commanded the Bank to report. Accordingly, the Bank should have provided these details that are both truthful and materially complete.

As used throughout the FCRA and specifically in the provisions here dealing with consumers' disputes, the standard for compliance is both "accuracy and completeness." This standard for accuracy under the FCRA is not *sui generis.* Omitting a material fact, as the Bank at a minimum did when it reported to the CRAs, also constitutes, for example, misrepresentation under common law (Restatement of Torts (Second), §§ 529, 551) and deception under the Federal Trade Commission Act. *Sterling Drug, Inc. v. F.T.C.,* 741 F.2d 1146, 1154 (9th Cir. 1984) ("failure to disclose material information may cause an advertisement to be deceptive, even if it does not state false facts").

This Court's most recent FCRA decision also confirms this standard. In *Dalton v. Capital Associated Industries, Inc.,* 257 F.3d 409 (4th Cir. 2001), an employment report summarized the employee's criminal record as having been charged with a "felony," followed by "guilty" and a recitation of the sentence; in fact, the person actually had pled guilty to a misdemeanor. This Court rejected the argument that the report was "accurate because it does not explicitly state that [the employee] was guilty of a felony" and held that these facts "create[d] a triable issue on the accuracy of the report." 257 F.3d at 515-16.[5]

Meaningfully accurate information is the hallmark of Congress's design of the CCPA. TILA is founded on the disclosure of "accurate" information. *See, e.g., Nigh v. Koons Buick Pontiac GMC, Inc.,* 319 F.3d 119, 124-25 (4th Cir. 2003); *Barber,* 577 F.2d at 225. Substance, not form, is determinative. *Mourning,* 411 U.S. at 366-68 (burying hidden finances charges). Similarly, the efficacy of the ECOA is dependent on its disclosures being based on "fact," not the "creditor's subjective belief." *Sayers v. General Motors Acceptance Corp.,* 522 F.Supp. 835, 840 (W.D.Mo. 1981); *see also, Fischl v. General Motors Acceptance Corp.,* 708 F.2d 143, 145-48 (5th Cir. 1983) (requiring accuracy and specificity).

The ultimate context within which to evaluate the Bank's compliance with § 1681s-2(b)(1)(C) is the function for which Congress intended the report to the CRAs to be used. The CRA is obligated, once it receives the furnisher's report, to determine not only whether the disputed information is "inaccurate or incomplete" but also whether it "cannot be verified." § 1681i(a)(5)(A). This provision shows the importance of furnishers reporting accurately to the CRAs. The FCRA's recognition of the possibility that the information is no longer verifiable explains why the Bank's report here was deficient and why Congress employed the plural in its use of the term "results" to implement its goal in 1996 to require a meaningful and effective role for furnishers in the dispute resolution process.

The Bank not only failed Ms. Johnson, but it failed the CRAs as well. None of the CRAs had any independent basis to resolve this dispute. All three therefore relied on the Bank's misrepresentation that it has "verified" the disputed information when they did not delete the tradeline from Ms. Johnson's report as should have been done if the Bank had reported accurately "the results of the investigation."

This case emphasizes that the concerns expressed in adopting the FCRA were both well founded and unfortunately clairvoyant:
[W]ith the trend toward computerization of billings and the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal "blips" and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable or uninsurable, as well as deny him the opportunity to obtain a mortgage to buy a home. We are not nearly as much concerned over the possible mistaken turn-down of a consumer for a luxury item as we are over the possible destruction of his good name without his knowledge and without reason.

The loss of a credit card can, of course, be expensive, but, as Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed.

Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982) (quoting 116 Cong. Rec. 36570 (1970)).

At every stage of this matter, the Bank breached its duties to Ms. Johnson and to the CRAs. Now it presents woefully insubstantial arguments to this Court in an attempt to escape the consequences of its misconduct. Its protestation that it is "not attempting to shirk any duties to Johnson or to the public at large" (Brief of Appellant, p. 40) rings hollow in the face of the plain language and purposes of the FCRA.

The Bank did not apply the plain language of the FCRA to determine its duties. It now asserts its unsupported desire as to how it wished Congress had drafted the law. If the Bank were not attempting to shirk its public duties, it would have changed its desk top procedures long ago and certainly once the district court had denied its motion for summary judgment and once it learned that the even FTC condemns its practices. And if it believed in the role of Congress in "balancing" "the competing interests" of all concerned (Brief of Appellant, p. 29), it would not accept the benefits of the 1996 amendments-including immunity from virtually all state laws in accordance with § 1681t(b)(1)(F)--and still attempt to escape any responsibility to perform the modest and reasonable role that Congress has assigned to it in maintaining the health of the free market.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed, with costs of appeal awarded to Ms. Johnson, and this matter remanded for the trial court to complete its award of costs and reasonable attorney's fees arising from the district court litigation and now from this appeal.

Appendix not available.

Footnotes

[1] See, http://www.federalreserve.gov/releases/g19/Current/(May 2003).

[2] Also probative of the meaning of § 1681s-2(b)(1) is that Congress required a credit card issuer as the Bank to "conduct[] an investigation" of a consumer's dispute under parallel provisions of TILA's Fair Credit Billing Act. 15 U.S.C. § 1666(a)(3)(B)(ii). This identical language creates the same "reasonable investigation" standard as the lower court applied here. Federal Reserve Board Regulation Z, 12 C.F.R. § 226.13(f) and note 31; *see, Burnstein v. Saks Fifth Avenue & Co.*, 208 F.Supp.2d 765, 772-73 (E.D.Mich. 2002).

[3] The Complaint and Consent Decree in *United States of America v. Performance Capital Management* are reproduced in the Addendum hereto.

[4] The Bank complains about the potential for "conflicting industry standards" if a jury is allowed to perform its function here. (Brief of Appellant, p. 38). The need for uniform enforcement of the law is a concept that all can embrace. The Bank's refusal to conform to the FTC's established standard of conduct raises serious concerns in this area, including for the competitive disadvantage that law-abiding financial services providers suffer as a result of the Bank's insistence on maintaining protocols at odds with the industry norm.

[5] *Dalton* was decided under a separate section that deals specifically with public record information for employment purposes and contains its own requirement of completeness. § 1681 k(2).

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.