

THE “NOT SO” FAIR CREDIT REPORTING ACT:
FEDERAL PREEMPTION, INJUNCTIVE RELIEF, AND
THE NEED TO RETURN REMEDIES FOR COMMON
LAW DEFAMATION TO THE STATES

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INTRODUCTION

If you have watched television at any time in the past few years, it is inevitable that you have seen commercials for “Freecreditreport.com.”¹ In these commercials, the actor sings about how his poor credit score has ruined his ability to buy the type of car he wanted,² to

1. www.freecreditreport.com

2. Television commercial for www.freecreditreport.com, Youtube, (posted by ErikETC, Mar. 13, 2008), available at <http://www.youtube.com/watch?v=Wm7lhFkEijY>

Well I was shoppin' for a new car, which one's me?/ A cool Convertible or an SUV?/ Too bad I didn't know my credit was whack,/ Cuz' now I'm drivin' off the lot in a used Subcompact./ F-R-E-E that spells “free,”/ credit report dot

get the type of job he desired,³ or even to buy a house.⁴ These commercial jingles are not only catchy; they are an accurate representation of the way that a negative consumer report can prevent a consumer from purchasing important high-priced goods or getting a desired job.⁵ Although the consumer credit industry is well publicized⁶ and the media continually warn consumers of the dangers connected to bad credit, most consumers still do not understand that the information contained in a credit report can solely determine an individual's ability to gain employment, finance a home, or qualify for insurance.⁷ On average, consumers do not understand that these reports do not only include credit ratings, but that they also reflect the individual's "responsibility and general reputation."⁸ In today's digital age these reports form the reputation by which individuals are judged⁹ —a reputation

com baby/ saw their ads on my T.V./ thought about going but was too lazy/
Now instead of lookin' fly & rollin' phat,/ My legs are sticking to the vinyl
and my posse's getting' laughed at./ F-R-E-E that spells "free,"/ credit report
dot com baby.

Id.

3. Television commercial for www.freecreditreport.com, Youtube, (posted by ErikETC, Aug. 4, 2008), available at <http://www.youtube.com/watch?v=CHDUDe3ggqk&list=UUuMANu1iKTSR-J8we31y92g&index=1&feature=plcp>

4. Television commercial for www.freecreditreport.com, Youtube, (posted by masonspeer1, Oct. 12, 2007, available at <http://www.youtube.com/watch?v=FspHU8hOxhY&feature=related>

5. G. Allan Van Fleet, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 Colum. L. Rev. 458, 459, 460-61 (1976) (describing the types of information typically contained in a consumer's credit report and how erroneous information in these reports can seriously harm a person's ability to obtain credit, insurance and employment); see also Richard H. Goldstein and Mark S. Brodie, *Commercial Credit Bureaus: The Right to Privacy and State Action*, 24 Am. U.L. Rev. 421, 423 (1975) ("Credit reports are usually initiated for purposes of retail credit, personnel selection, and insurance.").

6. Cf. Robert M. McNamara, Jr., *The Fair Credit Reporting Act: A Legislative Overview*, 22 Emory J. Pub. L. 67, 78 (1973) (noting that at the time Congress began considering regulating the credit industry many consumers were almost in "complete ignorance of the existence of credit reports").

7. Albert S. Jacquez & Amy S. Friend, *The Fair Credit Reporting Act: Is it Fair for Consumers?*, 5 Loy. Consumer L. Rep. 81, 81 (1993) (noting that good credit is necessary for a consumer to "obtain a job, a mortgage, or insurance.").

8. Augusta E. Wilson, *The Future of Common-Law Libel Actions Under the Fair Credit Reporting Act*, 21 Cath. U. L. Rev. 201, 201 (1971).

9. Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 Val. U. L. Rev. 1061, 1063, 1065 (2007) (explaining

over which we have far less control than we think. The individual consumers' lack of control over the content of these files is documented by numerous studies that nearly eighty percent of consumer reports contain errors, twenty-five percent of which contained errors serious enough to cause a denial of credit.¹⁰

Factual reports¹¹ and investigative reports¹² (hereinafter both referred to as "consumer reports"¹³) are compiled from individual mone-

that the biography of transactions that a consumer report creates are "taken as a whole, [and] constitute an individual's reputation").

10. *Id.* at 1100 (citing Alison Cassidy & Edmund Mierzwinski, *Mistakes do Happen: A Look at Errors in Consumer Credit Reports* 11, 13, <http://www.vitessefinancial.com/images/mistakes-do-happen-2004.pdf> (June 2004)); see also Virginia G. Maurer & Robert E. Thomas, *Getting Credit Where Credit is Due: Proposed Changes In the Fair Credit Reporting Act*, 34 Am. Bus. L.J. 607, 612 (1997) (noting that a 1991 consumers union study found an error rate of 48 percent out of 161 randomly selected credit report, nineteen percent of which contained a major error that would have significantly damages consumers by making them ineligible to receive credit); Jacquez & Friend, *supra* n. 7, at 81 (noting a study conducted in 1989 of 1,500 consumer reports and found a "serious error"—defined as an error that "could, or did, cause the denial of credit, employment or insurance—rate of 43 percent).

11. 15 U.S.C. § 1681a(d) (2006), amended by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1088, 124 Stat. 1376 (July 21, 2010):

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

Id.

12. *Id.* at § 1681a(e):

The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.

Id.

13. See Lucinda A. Low, *Preemption of State Credit Reporting Legislation: Toward Validation of State Authority*, 24 UCLA L. Rev. 84, 89 n. 33 (1976) ("The [FCRA's] definition of "consumer report" encompasses both investigative and purely factual reports.").

tary transactions and anecdotal accounts of the consumer's personality from neighbors, past employers, and past creditors.¹⁴ A consumer's reputation and credibility is determined not by personal interactions with others in a small community,¹⁵ but by examining credit files in an impersonal global world. Who determines what information is contained in a credit report? Not the consumer; instead, one or more of the three major¹⁶ Consumer Reporting Agencies¹⁷ (hereinafter referred to as "CRAs") controls the creation of consumer reports. The three main CRAs maintain consumer reports on over ninety percent of adult Americans,¹⁸ and they compile trillions of bytes of information about individual consumers,¹⁹ each recording billions of monthly transac-

14. See De Armond, *supra* n. 9, at 1063.

15. Daniel J. Solove, *The Digital Person: Technology and Privacy in the Informational Age 2* (NYU Press 2006) (noting that in "earlier times, communities were small and intimate," and that reputational information was "preserved in the memories of friends, family, neighbors"); see also De Armond, *supra* n. 9, at 1097 (The information contained in this credit report, regardless of its accuracy, is the way that banks, credit card companies, and future employers "estimate . . . [a] person's character with respect to a particular trait - in other words, a reputation.").

16. De Armond, *supra* n. 9, at 1080 ("The three major consumer [reporting agencies are] Experian, Trans Union, and Equifax."); see also, Michael Epshteyn, , *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?*, 93 Geo. L.J.1143, 1145-46 (2005) (noting that even though there are hundreds of "credit bureaus," the three major agencies that dominate the industry are Experian, Trans Union, and Equifax).

17. 15 U.S.C. § 1681a(f) (WL current through P.L. 112-90 approved January 3, 2012):

The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Id.

18. Maurer & Thomas, *supra* n. 10, at 611.

19. De Armond, *supra* n. 9, at 1117 ("Experian, one of the three major [CRAs], advertises that it maintains more than 65 terabytes . . . of data on North American consumers and businesses, including details on 215 million American consumers.") (internal citations omitted).

tions.²⁰ It is from these transactions that the CRAs compile a consumer's reputation.²¹

Before enactment of the Fair Credit Reporting Act (hereinafter referred to as the "FCRA"),²² individuals sought relief for consumer report inaccuracies by suing CRAs under common law defamation. In response to the difficulties consumers faced obtaining remedies under the common law, Congress passed the FCRA. The FCRA became fully effective in 1971 and was designed to safeguard the consumer²³ by ensuring that businesses in the credit-reporting industry conducted business fairly and impartially, while respecting the consumer's right to privacy.²⁴ The FCRA's three broad goals were (1) to increase transparency in the credit reporting industry by informing consumers of consumer reports about them, (2) to protect consumers from the damage incorrect information can do to their credit by creating a framework under which consumers can try to fix errors in reports, and (3) to improve the reports' accuracy.²⁵

What started out as an improvement over how the common law dealt with credit-reporting issues has evolved into a regulatory scheme that tends to favor the credit reporting industry. Individual consumers can no longer rely on the FCRA to protect their credit interests and reputations because the credit reporting industry lords more power over individual consumers' lives than ever.²⁶ The FCRA favors the credit industry over consumers by preempting state laws, thereby "undercut[ing] the states' traditional rule as 'laboratories of democracy.'"²⁷ The FCRA's preemption language, coupled with judicial interpretations of its preemptive scope, has whittled away state common

20. *Id.* (citing Robert Avery, Paul Calem, Glenn Canner, & Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Fed. Res. Bull., Feb. 2003, at 49 (available at <http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf>).

21. *Id.* at 1063 (noting that in the age of electronic data and transactions, "[f]or any one person, a full biography of these transactions with others will distinguish that individual from every other" by creating a reputation).

22. 15 U.S.C. 1681 *et seq.*

23. *Id.*; see also Matthew S. Criscimagna, *Attorneys Beware: Obtaining Credit Reports on Opposing Party May Lead to Punitive Damages Bakker v. Mckinnon*, 64 Mo. L. Rev. 1037, 1039 (1999).

24. 15 U.S.C. § 1681(a)(4); *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 593 (E.D. Tex. 2005).

25. Roger D. Blair & Virginia G. Maurer, *Statute Law and Common Law: The Fair Credit Reporting Act*, 49 Mo. L. Rev. 289, 304-05 (1984).

26. See De Armond, *supra* n. 9, at 1061-62.

27. Epshteyn, *supra* n. 16, at 1143.

law remedies. One example of the FCRA's overly broad preemptive scope is the prohibition of injunctive relief for consumers who bring common law defamation claims against CRAs. Section 1681h(e) of the FCRA carved out a specific allowance for consumers to go outside the statutory framework and seek relief for false information that CRAs published with malice or with the willful intent to injure the consumer ("malicious defamation").²⁸ Even though the FCRA explicitly allows common-law defamation actions, courts have interpreted the FCRA's preemption provisions as forbidding courts from granting injunctive relief for the violation of a state common law action for defamation.²⁹ Although injunctive relief is infrequently granted as a tort remedy because of its severe consequences,³⁰ in today's consumer credit industry, it may be the only available relief for many desperate consumers. Modern interpretations of FCRA preemption, however, have destroyed consumers' ability to seek injunctive relief. By forbidding injunctive relief under state law, courts abandoned the fundamental rule that preemption of state law is not presumed or favored in an area of law traditionally occupied by the states without a specific declaration by Congress of its intent to do so.³¹

This Comment advocates that Congress clarify, and ultimately modify, the FCRA's preemptive qualities to allow individuals to seek equitable relief under state common law to enjoin CRAs from republishing false and defamatory information.³² This clarification will allow consumers to seek the full spectrum of common law remedies for an action against a CRA pursuant to § 1681h(e) of the FCRA. Part

28. 15 U.S.C. § 1681h(e).

29. See e.g., *Hamilton v. DirecTV, Inc.*, 642 F. Supp. 2d 1304, 1307 (N.D. Ala. 2009); *Smith v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 822, 825-26 (E.D. Tex. 2007); *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 593, (E.D. Tex. 2005).

30. Richard B. Gallagher et al., Annotation, *Injunctions: Compliance with, or Violation and Enforcement of, Injunction*, 42 Am. Jur. 2d Injunctions § 316 (noting that violations of injunctions can result in both civil and criminal forms of contempt).

31. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (where Congress is legislating in "a field which the States have traditionally occupied," [the court must] 'start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the *clear and manifest purpose of Congress*.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))) (emphasis added).

32. 15 U.S.C. § 1681h(e) (allowing individual plaintiffs to bring an action for common law defamation if he alleges the CRA included the defamatory material in the credit report with "malice or willful intent to injure" the consumer).

I discusses the historical relationship between consumer reports and the common law tort of defamation. Part II discusses the FCRA's passage and current efficacy of its remedial provisions. Part III discusses the three types of federal preemption authorized by the Supreme Court of the United States and then addresses how the federal courts have interpreted the FCRA under these preemption guidelines. Part IV explains how allowing injunctive relief for common law defamation within the FCRA regulatory framework would provide consumers the much needed relief they need and why Congress should remove the provisions of the FCRA that currently preempt state courts from granting consumers equitable relief against CRAs.

I. *Background*

A. *Consumer Credit Industry Prior to the Passage of the Fair Credit Reporting Act*

The modern credit reporting industry started in the late nineteenth century, but the industry's most rapid growth occurred after World War II.³³ During the post-World War II period, creditors seeking to determine a consumer's creditworthiness started relying more heavily on credit report information managed by a nationally operated credit bureau, instead of relying on traditional methods such as turning to local sources who knew a consumer personally.³⁴ National credit bureaus provided larger amounts of information at a faster rate than the smaller independently run credit bureaus.³⁵ While creditors preferred the increase in the quantity of information about each consumer, the quality and accuracy of the information declined as the quantity increased.³⁶ As a result of the creditor's "strong interest in receiving as

33. See Jacquez & Friend, *supra* n. 7, at 82; see also Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 Tex. L. Rev. 1481, 1509-10 (2006); George S. King, Jr., *The Impact of the Fair Credit Reporting Act*, 50 N.C. L. Rev. 852, 852 (1972) (noting that the expansion of the credit reporting industry is partially a byproduct of the increasing "urbanization and mobility of the population" that occurred during the first half of the twentieth century).

34. Jacquez & Friend, *supra* n. 7, at 82.

35. *Id.*

36. Joanne Colombani, *The Fair Credit Reporting Act*, 13 Suffolk U. L. Rev. 63, 63 (1979) ("[I]ndustry-wide procedures that account for this massive dissemination of reports create a correspondingly large number of inaccurate reports."); Jacquez & Friend, *supra* n. 7, at 82.

much information as possible” to determine a consumer’s risk of default, the CRAs responded by “trading accuracy for volume.”³⁷

Even though the credit reporting industry was plagued with transparency and accuracy problems,³⁸ it managed to escape legislative notice and regulation until the 1960s.³⁹ During the pre-regulatory era, consumers could not access their consumer report files, and consumers could rely only on inadequate common law remedies to resolve errors in consumer reports.⁴⁰ The common law provided few remedies for consumers who found themselves victims of unduly prying investigations or wholly false information.⁴¹ A consumer’s only recourse was through common law tort actions, such as defamation and invasion of privacy.⁴² Defamation⁴³—“the act of harming the reputation of another by making a false statement to a third person”⁴⁴—has long been an individual’s primary method to ensure that his or her good name is not inappropriately tarnished.⁴⁵ In the context of consumer reports, the tort of defamation was the most logical cause of action, since consumer reports affected a consumer’s reputation and status in

37. Maurer & Thomas, *supra* n. 10, at 623; *see also* Colombani, *supra* n. 36, at 64 n. 11.

38. *See* Jacquez & Friend, *supra* n. 7, at 82 (noting problems with the pre-regulatory era such as errors in reports and the unwillingness of CRAs to let consumers view the reports about themselves); *see also* Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 *Geo. L.J.* 95, 101-02 (1983); Low, *supra* n. 13, at 87.

39. Van Fleet, *supra* n. 5, at 464; *see* McNamara, *supra* n. 6, at 71.

40. Low, *supra* n. 13, at 86-87.

41. Van Fleet, *supra* n. 5, at 461 (noting that common law remedies gave consumers recourse for credit damage arising from “false reports or overly-intrusive investigations”).

42. *See* Maurer, *supra* n. 38, at 95 n.4, 99.

43. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74

Cal. L. Rev. 691, 718 (1986) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” (citing Restatement (Second of Torts § 559 (1977))); *see also* Maurer, *supra* n. 38, at 97 n.9 (“The common law tort of defamation has been defined as ‘invasion of the plaintiff’s interest in reputation and good name by a communication to a third party which affects the community’s opinion of him.’” (citing William Prosser, *The Law of Torts* § 111, 737 (4th ed. 1971))).

44. *Black’s Law Dictionary* 479 (Bryan A. Garner ed., 9th ed. 2009).

45. *See* Maurer, *supra* n. 38, at 97 n.9.

the community.⁴⁶ While the tort fit the harm, consumers seeking remedies under common law defamation faced an uphill battle because of two main problems. First, the consumer credit industry operated in near complete privacy,⁴⁷ and second, CRAs enjoyed qualified privilege in defamation suits in many jurisdictions.⁴⁸

B. *Veil of Secrecy in the Consumer Credit Industry Prior to the Fair Credit Reporting Act*

It is undeniable that the roles CRAs and the credit reporting industry play are vital, even essential, to the healthy operation of the economy.⁴⁹ An economy's health is directly related to the availability of credit, and providers-of-credit decide whether or not to grant an individual credit based on his or her risk of default.⁵⁰ CRAs played, as they do today, a vital role in the availability of credit, but as their role in the credit market increased, so did the threat of inaccuracies in consumer reports. In order to ensure that they could gather large quantities of information, many CRAs ensured providers of information (called "furnishers of information" or "furnishers" under the FCRA) that their identities would not be revealed to consumers.⁵¹ One method CRAs used to deliver the furnishers' privacy was by contractually obligating the report's user to refrain from disclosing to an individual that consumer reports were even used.⁵² CRAs staunchly protected their sources to prevent those fonts of information from drying up.⁵³

46. See De Armond, *supra* n. 9, at 1066 (noting how consumer credit reports are "collection[s] of transactional identities [that] create a parallel universe of sorts, one inhabited by virtual individuals . . . permanent particles of data").

47. See Low, *supra* n. 13, at 86 (noting that as the credit reporting industry "transform[ed] into nationwide, anonymous enterprises of what had originally been highly localized, visible businesses, a consumer could be damaged by a credit report and yet be unaware of the report or the reporting agency's existence"); see also Blair & Maurer, *supra* n. 25, at 299.

48. Van Fleet, *supra* n. 5, at 461.

49. King, *supra* n. 33, at 854 (noting that CRAs are "valuable if not absolutely necessary" to a well-functioning economy).

50. See Blair & Maurer, *supra* n. 25, at 292.

51. See McNamara, *supra* n. 6, at 80.

52. Blair & Maurer, *supra* n. 25, at 299.

53. See McNamara, *supra* n. 6, at 80 (CRAs thought that if sources felt they would be subjected to later verification of the facts provided, "there would be a

Despite the concerns voiced by CRAs during congressional hearings on the current state of the credit reporting industry, it came to light that the CRAs refused to reveal the sources of information mainly to save on administrative costs while blocking consumers' attempts to challenge the validity of their consumer reports by keeping this information from them.⁵⁴ Under this regime of secrecy, a consumer trying to obtain a line of credit would only know that she had been denied; however, she could not know whether the credit was denied due to erroneous information on his or her report.⁵⁵ Even if the consumer could figure out the source of the information and identify the error, she could not be sure that she could view her actual credit file.⁵⁶ The lack of access to their reports prevented consumers from gathering the information necessary to overcome the qualified immunity that protected the CRAs.⁵⁷

C. *Common Law Qualified Immunity*

By the end of the nineteenth century, all but two states—Georgia and Idaho—had adopted a regime of qualified immunity for CRAs involved in defamation suits.⁵⁸ The qualified immunity regime heightened the consumer's burden of proof when bringing a defamation claim against a CRA because the privilege voided the "presumptions of malice and harm" that traditionally accompanied a defamation action.⁵⁹ The qualified privilege regime instead required the consumer

[future] reluctance on their part to divulge information," and they would no longer speak "freely and candidly").

54. *Id.*

55. See Blair & Maurer, *supra* n. 25, at 299.

56. Low, *supra* n. 13, at 86-87.

57. See Maurer, *supra* n. 38, at 99-100.

58. See *id.*; see also King, *supra* n. 33, at 860-61 (explaining the basic propositions underlying the common law qualified immunity, as (1) that "no one has a right to credit," (2) it is "socially desirable that . . . inherently risky [credit] transactions occur, and (3) that "the subject has at least impliedly consented to the use of such reports by applying for credit . . . and has thereby agreed to assume the risk of inaccurate reporting that falls short of some gross misconduct by the reporting agency").

59. Van Fleet, *supra* n. 5, at 462; cf. Robert A. Steinberg, *Defamation, Privacy and the First Amendment*, 5 Duke L.J. 1016, 1020-21, 1029-30 (1976) (Historically, at common law, once a statement was found defamatory, general damages were presumed, and the plaintiff did not have to demonstrate actual damages to recover. After a series of Supreme Court cases, namely *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), however, the Supreme Court struck down the presumption, instead requiring all damages be actual, alleged, and proven if they were to be recoverable.).

to prove “actual damages and sufficient abuse of the privilege on the part of the [CRA] to warrant a finding of actual malice.”⁶⁰ In terms of qualified immunity in a defamation action, malice did not mean “moral malice” or the direct desire to injure someone.⁶¹ Instead, for a CRA to act with malice, it had to publish information “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁶² The rationales behind giving CRAs qualified immunity were the theory of “common interest,”⁶³ and the presumption that the credit industry’s own preference for high levels of accuracy would result in the industry policing itself.⁶⁴ In addition, courts reasoned that the importance of widely available credit outweighed the harm caused to single consumers by an occasional piece of erroneous information in a credit file.⁶⁵

The qualified privilege doctrine, coupled with the near impossibility of finding the correct source of the false information, made it difficult for consumers to mount successful defamation suits.⁶⁶ It also precluded consumers from learning what personal information was revealed about him or her to a third party, leaving the consumer without any ability to refute or to alter the potentially erroneous information.⁶⁷

II. *The Passage of the Fair Credit Reporting Act: Regulatory Changes and Remnants of Common Law Defamation*

A. *Purpose of Passing the Fair Credit Reporting Act*

For nearly seventy years, the CRAs and other members of the credit industry operated smoothly under the benefits of common law qualified immunity, removed from the watchful eye of state and federal

60. Van Fleet, *supra* n. 5, at 462; *see also* Maurer, *supra* n. 38, at 100-101.

61. *See* De Armond, *supra* n. 9, at 1123; *see also* Blair & Maurer, *supra* n. 25, at 300.

62. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

63. Van Fleet, *supra* n. 5, at 461 (internal quotation marks omitted).

64. *See* Blair & Maurer, *supra* n. 25, at 299-300 (noting that other courts accepting the qualified immunity regime did so because they reasoned that “in applying for credit the applicant impliedly consent[ed] to the use of credit reports” and therefore waived the ability to bring any claims for defamation).

65. *See id.* at 299.

66. Van Fleet, *supra* n. 5, at 462.

67. Wilson, *supra* n. 8, at 201.

regulators.⁶⁸ Indeed, before Congress enacted the FCRA, only Oklahoma had legislation regulating the industry's activities.⁶⁹ While the CRAs were satisfied with the status quo, consumers grew tired of the courts finding that society's general interest in facilitating commerce was more important than the individual's right to accurate consumer reports that were free of defamatory information.⁷⁰ The credit reporting industry expanded rapidly throughout the first half of the twentieth century because it paralleled the increased use of credit by consumers.⁷¹ As consumers relied more heavily on credit, businesses found it increasingly hazardous to freely grant lines of credit.⁷² As a result, CRAs and creditors sought to protect themselves from risky investments; thus, they preferred to know as much about a consumer as possible, even if that meant errors that reduced the consumer's likelihood of receiving credit.⁷³ As consumers' complaints regarding the credit reporting industry increased, so did Congress's concerns about abuse by the industry.⁷⁴

After nearly a decade of Congressional investigation and numerous legislative proposals, drafts and compromises,⁷⁵ President Nixon signed the FCRA⁷⁶ into law in 1971⁷⁷ as part of the Consumer Credit

68. Blair & Maurer, *supra* n. 25, at 301; Sheldon Feldman, *The Fair Credit Reporting Act - From the Regulators Vantage Point*, 14 Santa Clara Law. 459, 461 (1974) ("Until 1971 the consumer reporting industry operated almost entirely outside the scrutiny of state or federal regulators, and functioned without the need or desire to involve consumers in its operations.").

69. McNamara, *supra* n. 6, at 71.

70. See Wilson, *supra* n. 8, at 201.

71. See McNamara, *supra* n. 6, at 68.

72. *Id.* ("As the use of credit grew and became an ordinary method of transacting business, it also became more risky for business, and consequently, certain safeguards were necessary to protect those who were extending credit to their customers."); see also King, *supra* n. 33, at 852-53 (noting that credit grantors are concerned with the risk of the people they loan money to and strive to "identify as precisely as possible the degree of risk against which [the grantor] is called upon to insure").

73. Maurer & Thomas, *supra* n. 10, at 616-23.

74. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (1995); see also *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 883 (5th Cir. 1989).

75. For an extensive discussion of the various proposals and legislative evolution of the Fair Credit Reporting Act, see McNamara, *supra* n. 6, at 67-77.

76. Epshteyn, *supra* n. 16, at 1145 ("The FCRA is the federal statute that governs the collection and use of consumer credit information. It regulates the activities of [CRAs], defines the permissible uses of credit reports, sets standard for furnishers of credit information, and establishes rights for consumers affected by such reports.").

Protection Act.⁷⁸ Congress was motivated to enact the FCRA primarily due to the suspect methods the CRAs used during the pre-regulatory time period.⁷⁹ The passage of the FCRA demonstrated Congress's recognition that the high rate of inaccuracies and misleading information in consumer credit reports were a major problem, if not the most serious one, in the credit reporting industry.⁸⁰ Congress explained that the purpose of the FCRA was "[t]o safeguard the consumer in connection with the utilization of credit"⁸¹ and "to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."⁸² Senator Proxmire, the author of the Senate bill later integrated into the FCRA, "asserted that the purpose of the bill was to [e]nsure that the credit reporting system would serve not only the credit industry but also the consumer."⁸³ The FCRA aimed to protect consumers from groundless privacy invasions and errors on consumer reports.⁸⁴ The FCRA regulates records that influence society's perception of an individual's character, credit, general reputation, and

77. See Van Fleet, *supra* n. 5, at 465 n.47.

78. 15 U.S.C. §§ 1681 *et seq.*; see also Neil Vanderwoude, *The Fair Credit Reporting Act: Fair for Consumers, Fair for Credit Reporting Agencies*, 39 Sw. L. Rev. 395, 397 (2009).

79. While the methods CRAs used to gather information for all three types was questionable, the sources used for insurance credit ratings drew the most criticism. McNamara, *supra* n. 6, at 77-78. The insurance credit rating reports would contain "information concerning the applicant's marital life, private morals, drinking habits, extra-marital affairs, and any tendency toward deviate sexual behavior." *Id.* In addition, "the methods used to gather this type of information are less than reliable since they consist, for the most part, in nothing more than interviews with neighbors and friends of the applicant. *Id.* The basis, then, for a negative insurance credit rating is generally hearsay and malicious gossip, but also often includes value judgments of the applicant's life style." *Id.*

80. Jacquez & Friend, *supra* n. 7, at 82.

81. 15 U.S.C. § 1681a(1); see also Conrad, *supra* n. 23, at 581.

82. 15 U.S.C. § 1681a(4); *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 593, (E.D. Tex. 2005).

83. Colombani, *supra* n. 36, at 68.

84. *Id.*; cf. De Armond, *supra* n. 9, at 1100 (arguing that the FCRA's "most significant flaw is that it imposes meaningful accuracy requirements only *after* a false and negative item has been reported," therefore the FCRA's stated intention to increase accuracy in the credit industry is not carried through into action).

personal characteristics, all of which bear on his ability to obtain credit or even to gain employment.⁸⁵

From the beginning, however, the FCRA was a compromise between the credit industry and the needs of the consumer:⁸⁶ to give individual consumers more recourse⁸⁷ while not burdening the industry with such heavy regulations that it could no longer function.⁸⁸ The FCRA established “a system of ‘due process’” for consumers through which they could learn of adverse actions taken against them due to negative information on a consumer report.⁸⁹ The statute also established procedures by which individuals could dispute and try to correct false entries on their reports.⁹⁰ At the core of the FCRA’s framework are the definitions of “consumer report”⁹¹ and “consumer reporting agency.”⁹² But commentators have routinely denounced this system as unbalanced in favor of the credit industry at the expense of consumers’ rights and accurate information.⁹³ This criticism is founded on the conflicting interests between the CRAs and consumers

85. De Armond, *supra* n. 9, at 1100. Consumer reports are distributed for many reasons, such as “determining a consumer’s eligibility for credit, insurance, or employment.” *Id.*

86. Van Fleet, *supra* n. 5, at 466.

87. *Id.* at 485; *see also* Low, *supra* n. 13, at 88.

88. *See* Jacquez & Friend, *supra* n. 7, at 83 (“The FCRA sought to achieve a balance between the legitimate business need of creditors to obtain the necessary information on which to base credit decisions and the right of consumers to protect the accuracy and confidentiality of their personal and financial records.”).

89. Van Fleet, *supra* n. 5, at 466; *see also* McNamara, *supra* n. 6, at 79.

It is interesting to note, as Senator Proxmire pointed out, that we certainly would not tolerate a government agency depriving the citizen of his livelihood or freedom on the basis of an unsubstantiated piece of gossip without an opportunity to present his side of the case. This kind of protected character assassination has no place in a democracy where the right of procedural due process is guaranteed to every citizen. Yet, it was precisely this type of protection which the credit agencies enjoyed.

Id.

90. 15 U.S.C. § 1681i.

91. 15 U.S.C. § 1681a(d).

92. 15 U.S.C. § 1681a(f).

93. *See* Maurer & Thomas, *supra* n. 10, at 624 (noting that individual consumers’ and society’s interest in having consumer reports reflect the most accurate information directly conflicts with the interest of CRAs, who are more interested in producing the most information possible about individuals to their subscribers and note that the cost of ensuring accuracy would prevent them from accomplishing this goal).

concerning the kinds of information contained in consumer reports.⁹⁴ Consumers use their reports to try to obtain credit, whereas lenders use consumer reports to try to reduce the number of risky loans they make.⁹⁵ Therefore, the lenders who assume the risk of defaulted loans justifiably use consumer credit reports to learn as much information as possible on a consumer seeking credit.⁹⁶ Negative information on an individual's report will increase a creditor's risk of lending to that individual, and that creditor will try to avoid the risk; after all, it is more beneficial for both lenders and borrowers if loans are only given to those who will not default.⁹⁷ The problem arises when the creditors' desire for information outweighs their desire for accurate information, as CRAs tend to cater to the market for voluminous information more than they do to less powerful consumers.⁹⁸ False negative information, even if the lender does not know it is false, is beneficial to that user and a disaster to the consumer.⁹⁹

In an effort to balance these conflicting interests, the FCRA's "due process" system strove to spread the burden of ensuring information accuracy to both the CRAs and individual consumers; in application,

94. *Id.* at 625, 644-45 ("Consumers themselves have the strongest incentive to assure accuracy of credit information . . . Credit reporting agencies, by contrast, have high error-detection costs and little incentive to correct false negative information. Hence, facilitating consumer-initiated error correction is the more cost effective approach to accuracy."); *see also* Feldman, *supra* n. 68, at 461 ("[T]he need for accurate information in the realm of credit extension and insurance coverage is accorded highest priority by both applicants and businessmen.").

95. *Id.* at 617-18 (noting that the objectives of CRAs and users of the information provided by CRAs are both to maximize income; CRAs wish to maximize the information included in reports, and false negative information on consumer reports is beneficial to the reports' users (*i.e.*, the lenders who extend credit) because it reduces the risk that they will extend credit to a consumer who will then default).

96. *Id.*

97. *Id.*

98. *See* Maurer & Thomas, *supra* n. 10, at 623.

99. *Id.* at 622 ("Credit report users' interests can also deter the [CRAs] from correcting negative errors. Credit report users share credit reporting agencies' preference for avoiding false positives. Acting on false positive information is likely to be more costly than acting on false negative information."); *see also* De Armond, *supra* n. 9, at 1137 ("Law and economics arguments that privacy is inefficient because it promotes fraud and hampers the exchange of information do not apply where the information is false, and in fact, privacy would help cleanse the market of fraudulent information.") (citing Richard A. Posner, *Overcoming Law*, 532-37 (Harvard University Press 1995)).

however, the burden is placed disproportionately on the consumers.¹⁰⁰ The FCRA only requires CRAs to abide by “reasonable” procedures to ensure accuracy, which is a lax standard in practice.¹⁰¹ By comparison, individual consumers must police the accuracy of information in their reports by starting reinvestigations into allegedly incorrect information.¹⁰² Undoubtedly, the individual bears the burden of being financially responsible. But consumers cannot adequately meet this burden because of the comparative advantage CRAs possess over individual consumers.¹⁰³ Even *after* the FCRA was passed, an individual consumer still did not have access to all the information in the reports about himself, whereas the CRAs do.¹⁰⁴

B. *Enforcement and Remedies of the Fair Credit Reporting Act*

In the pre-regulatory era, the two greatest obstacles preventing consumers from gaining recourse against CRAs were the intense secrecy under which CRAs operated and the qualified immunity that protected CRAs.¹⁰⁵ Although proving malice could be challenging, accessing the report was the most crucial, and most difficult, element of presenting a successful defamation claim.¹⁰⁶ Establishing malice was difficult because the CRA could simply refuse to allow the consumer to

100. See De Armond, *supra* n. 9, at 1100-01 (noting that the FCRA’s most significant flaw is that it “imposes meaningful accuracy requirements” only after information has been released into the “data sea” where the FCRA’s reinvestigation and removal provisions are inadequate to remove the errors). *But see* Maurer & Thomas, *supra* n. 10, at 666 (“The FCRA too often misplaces this burden. The Act places the entire burden of consumer protection on credit reporting agencies.”).

101. See Maurer & Thomas, *supra* n. 10, at 617 (noting that it would be unduly burdensome and potentially destructive to the credit industry as a whole to require CRAs to ensure the accuracy and relevancy of every piece of information they receive about a consumer because CRAs obtain millions of pieces of information every day that automatically gets added to individual reports).

102. 15 U.S.C. § 1681i.

103. See Feldman, *supra* n. 68, at 483 (noting that placing the burden on the consumer to prove negligence and malice is misplaced because the requisite information to prove such behavior is “likely to be in the sole possession of the” entity being sued).

104. See 15 U.S.C. § 1681g(a)(1) (noting the types of information that are not included when a consumer views a copy of his file).

105. Maurer, *supra* n. 38, at 99-100; *see also* King, *supra* n. 33, at 862-63.

106. See Van Fleet, *supra* note 5, at 463-64 (noting that CRAs could simply refuse to let consumers see a copy of the consumer’s credit history file).

review the file that controlled her reputation.¹⁰⁷ The FCRA's disclosure and notification requirements removed much of the secrecy that CRAs operated behind and provided consumers greater, but not complete access to the files that controlled their reputations, creditworthiness, and job-worthiness.¹⁰⁸ While the FCRA required CRAs to notify consumers that their files were accessed, the FCRA laid the duty on the consumer to request to see the report.¹⁰⁹ The disclosure provisions increased the probability that consumers could discover errors themselves and start the process to get them fixed or removed.¹¹⁰

The FCRA created a triple enforcement scheme by combining criminal,¹¹¹ civil,¹¹² and administrative remedies.¹¹³ The FCRA granted

107. *Id.*

108. The CRA does not need to give an exact copy of the consumer report; instead, the CRA is legally allowed to withhold certain information, such as credit scores and the names of furnishers for information contained solely in an investigative report. *See* 15 U.S.C. § 1681g(a)(1)-(2); *see also* Carol A. Ahern & Jeffrey P. Taft, *The Consumer Credit Reporting Reform Act of 1996: An Attempt to Make The Fair Credit Report More Fair*, 51 *The Consumer Fin. L.Q. Rep.* 304, 309 (1997).

109. *See e.g.*, 15 U.S.C. § 1681d(a)(1) - d(b) (2006) (investigative reports cannot be obtained unless the consumer at subject in the report is informed in writing, and the consumer is entitled to *request* and receive a "complete and accurate disclosure of the nature and scope of the investigation . . ."); *id.* at § 1681g(a)(1) (stating that CRAs shall, upon request only, "clearly and accurately disclose to the consumer . . . all information in the consumer's file at the time of the request except . . . nothing in this paragraph shall be construed to require a [CRA] to disclose to the consumer *any* information concerning credit scores or any other risk scores or predictors relating to the consumer . . ." (emphasis added)); *id.* at § 1681m(a) (requiring the consumer be informed if the consumer is denied credit or insurance based on negative information on the report).

110. *See* Van Fleet, *supra* n. 5, at 466 (noting that FCRA created a system of "due process" under which consumers could learn of adverse information on their reports, be able to have limited viewing of the information, and start the process to correct or supplement the erroneous or misleading entries on the report).

111. 15 U.S.C. §§ 1681q-r (explaining that criminal actions will be imposed upon those persons who willfully obtain consumer reports under false pretenses and employees or officers of CRAs who willfully supply consumer information to unauthorized parties).

112. 15 U.S.C. §§ 1681n-o (allowing consumers to file civil actions to recover actual damages against a CRA or user of information who negligently fails to comply with FCRA provisions, punitive damages for those who acted with willful non-compliance, and attorneys' fees); *see also* Van Fleet, *supra* n. 5, at 468.

113. The FCRA provides the Federal Trade Commission ("FTC") the power to exert administrative powers for violations of the FCRA, but not the power to issue regulations; it also gives limited administrative enforcement power to state attorneys general. 15 U.S.C. § 1681s. The recent passage of the Dodd-Frank Wall Street

the Federal Trade Commission (hereinafter referred to as the "FTC") enforcement power over all portions of the FCRA pursuant to the Federal Trade Commission Act.¹¹⁴ While the FTC has the congressionally granted administrative powers to enforce the FCRA, the agency's position is that private litigation best enforces the FCRA.¹¹⁵

Private litigation can occur in the form of actions for violations of the FCRA itself¹¹⁶ or state law tort actions relating to consumer information disclosed in a manner provided for by the FCRA.¹¹⁷ An individual consumer can seek statutorily imposed recourse for a direct violation of any of the FCRA's provisions pursuant to 15 U.S.C. §§ 1681n and 1681o.¹¹⁸ At first glance, the civil liability provisions appear to be a more attractive form of redress for most consumers.¹¹⁹ This is because consumers can point to violations of specific statutory provisions and bring suits for both willful¹²⁰ and negligent¹²¹ noncompliance. For a willful violation of any FCRA statutory requirement, § 1681n allows recovery of "any actual damages . . . as a result of the failure or damages of not less than \$100 and not more than \$1,000; or . . . such amount of punitive damages as the court may allow . . ." as well as the costs of the lawsuit and attorneys' fees if the consumer wins.¹²² For negligent noncompliance of any FCRA statutory provi-

Reform and Consumer Protection Act has modified the FTC's power to enforce the FCRA by removing some of the FTC's power and giving it to the newly created Bureau of Consumer Financial Protection. Pub. L. No. 111-203, Sec. 1088, 124 Stat 1376 (July 21, 2010). The effects of the creation of the Bureau of Consumer Financial Protection and the reduction of the FTC's power on the FCRA and proposals in this comment are not yet known. *See also* Maurer, *supra* n. 38, at 111 (noting that the FCRA "makes the [FTC] responsible for enforcing the Act, but not for issuing regulations").

114. 15 U.S.C. § 1681s.

115. Van Fleet, *supra* n. 5, at 506.

116. 15 U.S.C. §§ 1681n-o.

117. 15 U.S.C. § 1681h(e).

118. 15 U.S.C. §§ 1681n-o; *see also* *Bakker v. McKinnon*, 152 F.3d 1007, 1012-13 (8th Cir. 1998) (noting that violations of the FCRA that create criminal punishment can also produce civil liability for the affected consumer).

119. *See* Maurer, *supra* n. 38, at 114.

120. 15 U.S.C. § 1681n.

121. 15 U.S.C. § 1681o.

122. *Id.* at § 1681n.

sion, § 1681o allows the consumer to recover actual damages sustained by the consumers as well as reasonable attorney's fees.¹²³

Even though the FCRA remedies seemed to be an improvement over pre-regulatory era common law actions,¹²⁴ it was not long before their inadequacies came to light. As early as 1973, FTC members testified before Congress that the damages awarded under the FCRA were so insignificant CRAs and credit report users had little incentive to follow the FCRA's requirements.¹²⁵ Paying the small damage awards that a consumer might win would be significantly less expensive than the cost of effectively preserving informational accuracy in consumer reports.¹²⁶ The compensatory damages allowed under the FCRA, however, are not stringent enough to adequately remedy an affront to personal character in the same manner that the common law tort of defamation could.¹²⁷ Even though the FCRA sought to create better remedies than those available at common law, the FCRA's drafters carved out a provision allowing consumers to continue to bring certain common law tort claims, defamation among them.¹²⁸ Section 1681h(e), which will be discussed in more depth below, allows consumers to bring actions "in the nature of defamation" when the CRA distributed "false information . . . with malice or willful intent to injure" the consumer.¹²⁹ In situations where the FCRA's monetary remedies fail to adequately protect the consumer's reputation from false information,¹³⁰ allowing an injunction as a remedy to a successfully mounted, and proved, defamation suit brought under § 1681h(e) would provide a better remedy than § 1681n or § 1681o. This is because an injunction, unlike statutory damages, would accomplish the fundamental FCRA goal of removing erroneous information from

123. *Id.* at § 1681o; *see also* Wilson, *supra* n. 8, at 205 (noting that before the FCRA, common law did not allow recovery against a CRA based on ordinary negligence even if actual damages occurred).

124. Feldman, *supra* n. 68, at 483.

125. Van Fleet, *supra* n. 5, at 506.

126. Feldman, *supra* n. 68, at 484.

127. *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 351 (2007).

128. 15 U.S.C. § 1681h(e).

129. *Id.*

130. John Murphy, *Rethinking Injunctions in Tort Law*, 27 Oxford J. Leg. Stud. 509, 512 (2007) (noting that while courts prefer to award monetary damages for torts, "an award of damages will often be an inadequate remedy [in defamation claims] because it will be a mere *approximate* to the loss").

consumer reports¹³¹ and deter CRAs from failing to comply with accuracy requirements.¹³²

For a consumer seeking to remove erroneous information from his consumer report, or to modify misleading information, § 1681i sets out procedures for requesting reinvestigation into erroneous or misleading information on a consumer report and removal of those inaccuracies where appropriate.¹³³ The consumer must exhaust the administrative remedies provided by § 1681i before filing suit for the damages provided by § 1681n or § 1681o.¹³⁴ If, after an investigation into erroneous information on a consumer report, the CRA continues to publish this false information, the customer may then pursue actual and punitive damages under §§ 1681n-o.¹³⁵ There is no statutory instruction about whether the consumer can seek a court order forcing the CRA to remove the offending information if a CRA continues to include the false information in a consumer report up until the date of a court judgment finding the information erroneous. In addition, § 1681i only requires that a CRA conduct a “reasonable investigation” into information the consumer alleges is erroneous.¹³⁶ This statutorily required investigation often results in erroneous and harmful information remaining in the consumer’s report because CRAs can fulfill the “reasonable investigation” requirement merely by obtaining a certifi-

131. Blair & Maurer, *supra* n. 25, at 303-305 (explaining that two of the FCRA’s fundamental goals are reducing the potential damage to consumers caused by erroneous and defamatory information on consumer reports by providing a way for consumers to get that information removed, and to increase the accuracy of consumer reports).

132. See Feldman, *supra* n. 68, at 484 (explaining that the monetary damages allowed for under the FCRA do not provide CRAs an incentive to correct inaccuracies in consumer reports as it will be less expensive to pay the damages than fix the problem).

133. 15 U.S.C. § 1681i.

134. James Lockhart, Annotation, *Remedies Available in Private Action Under §§ 616 and 617 of Fair Credit Reporting Act - Other than Attorney’s Fees*, 20 A.L.R. Fed. 2d 509 §3 (2007) (explaining that when a plaintiff sues a CRA alleging *only* that the information in the consumer report is incorrect, and not that the CRA failed to take adequate steps to ensure accuracy of information pursuant to § 1681e, the consumer *must* exhaust the administrative remedies provided by § 1681i before seeking damages under § 1681n or § 1681o).

135. See *Zala v. Trans Union, LLC*, No. 3:99-cv-0399-D, 2001 U.S. Dist. Lexis 549, at *14-16 (N.D. Tex. Jan. 17, 2001).

136. 15 U.S.C. § 1681i(a)(1)(A) (stating that if a piece of information is disputed by the consumer, the CRA must “conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate . . .”).

cation of accuracy by the furnisher of the information, instead of conducting their own investigation.¹³⁷ As long as the CRA has conducted a reasonable investigation, even one that does not assure absolute accuracy and even if erroneous information remains on the report, then the consumer cannot recover.¹³⁸

The case of *Dennis v. BEH-1, LLC*¹³⁹ gives an example of how erroneous information can remain on a consumer report even after the furnisher certified the information's accuracy.¹⁴⁰ In *Dennis*, the plaintiff sued one of the "big three" CRAs, Experian, alleging that it violated its duty to reinvestigate information pursuant to § 1681i when it allowed false information regarding a dismissed action against him to remain on his consumer report.¹⁴¹ As a result of this false information, the plaintiff could not obtain a loan he needed to start a business, even though he had "diligently paid his bills on time for years so that he would have a clean credit history when he sought financing for the [business] venture."¹⁴² Dennis started reinvestigation procedures pursuant to § 1681i, after which Experian requested the furnisher confirm the accuracy of the negative information on his consumer report.¹⁴³ During the reinvestigation, the furnisher's investigator misinterpreted court documents, misreporting an out-of-court agreement and subsequent dismissal of a lawsuit as a court judgment against him.¹⁴⁴ As a result of the furnisher's flaw, the erroneous notation remained on the plaintiff's record and damaged his credit.¹⁴⁵ Based upon this investigator's incorrect certification, Experian kept the false information on the plaintiff's consumer report, an action which directly resulted in his

137. 15 U.S.C. § 1681i(a)(5)(B)(i) ("If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the [CRA] unless the person who furnishes the information certified that the information is complete and accurate.")

138. *Anderson v. Trans Union, LLC*, 345 F. Supp. 2d 963, 972-973 (W.D. Wis. 2004) (finding a CRA's reinvestigation policies reasonable even though the erroneous information, which incorrectly noted the plaintiffs as deceased, remained on the plaintiffs' consumer reports up to and after the law suit, and therefore holding that plaintiffs were not entitled to recover damages under the FCRA).

139. 520 F.3d 1066 (9th Cir. 2008).

140. *Id.* at 1068-69.

141. *Id.* at 1068-71.

142. *Id.* at 1069.

143. *Id.* at 1070-71.

144. *Dennis*, 520 F.3d at 1070-71.

145. *Id.*

being unable to obtain a much needed line of credit.¹⁴⁶ The Ninth Circuit found Experian's actions negligent and ruled on the motion in favor of the plaintiff.¹⁴⁷

Many consumers are not as lucky as the one in *Dennis v. BEH-1*. For example, in *Anderson v. Trans Union, LLC*¹⁴⁸ a Federal District Court in Wisconsin denied consumers recovery against a CRA on the grounds that the CRA's reinvestigation procedures met the "reasonable" standard in the statute.¹⁴⁹ This denial of statutory remedies occurred even after a reinvestigation revealed that the couple's consumer report continued to falsely identify both spouses as deceased even though they were alive.¹⁵⁰ After all, it is neither illegal nor a violation of the FCRA to provide, to include, or to publish erroneous information in a consumer report as long as the source of that information "maintained reasonable procedures" to assure the information's accuracy.¹⁵¹ It is situations like these where the FCRA's procedures result in absurd outcomes that a common law defamation action could provide consumers with much needed relief.¹⁵²

Increasing accuracy of information in consumer reports by imposing statutory duties on members of the credit industry was one of the main purposes of the FCRA.¹⁵³ The investigations leading up to the FCRA's passage explicitly demonstrated how the credit industry's practices during the pre-regulatory era wreaked havoc on vast numbers of Americans' lives by including false information on consumer

146. *Id.* at 1070.

147. *Id.*

148. 345 F. Supp. 2d 963 (W.D. Wis. 2004).

149. *Id.* at 972.

150. *Id.* at 973.

151. Feldman, *supra* n. 68, at 468.

152. See Wilson, *supra* n. 8, at 208 ("If the reinvestigation [under § 1681i] proves the information inaccurate and such information is not then deleted, this would fulfill the statutory exception for a defamation action on the grounds of 'false information furnished with malice or willful intent to injure such consumer' under Section 1681h(e) . . .").

153. Epshteyn, *supra* n. 16, at 1150 (noting that the FCRA "was intended to 'correct certain abuses which have occurred within the industry and to insure that the credit information system is responsive to the needs of consumers . . .'"); see also Feldman, *supra* n. 68, at 463 ("The basic purpose of the [FCRA] is to protect consumers from inaccurate or obsolete information contained in a report which is used as a factor in determining an individual's eligibility for credit, insurance or employment.").

reports.¹⁵⁴ The FCRA's ability to force CRAs to reveal information contained in reports to the consumers was, and still is, an improvement over the pre-regulatory era.¹⁵⁵ But as the FTC testimony and the examples given above demonstrate, the FCRA has not exhibited the desired effect, likely because it was a product of compromise.¹⁵⁶ In practice, the balance sought by the FCRA between the interests of consumers and the credit industry has been lost, and the Act fails to protect consumers as much as it does the credit industry,¹⁵⁷ and over time, the FCRA's amendments have favored the industry's interests over consumers[.]¹⁵⁸

C. *Remnants of Common Law Defamation in the Fair Credit Reporting Act: 15 U.S.C. § 1681h(e)*

The FCRA sought to create a regulatory structure that provided relief to consumers and was superior to common law defamation.¹⁵⁹ But even though the FCRA was supposed to provide an improvement past common law actions, Congress specifically preserved the right of consumers to bring defamation claims, and a few other torts, against CRAs.¹⁶⁰ The preservation of common law defamation actions against CRAs is found in 15 U.S.C. § 1681h(e),¹⁶¹ which forbids con-

154. See McNamara, *supra* n. 6, at 77-88; see also Maurer & Thomas, *supra* n. 10, at 608 ("The popular literature of the time and evidence in congressional hearings though the 1960s catalogued the potential for credit bureaus to threaten consumers' personal economic security through the spread of inaccurate information and their personal privacy through improper use of that information.").

155. See Van Fleet, *supra* n. 5, at 485.

156. See *id.* at 466 (noting that "while the FCRA is clearly a broadly remedial measure, it should be equally apparent that the Act is a product of compromise").

157. Maurer & Thomas, *supra* n. 10, at 607-08 ("The public policy of the Act assumes that the nation has a social interest both in meeting the needs of credit markets for consumer credit information and in the accuracy of the report and the privacy of consumers.").

158. De Armond, *supra* n. 9, at 1118 (explaining that "the aggregator-and provider-friendly interpretations of the FCRA's accuracy provisions . . . arguably [makes] the Act . . . not a consumer protection act, but rather a data provider and data aggregator protection act"); see also Maurer & Thomas, *supra* n. 10, at 637 ("Although many features of the FCRA are superior to prior law, the FCRA still does not efficiently balance the interests of the parties. The Act fails to address the full potential for harm arising out of the basic dynamic of the credit information transaction.").

159. See Low, *supra* n. 13, at 88.

160. 15 U.S.C. § 1681h(e).

161. Wilson, *supra* n. 8, at 207.

sumers from bringing actions “in the nature of defamation . . . based on information disclosed [to the consumer] pursuant to §§ 1681g,¹⁶² 1681h,¹⁶³ or 1681m¹⁶⁴ of this title . . . *except as to false information furnished with malice or willful intent to injure such consumer.*”¹⁶⁵

This section codified the common law qualified immunity that protected CRAs as a “quid pro quo” in exchange for the CRAs to allow consumers to access parts of their files.¹⁶⁶ Without a doubt, omitting the qualified immunity provisions would benefit consumers the most.¹⁶⁷ By getting consumers access to the reports controlling their reputation, this quid pro quo is an improvement, if only a small one, over the pre-regulatory era, because consumers can identify and try to remedy the mistakes.¹⁶⁸

There is an important distinction between suits brought under § 1681h(e) and those brought under § 1681n or § 1681o, seeking monetary damages. The latter two provisions, §§ 1681n-o, provide remedies for a violation of any provision of the FCRA.¹⁶⁹ In a suit brought pursuant to § 1681h(e), however, the consumer is not seeking relief for a violation *of* the FCRA.¹⁷⁰ Instead the consumer is suing a CRA because the information contained in a consumer report that was le-

162. 15 U.S.C. § 1681g (requiring the disclosure of the “nature,” but not actual complete contents, of the information in the consumer’s file).

163. 15 U.S.C. § 1681h (delineating the conditions under which a credit report may be disclosed to the consumer).

164. 15 U.S.C. § 1681m (requiring the user of a credit report to tell the consumer the name of the CRA that provided the report if the credit report was the basis for denial of credit, insurance or employment).

165. 15 U.S.C. § 1681h(e) (emphasis added).

166. *See* Epshteyn, *supra* n. 16, at 1151 (The immunization of CRAs, furnishers of information and users of credit reports was “seen as a quid pro quo” for allowing consumer limited access to credit files, because “[t]he credit bureaus feared that opening their files to the public at large would initiate a flood of nuisance suits, and industry practice at the time was to allow consumers to review their files only if they waived their rights to bring state law claims”) (citing Anothony Rodriguez, et al., *Nat’l Consumer Law Ctr., Fair Credit Reporting*, at 12 n. 70 (5th ed. 2002)).

167. *See* De Armond, *supra* n. 9, at 1115-16 (noting that the FCRA “sweeps away state common law causes of action” by, among other things, requiring the consumer to prove malice or willful intent to injure).

168. *See supra* Part I. A-B.

169. 15 U.S.C. §§ 1681n-o (explaining that if a CRA willfully or negligently violates an provision of the FCRA, such as failing to conduct an appropriate reinvestigation of disputed information pursuant to § 1681i (or any other provision), then consumers can seek remedies under §§ 1681n-o).

170. *See* 15 U.S.C. § 1681h(e).

gally disclosed pursuant to an FCRA provision is defamatory.¹⁷¹ As long as the consumer demonstrates that a CRA disclosed the individual's consumer report in one of the listed methods and meets the malice or willful intent standard, the consumer can pursue state tort remedies.¹⁷² If a consumer *cannot* demonstrate malice or willful intent to injure, then the CRA can defend itself against the suit by claiming preemption of state law by the FCRA.¹⁷³ The "malice" required by § 1681h(e) is the same standard that applied during the pre-regulatory era.¹⁷⁴ A CRA acts maliciously when it includes information in a consumer report and "knew it was false or acted with reckless disregard for its truth or falsity."¹⁷⁵ Similarly, due to the lack of a statutory definition of "willfulness," courts have been forced to glean Congress' intent.¹⁷⁶ The predominant standard for willfulness in § 1681h(e) is the same as "willful" violation under § 1681n, which requires that the "defendant must have 'knowingly and intentionally committed an act in conscious disregard for the rights of others.'"¹⁷⁷

171. 15 U.S.C. § 1681h(e).

172. *Id.*

173. *See Cushman v. Trans Union Corp.*, 920 F. Supp. 80 (E.D. Pa. 1996) (stating that § 1681h(e) preempts a defamation action unless the consumer can show that the CRA reported false information with malice or willful intent to injure the consumer). The only way a consumer can avoid a CRA bringing a preemption defense is if a consumer discovers the defamatory information other than by disclosure of the credit report pursuant to the FCRA. *See Retail Credit Co. v. Russell*, 218 S.E.2d 54, 56 (Ga. 1975) (noting that the FCRA provides a qualified immunity privilege to CRAs who "furnish information concerning an individual directly to that individual upon his request," but in situations when the CRA furnished information to subscribers of the company and the consumer learned of the information without the CRA providing him with a report, the state libel law controls). But as the disclosure provisions listed in § 1681h(e) are the most likely ways that consumers can gain access to their files, the § 1681h(e) preemption defense will most likely apply, and the consumer will have to demonstrate malice or willful intent. *See Blair & Maurer, supra* n. 25, at 306.

174. *See Cousin v. Trans Union Corp.*, 246 F.3d 359, 374 (5th Cir. 2001) (noting that malice for the purposes of § 1681h(e) is "congruent with the common law standard," and so to establish "defamation with malice . . . one must establish that the defendant when he published the words (1) either knew they were false, or (2) published them in reckless disregard of whether they were true or not." (citing *Thornton v. Equifax*, 619 F.2d 700, 703 (8th Cir. 1980))).

175. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

176. *See Maurer & Thomas, supra* n. 10, at 636.

177. *Stevenson v. TRW Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993) (quoting *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986)); see also *Lawrence v. Trans Union L.L.C.*, 296 F. Supp. 2d 582 (E.D. Pa. 2003) (noting that "willful intent to injure" in

The defamation action allowed in § 1681h(e) is the most historically and recently effective form of action to seek remedies for an injured reputation.¹⁷⁸ But the issue of exactly what remedy a consumer can seek is left unanswered by § 1681h(e), which does not indicate what relief a court can grant for common law defamation.¹⁷⁹ Therefore, when a consumer seeks enforcement under common law defamation, a state court—or federal court exercising supplemental jurisdiction—does not know what remedies are allowed under state common law. The dilemma of what remedies are available for claims brought under § 1681h(e) is not clarified by the rest of the FCRA's text or legislative history, as both are severely lacking as to the execution of common law defamation actions under § 1681h(e).¹⁸⁰ Presumably state courts would be able to provide the full spectrum of remedies that have been available for centuries to remedy common law defamation¹⁸¹—traditionally, monetary compensation for actual and punitive damages.¹⁸² But monetary damages are not the exclusive remedy for defamation; courts will grant injunctions when there is a continuing irreparable injury that remedies at law will not adequately address.¹⁸³ Therefore, a court reading the plain text of § 1681h(e) could reasonably assume that a consumer bringing a common law defamation claim pursuant to § 1681h(e) could seek the full panoply of remedies tradi-

§ 1681h(e) is the name as “willfulness” for § 1681n); Maurer & Thomas, *supra* n. 10, at 636 n.76.

178. See De Armond, *supra* n. 9, at 1062 (“The age old tort of defamation . . . can allow realistic relief that may motivate data aggregators to treat individual records and personal identifying information much more carefully.”).

179. See *Hamilton v. DirecTV, Inc.*, 642 F. Supp. 2d 1304, 1307 (N.D. Ala. 2009); *Smith v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 822, 825-26 (E.D. Tex. 2007); *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 592-93 (E.D. Tex. 2005).

180. Wilson, *supra* n. 8, at 208 (“The legislative history of the [FCRA] regarding common law defamation suits is not as clear as it might be.”).

181. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 549 (2005) (noting that Sir William Blackstone recognized defamation in his list of personal tort actions in his legal treatises in the sixteenth century).

182. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 10-1 (3d ed. 1999) (noting directly after, however, that “there is plainly no logical method for expressing any such injury in dollars and cents”).

183. *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 351 (Cal. 2007); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 559 N.W.2d 740, 747-49 (Neb. 1997); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 27-31 (Minn. 1984); *O'Brien v. University Cmty. Tenants Union, Inc.*, 327 N.E.2d 753, 755-56 (Ohio 1975); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975).

tionally available under common law.¹⁸⁴ As discussed in Section III below, federal courts, however, have held the opposite.¹⁸⁵

III. *Federal Preemption under the Fair Credit Reporting Act*

Congress's ability to override state legislation or common law—that is, to preempt it—comes from the Supremacy Clause of the United States Constitution.¹⁸⁶ Article VI, clause 2, declares that laws passed by Congress are “the supreme law of the land” and supplant any state law that “interferes with or is contrary” to federal law.¹⁸⁷ Determining whether, and to what extent, a federal statute preempts state law is difficult, as the Supreme Court's test for determining preemption have shifted over time as the justices have changed.¹⁸⁸ In addition, preemption is an inherently *ad hoc* determination dependent upon the particular federal statute and state law at issue.¹⁸⁹ While judicial approaches towards preemption have changed over the years, the Supreme Court has provided some guidelines,¹⁹⁰ setting out two types of preemption: “express preemption”¹⁹¹ and “implied preemption.”¹⁹² Implied preemption can occur either in the form of “field

184. 15 U.S.C. § 1681h(e).

185. *See Infra* discussion at section II (c).

186. U.S. Const. art. VI, cl. 2.

187. *Id.*; *see also Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992).

188. Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 569 (1997) (“Largely because of its changing attitude toward the deference due to states' interests, the Supreme Court's approach toward preemption has fluctuated significantly.”).

189. Low, *supra* n. 13, at 94.

190. *See id.*

191. *See e.g.*, ERISA, 29 U.S.C. § 1144(a) (stating that the statute “supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee [retirement] benefit plan”); *Jones v. Rath Packing Co.*, 430 U.S. 519, 30-31 (1977) (finding that the Federal Meat Inspection Act expressly preempted a California statute pertaining to the labeling by weight of packaged meats, as the federal law contained an express preemption provision that stated “Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State,” and the California statute did not permit deviations from the weight listed on the package due to moisture loss whereas the federal law did).

192. Erwin Chemerinsky *Constitutional Law: Principles & Policies* (3d ed., Aspen Publishers 2006); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

preemption” or “conflict preemption.”¹⁹³ No matter what category of preemption is involved, the determining factor in a preemption inquiry is always Congressional intent.¹⁹⁴

“Express preemption” is when Congress has expressly noted in the federal statute an intent to preempt state or local law on the same issue.¹⁹⁵ Field preemption, the first kind of implied preemption, occurs when the federal regulatory scheme is so pervasive as to make “the reasonable inference that Congress left no room for the States to supplement” the regulation.¹⁹⁶ Conflict preemption, the second kind of implied preemption, is recognized when “compliance with both federal and state [law] is a physical impossibility,”¹⁹⁷ or when the state law stands as an obstacle to the accomplishment and execution of Congress’s full purposes and objectives.¹⁹⁸ As Congress is rarely precise about the preemptive scope it intends for a law, it is left up to courts to decide what is preempted by undertaking an inquiry into congressional intent.¹⁹⁹ Since implied preemption assumes that Congress has not included a provision in the federal statute expressly preempting state

193. Chemerinsky, *supra* n. 191, at 393 (citing *Gade*, 505 U.S. at 98).

194. *Id.* (stating that the Supreme Court has recognized that in both express and implied preemption situations, “the issue is discerning congressional intent”).

195. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

196. *Gade*, 505 U.S. at 98 (quoting *Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (internal quotation marks omitted). For the most frequently cited case on field preemption, see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (holding that even though the previous version of the United States Warehouses Act seemed to support concurrent regulation, the purpose of the latest version of the Act appeared to eliminate the dual state-federal regulation in exchange for exclusive control of the industry); see also Chemerinsky, *supra* n. 192, at 402 (“In other words, the Court will find field preemption either if Congress expresses a clear intent that federal law will be exclusive in an area or if comprehensive federal regulation evidences a congressional desire that federal law should completely occupy the field.”).

197. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); see e.g., *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (finding that where a federal Food and Drug Act required maple syrup labels in a manner that directly conflicted with Wisconsin’s maple syrup labeling requirements such that the manufacturer could not comply with both statutes, the federal law prevailed).

198. *Gade*, 505 U.S. at 98 (finding that the federal OSHA statute preempted an unapproved Illinois worker health and safety law, even though worker safety was a traditional state police power function, because the Illinois law was not approved, and OSHA had a provision that allowed states to get their health and safety legislation approved by OSHA, at which point the state act would replace the federal laws).

199. Chemerinsky, *supra* n. 192, at 393.

law, the inquiry is a combination of both the court's perception of congressional intent and the statute's text.²⁰⁰

Federalism is the reason that the Supreme Court has held congressional intent out as being such an important determination in a preemption inquiry.²⁰¹ As the United States operates in a sphere of dual sovereignty, the Supreme Court instructs that all preemption analysis start with the presumption that "Congress does not intend to supplant state law."²⁰² Therefore, in all preemption cases, and particularly in those where Congress is legislating in "a field which the States have traditionally occupied," the court must start with a strong presumption against preemption, unless it finds explicit congressional intent to counter that presumption.²⁰³ Before the FCRA became law, there was no other federal regulation of the credit reporting industry; it was *only* the domain of the states.²⁰⁴ The Supreme Court also recognizes that each state has a vested interest in "protecting its residents" from "malicious [defamation],"²⁰⁵ and states have "a significant interest in redressing injuries that actually occur within the State."²⁰⁶ Nothing combines these two important state interests more than having its residents denied credit, employment, or insurance²⁰⁷ because of defamatory information in a consumer report.

A. *Preemption Provisions of the Fair Credit Reporting Act*

Consumer protection regarding credit reports was the states' domain until Congress passed the FCRA.²⁰⁸ Beginning with the FCRA,

200. *Id.*

201. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2004-05 (2009).

202. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

203. *Medtronic*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230) (emphasis added).

204. Epshteyn, *supra* n. 16, at 1144.

205. See *Farmer v. United Broth. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 298 (1977) ("[T]he Court recognized that there was 'an overriding state interest' in protecting residents from malicious libels, and that this state interest was 'deeply rooted in local feeling and responsibility.'" (quoting *Lynn v. Plant Guard Workers*, 383 U.S. 53, 61-62 (1966))).

206. *Keenton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).

207. Jacquez & Friend, *supra* n. 7, at 81.

208. Barbara S. Leonard & Drew V. Tidwell, *Consumer Credit Regulation: Is Federal Preemption Necessary*, 35 Bus. Law. 1291, 1295 (1980) ("States have his-

when Congress started regulating the credit reporting industry, however, most of the other legislative acts except the FCRA “contain[ed] a specific provision regarding the relationship of [that piece of legislation] to similar state law.”²⁰⁹ The FCRA includes both preemption provisions and savings provisions that attempt to indicate,²¹⁰ albeit ambiguously, Congress’s intent concerning the FCRA’s preemptive scope.²¹¹

As discussed above, Congress struck a compromise with the consumer credit industry, preserving the CRAs’ common law qualified privilege for certain torts in exchange for allowing individuals to access their consumer reports.²¹² Section 1681h(e) establishes the one circumstance where torts “in the nature of defamation” can be brought against a CRA:

Except as provided in sections 616 and 617 [15 USCS §§ 1681n and 1681o], no consumer may bring any action or proceeding in the nature of defamation . . . against any consumer reporting agency . . . based on information disclosed pursuant to section 609, 610, or 615 [15 USCS § 1681g, 1681h, or 1681m], . . . *except as to false information furnished with malice or willful intent to injure such consumer.*²¹³

This section is the most telling provision of Congress’ intent to preempt the common law defamation and replace it with the regulatory regime set out in the FCRA except where malice or willful intent can be found.²¹⁴ Because of the lack of textual sources, such as a written legislative history or transcripts from congressional debates concerning this issue,²¹⁵ however, “[t]he legislative history of the

torically regulated consumer credit activity within their borders . . .”); *see also* De Armond, *supra* n. 9, at 1115 (“The right to redress for someone’s false report of an act has traditionally been in tort, the province of state law.”).

209. Leonard & Tidwell, *supra* n. 208, at 1295.

210. *Id.* at 1294 (1980) (noting that “courts addressing [the preemption] issue have suffered from lack of guidance concerning factors to be considered and the relevant weight to be given to each”).

211. *Id.* (noting that Congress did not give courts specific guidance, so “a court is essentially free to pick and choose among legislative histories and perceived Congressional intents to arrive at any result it considers best” instead of the true intent of Congress).

212. Epshteyn, *supra* n. 16, at 1151.

213. 15 U.S.C. § 1681h(e) (emphasis added).

214. *See* Wilson, *supra* n. 8, at 207. For a discussion of what “malice” and “willful intent to injure” mean in § 1681h(e), *see supra* Part II.c.

215. Wilson, *supra* n. 8, at 209. “The exact language of the Senate report regarding common-law defamation actions under Section 1681h states:

[FCRA] regarding common law defamation suits is not as clear as it might be.”²¹⁶

In addition to including § 1681h(e) in the original FCRA legislation, Congress included a savings clause concerning “state laws” in place.²¹⁷ The FCRA’s savings clause is found in § 1681t(a), entitled “Relation to State Laws.”²¹⁸ The savings clause states that:

Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from *complying with the laws of any State* with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, *except to the extent that those laws are inconsistent with any provision of this subchapter*, and then only to the extent of the inconsistency.²¹⁹

Based on the text alone, one can see how a private plaintiff may, therefore, recover federally imposed remedies from a CRA for a violation of the FCRA and also take legal action under state laws that are not preempted by the FCRA. The text of this provision—the perfect place for Congress to explain its position on preemption, but where it failed to do so—arguably demonstrates that Congress did not intend to prevent states from making their own laws regarding the credit reporting industry. Congress intended § 1681t(a) to set a minimum standard²²⁰ that CRAs and other members of the credit reporting industry had to meet.²²¹ The establishment of a “minimum” standard in

Reporting agencies, their sources and the users of information are given immunity from libel or other suits as a result of information in their credit file disclosed to consumers pursuant to Section 1681(g), 1681(h), and 1681(m) unless the information was furnished with malice or willful intent to injure the consumer. The immunity provisions under this section do not extend to information acquired by a consumer through other means.”

Id. (quoting S. Rep. No. 517, 91st Cong., 2d Sess., 6 (1970)).

216. *Id.* at 208.

217. Matthew Bender & Co., Annotation, *Debtor-Consumer Law* §16.09-3 (2010); see also *Bank of Am. v. Dale City*, 279 F. Supp. 2d 1118, 1123 (N.D. Ca. 2003) (noting that when the FCRA was enacted, § 1681t was a broad savings clause).

218. 15 U.S.C. § 1681t(a).

219. *Id.* (emphasis added).

220. See Low, *supra* n. 13, at 102 n.97.

221. See *id.* (“Thus, the FCRA imposes on [CRAs] minimum but not maximum or uniform standards. This view is in accord with judicial interpretations of the other titles . . . as establishing minimum requirements, and with the general purpose of the FCRA.”).

§ 1681t(a) was consistent with Congress's intent not to automatically preempt state law with each piece of consumer credit legislation that it passed.²²²

The first conflict between these two preemption provisions came when CRAs and other members of the credit industry tried to argue that § 1681t(a) barred *all* common law defamation claims, even those where the plaintiff plead "malice or willful intent to injure" on the part of the CRA.²²³ Early on, however, the courts ensured that the exception made by § 1681h(e) for malicious defamation survived preemption claims.²²⁴ Courts interpreted § 1681t(a) as a general preemption provision and § 1681h(e) as the more specific preemption provision.²²⁵ When a specific statute carves out an exception to a general statute, the "specific statute will not be controlled or nullified

222. *See id.*; Leonard & Tidwell, *supra* n. 208, at 1291 (in summarizing Congress's approach to consumer credit legislation, explaining that "Congress stated its intention that similar state laws be preempted only if they were inconsistent with federal legislation. In later consumer credit statutes that did alter substantive rights, such as the Equal Credit Opportunity Act and the Fair Debt Collection Practices Act, Congress declared that state statutes that are 'more protective' of consumer rights would not be 'inconsistent' and therefore not preempted").

223. *See Thornton v. Equifax, Inc.*, 619 F.2d 700, 703 (8th Cir. 1980) (noting that defamation is only preempted when malice or willful intent to injure is *not* plead).

224. *Id.* (stating that the limitations of § 1681h(e) are twofold: (1) that malice or willful intent must be plead, and then (2) at trial it must be proved in order to establish a right to recover) (citing *Peller v. Retail Credit Co.*, 359 F.Supp. 1235, 1237 (N.D.Ga.1973), *aff'd*, 505 F.2d 733 (5th Cir. 1974), and *Thomas v. Equifax, Inc.*, 142 Ga.App. 422, 236 S.E.2d 154, 155 (1977))). At the pleading stage, plaintiffs need only set out an allegation, albeit a non-frivolous one, of malice or willful intent. *See Cisneros v. Trans Union, LLC.*, 293 F. Supp. 2d 1167, 1177 (D. Haw. 2003) (denying the defendant credit union's 12(b)(6) motion to dismiss because § 1681h(e) allowed for this kind of defamation claim and finding that the consumer had sufficiently pled a prima facie case of defamation by alleging that the reporting agencies "recklessly, maliciously and/or intentionally, published and disseminated false and inaccurate information concerning Plaintiff with reckless disregard for the truth of the matters asserted"). At the trial stage, the plaintiff must bring forth proof of malice or willfulness in order to survive preemption. *See Cushman v. Trans Union Corp.*, 920 F. Supp. 80 (E.D. Pa. 1996) (noting that a consumer did not have to produce a "smoking gun or other definitive proof of the CRA's malicious intent, as the fact finder could deduce malice from surrounding circumstances").

225. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1166-67 (9th Cir. 2009); *see also Cisneros*, 293 F. Supp. 2d at 1175 (noting that the FCRA includes two preemption provisions, § 1681h(e) being the more specific provision and § 1681t and its subsections being the more general provisions).

by [the] general one, regardless of the priority of enactment.”²²⁶ Using this standard, courts applied the more specific preemption language, § 1681h(e), in determining whether the state common law claims are preempted.²²⁷ Therefore, a logical conclusion is that immediately after FCRA’s passage, consumers could bring state common law defamation suits against CRAs as long as the malice or willfulness requirements were met.²²⁸ But the issue of what remedies an individual could receive for such a claim was left either unaddressed or uncertain, as Congress made evident the types of remedies available under the FCRA, but not those available under the common law actions of defamation the FCRA allowed.²²⁹

In the late 1990s and early 2000s, consumers started to pursue injunctive relief as a method to remove defamatory information from their consumer reports. Consumers brought injunctive relief claims both for violations of the FCRA itself,²³⁰ which the remedies under §§ 1681n-o are designed to rectify, and for the common law defamation caused by false information contained in their credit reports.²³¹ The fact that § 1681h(e) does *not* provide a remedy for a violation of the FCRA becomes important during a remedy inquiry. Congress de-

226. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of a priority of enactment.”) (citations omitted).

227. *See Cisneros*, 293 F. Supp. 2d at 1175.

228. *See supra* n. 216-32.

229. *See* 15 U.S.C. 1681h(e); *see also* Grey, *supra* n. 188, at 565 (“Even when Congress enacts express preemption clauses, those clauses typically do not make clear whether they preclude recourse to state tort remedies.”).

230. *See e.g. Weiss v. Regal Collections*, 385 F.3d 337, 341 (3d Cir. 2004); *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 268 (5th Cir. 2000). *But see e.g. Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001) (suggesting that private consumer plaintiffs could obtain an injunction against a violator of the FCRA); *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056 (C.D. Cal. 1998) (noting that the FCRA *does* allow private plaintiffs to seek injunctive relief under the FCRA), *aff’d in part on other grounds, rev’d in part on other grounds*, 225 F.3d 1063 (9th Cir. 2000), *as amended*, (Oct. 4, 2000), *and judgment rev’d and remanded on other grounds*, 534 U.S. 19, (2001), *and aff’d on other grounds*, 289 F.3d 600 (9th Cir. 2001).

231. *See e.g. Hamilton v. DirecTV*, 642 F. Supp. 2d 1304, 1305-06 (M.D. Ala. 2009); *Carlton v. Choicepoint, Inc.*, Civil No. 08-5779, 2009 WL 4127546 (D. N.J. 2009) (denying without prejudice plaintiff’s motion seeking injunction, but remaining open to having the parties re-brief the subject); *Jones v. Sonic Automotive, Inc.*, 391 F. Supp. 2d 1064, 1065 (M.D. Ala. 2005); *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 593, (E.D. Tex. 2005).

signed § 1681h(e) to preserve the specific common law action against a CRA when the information contained in the consumer report is defamatory and where the plaintiff can demonstrate malice.²³² While reserved for only egregious situations, state courts have remedied consumers with injunctions against CRAs.²³³ As consumers started to bring these suits, the federal courts gradually developed a majority rule that individuals cannot seek injunctive relief for common law defamation because it would violate Congress's intent to reserve the power to grant equitable relief only to the FTC.²³⁴

As discussed below, the majority rule is based on an arguably flawed implied conflict preemption²³⁵ analysis of § 1681h(e) and § 1681t(a) that fails the Supreme Court's requirement that an area traditionally occupied by the states can only be preempted by a "clear and manifest intent" by Congress.²³⁶ A stronger argument for implied conflict preemption can be made by focusing on the interaction be-

232. See 15 U.S.C. § 1681h(e); Chad M. Pinson, John B. Lawrence, *FCRA Preemption of State Law: A Guide Through Muddy Waters*, 15 J. Consumer & Com. L. 47, 50 (2012) ("Even if the consumer establishes that the information at issue was never disclosed pursuant to sections 1681g, 1681h, or 1681m, the state law claim is still preempted by the FCRA unless the defendant acted 'with malice or willful intent to injure' to consumer.").

233. See *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975) (affirming the trial court judgment in an FCRA case enjoining a CRA from continuing to disseminate false information in the plaintiff's consumer report); see also *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F. Supp. 602, 609-10 (D. Colo. 1983) (dealing with a non-FCRA case against a CRA, the court denied an injunction request against a CRA *only* because there was no showing that the CRA continued to report inaccurate information about the consumer).

234. The foundational case on this issue is *Poulson*, 370 F. Supp. 2d at 593. See also *Hamilton*, 642 F. Supp. 2d at 1307 (N.D. Ala. 2009); *Smith v. Equifax Info. Servs., LLC.*, 522 F. Supp. 2d 822, 825-26 (E.D. Tex. 2007).

235. Express preemption is not at issue here because the only actions that are expressly preempted by the FCRA are those where malice and willfulness are established. 15 U.S.C. § 1681h(e). When discussing remedies available for successful defamation actions, this requires that malice or willful intent has been pled and proven. Field preemption is also not at issue because the FCRA, while a broadly applicable statute, never intended to inhabit the field of consumer credit reporting at the full exclusion of state legislation or common law. See *Data of Arizona, Inc. v. Arizona*, 602 F.2d 195, 197 (9th Cir. 1979) ("Thus § 1681t refutes appellant's argument that in enacting the Fair Credit Reporting Act Congress intended to preempt the field.").

236. *Medtronic*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230) (emphasis added).

tween removal of information pursuant to § 1581i(a)(5)²³⁷ and a common law injunction obtained under § 1681h(e) ordering removal.

B. *Preemption of Injunctive Relief for a Common Law Defamation Claim Brought under § 1681h(e): Analysis of the Dominant Trend in the Federal Courts*

One must examine the attempts by consumers to get injunctive relief for a violation of the FCRA in order to understand the rationale behind the leading federal case finding state grants of injunctive relief for defamation preempted by the FCRA. The majority of federal courts, both lower and appellate, hold that individual plaintiffs cannot seek injunctive relief against a CRA for a violation of the FCRA.²³⁸ The Court of Appeals for the Fifth Circuit's opinion in *Washington v. CSC Credit Services, Inc.*,²³⁹ is the leading case on this issue.

237. 15 U.S.C. § 1681i(a)(5) (controlling the manner in which a CRA must remove information that it has determined to be incorrect after conducting a reinvestigation pursuant to the requirements of § 1681i(a)(1)). See *Gade*, 505 U.S. at 108 (“[U]nder the Supremacy Clause . . . ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1962))).

238. See *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 268 (5th Cir. 2000); see also e.g., *Weiss v. Regal Collections*, 385 F.3d 337, 341 (3d Cir. 2004) (citing *Washington* for its holding that individual plaintiffs suing under the FCRA may not receive injunctive relief because Congress intended to give that remedy only to the FTC); *Hamilton*, 642 F. Supp. 2d at 1305-06; *Jones v. Sonic Automotive, Inc.*, 391 F. Supp. 2d 1064, 1065 (M.D. Ala. 2005); *Poulson*, 370 F. Supp. 2d at 593; *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1145 (N.D. Cal. 2005) (same); *In re Trans Union Corp. Privacy Litigation.*, 211 F.R.D. 328, 339 (N.D. Ill. 2002) (same); *Bumgardner v. Lite Cellular, Inc.*, 996 F. Supp. 525, 526-27 (E.D. Va. 1998) (finding that courts are not permitted to grant injunctive relief to plaintiffs bringing actions pursuant to the FCRA); *Mangio v. Equifax, Inc.*, 887 F. Supp. 283, 284 (S.D. Fla. 1995) (same). But see, *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001) (suggesting that a private consumer plaintiff could obtain an injunction against a violator of the FCRA); *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056 (C.D. Cal. 1998) (noting that the FCRA *does* allow private plaintiffs to seek injunctive relief under the FCRA).

239. 199 F.3d at 268.

1. *Preemption of Common Law Injunctive Relief: The Foundational Case of Washington v. CSC Credit Services, Inc.*

In *Washington*, the Fifth Circuit Court of Appeals addressed an issue on certification from the lower federal district court on whether consumers could, in their standing as individuals, seek injunctive relief against CRAs for violations of the FCRA.²⁴⁰ The *Washington* court started its analysis by restating the rule created by the Supreme Court in *Califano v. Yamasaki*,²⁴¹ which held that federal district courts are not stripped of their inherent power to issue injunctions in suits where they have jurisdiction, unless Congress has “clearly and unambiguously limited the court’s equity jurisdiction.”²⁴² The court then examined the FCRA’s grant of jurisdiction to the federal courts to hear “actions to enforce liability created under” the FCRA.²⁴³ The court narrowly interpreted “liability” to mean the *civil* liability stated in the FCRA’s civil liability provisions, §§ 1681n-o, which only allow for monetary damages.²⁴⁴ The Court juxtaposed the list of remedies provided to the individual with the remedies the FCRA grants to the FTC, including the ability to “compel parties to ‘cease and desist’ from committing certain acts” and violating the FCRA.²⁴⁵ Acknowledging that the lower federal courts were split as to whether the FCRA allows private litigants to seek a claim for injunctive relief, the court set out to resolve the conflict.²⁴⁶

240. *Id.*

241. *Id.* (quoting *Califano*, 442 U.S. 682, 705 (1979)).

242. *Id.*

243. 15 U.S.C. § 1681p; *see also Washington*, 199 F.3d at 268.

244. 15 U.S.C. §§ 1681n-o; *Washington*, 199 F.3d at 268.

245. *Id.* (citing 15 U.S.C. 41 § 45(b) (2006)); Feldman, *supra* n. 68, at 467 (“The Commission can use its cease-and-desist power and any other procedural, investigative and enforcement powers which it has under the Federal Trade Commission Act . . .”).

246. *Washington*, 199 F.3d at 268 (examining the district court confusion, the Fifth Circuit examined the following cases: *Bumgardner v. Lite Cellular, Inc.*, 996 F. Supp. 525, 526-27 (E.D. Va. 1998) (holding that it lacked the power to grant a private litigant's request for injunctive relief under the FCRA); *Ditty v. CheckRite, Ltd.*, 973 F. Supp. 1320, 1338 (D. Utah 1997) (same); *Mangio v. Equifax, Inc.*, 887 F. Supp. 283, 284-85 (S.D. Fla. 1995) (same); *Kekich v. Travelers Indem. Co.*, 64 F.R.D. 660, 668 (W.D. Pa. 1974) (same), *Andrews*, 7 F. Supp. 2d at 1084 & n. 33 (concluding that the FCRA “does allow injunctive relief on the plaintiff's own behalf”); and *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092, 1096-97 (D. Ariz. 1974) (certifying a class action on a claim for injunctive relief under the

The court ruled that the FCRA does *not* allow a consumer, in his capacity as a private litigant, to pursue injunctive relief for violation of the FCRA.²⁴⁷ The court reasoned that the FCRA's "affirmative grant" to the FTC to pursue equitable remedies, "coupled with the absence of a similar grant to private litigants" in the civil liability provisions of the FCRA, demonstrated Congress's intent to strip federal courts of their equitable powers because "the power to obtain injunctive relief [lies] *solely* with the FTC."²⁴⁸ In a footnote, the *Washington* court acknowledged that the FTC is not, in reality, the only entity that can seek injunctive relief under the FCRA.²⁴⁹ Indeed, the FCRA allows state attorneys general to use equitable remedies if need be,²⁵⁰ and § 1681u(m) allows the use of equitable relief to ensure that the Federal Bureau of Investigation complies with the regulations imposed on it by the FCRA.²⁵¹ The court reasoned that if Congress had wanted private persons to be able to maintain a claim for equitable relief, it would have explicitly stated so in the civil liability provisions as it had done for certain administrative agencies, such as the FTC.²⁵² Without this explicit and unambiguous statement as required by the Supreme Court in *Califano v. Yamasaki*,²⁵³ the Fifth Circuit stripped itself and its subordinate federal district courts of their procedural right to grant injunctive relief.²⁵⁴

Even though the *Washington* court set out to resolve the dispute among the federal district courts, federal courts on the district and appellate level have questioned the *Washington* holding. In 2001, the United States Court of Appeals for the Seventh Circuit, in *Crabill v. Trans Union, LLC*, stated that even if a consumer could not establish the facts necessary to allow a recovery of actual damages, it did not follow that the plaintiff could not obtain a different remedy such as an

FCRA and granting preliminary injunctive relief), *aff'd on other grounds*, 524 F.2d 1145 (9th Cir. 1975))).

247. *Washington*, 199 F.3d at 268.

248. *Id.*

249. *Id.* at 269 n.4.

250. 15 U.S.C. § 1681s(c)(1)(A).

251. 15 U.S.C. § 1681u(m).

252. *Washington*, 199 F.3d at 269 ("Thus, where Congress intended to allow private injunctive relief under the FCRA, it expressly stated that this relief was available. This language would be unnecessary if injunctive relief were otherwise available.").

253. 442 U.S. 682, 705 (1979).

254. *Washington*, 199 F.3d at 270.

injunction.²⁵⁵ In 2006, the United States Court of Appeals for the Sixth Circuit in *Beaudry v. Telecheck Services, Inc.*, noted that the answer to the question of whether an individual consumer can seek injunctive relief is “far from self-evident.”²⁵⁶ The *Beaudry* court interpreted the Fifth Circuit’s holding in *Washington* as relying solely on a “negative inference” to reach its conclusion, a reasoning that the Sixth Circuit concluded was “not free from doubt.”²⁵⁷

The Sixth Circuit was wary of following the *Washington* court’s willingness to set aside its inherent ability to grant injunctive relief absent the “clearest command to the contrary from Congress.”²⁵⁸ As the *Washington* court’s finding was based on a mere negative inference in the FCRA’s statutory language despite a Supreme Court holding to the contrary, the *Beaudry* court ultimately did not make its own determination because the issue was not properly preserved in the lower court for appellate review.²⁵⁹ The *Beaudry* court’s decision, however, is important because it casts doubt on the foundational case for the current majority rule, declaring that the FCRA preempts actions where the consumer seeks injunctive relief as a common law defamation remedy.²⁶⁰

2. *Poulson v. Trans Union, LLC and Progeny: Analysis of the Argument that Injunctions for Common Law Defamation are Preempted by The Unavailability of Injunctions for a Violation of the FCRA*

The leading case on the availability of injunctive relief for common law defamation is *Poulson v. Trans Union, LLC*.²⁶¹ In *Poulson*, the plaintiff sought injunctive relief against several CRAs under unde-

255. 259 F.3d 662, 664 (7th Cir. 2001).

256. 579 F.3d 702, 709 (6th Cir. 2009).

257. *Id.*

258. *Id.*

259. *Id.* at 708-09.

260. The foundational case of *Washington* established the principle that Congress did not intend to grant injunctive relief to private citizens under the FCRA, thereby establishing Congress’ intent for the purposes of the FCRA’s general preemption provision, § 1681t(a). Subsequent federal court opinions have used the *Washington* holding and § 1681t(a) to hobble State courts’ ability through § 1681h(e) to completely protect their citizens against malicious defamations by CRAs. See *Hamilton v. DirecTV, Inc.*, 642 F. Supp. 2d 1304, 1307 (M.D. Ala. 2009); *Smith v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 822, 825-26 (E.D. Tex. 2007).

261. 370 F. Supp. 2d 592 (E.D. Tex. 2005).

financed state laws, including common law, for the CRAs' failure to correct inaccuracies on her consumer report, even after the required re-investigation under the FCRA.²⁶² Relying on the Fifth Circuit Court of Appeals decision in *Washington v. CSC Credit Services*,²⁶³ the Texas District Court found that the FCRA did not allow private litigants to seek injunctive relief against CRAs.²⁶⁴ Next, the court summarily rejected the plaintiff's claim for injunctive relief under state common law as preempted by the FCRA, stating that the "FCRA preempts state laws to the extent that those laws are inconsistent with [the] FCRA."²⁶⁵ The court reasoned that granting injunctive relief under state law would conflict with the prohibition against injunctive relief for individual consumers under the FCRA found in *Washington*.²⁶⁶

In subsequent years, federal district courts both inside and outside of the Fifth Circuit have rejected requests for injunctive relief for common law claims brought via § 1681h(e).²⁶⁷ The District Court for the Eastern District of Texas in *Smith v. Equifax Information Services, LLC*,²⁶⁸ dealing with exactly the same problem at issue in *Poulson*, held that any state claim that would "provide injunctive relief to a private litigant would frustrate" and conflict with the purpose of the FCRA.²⁶⁹ The *Smith* court, like the *Poulson* court, adopted the *Washington* court's position on injunctive relief for private plaintiffs:²⁷⁰ the FCRA does not allow private plaintiffs to seek injunctive relief for violations of the FCRA *itself*. The *Smith* court went on to reject the plaintiff's argument that she could pursue injunctive relief under common law through the provision in § 1681h(e).²⁷¹ The court reasoned that § 1681h(e) was "irrelevant for the purpose of deciding whether a private litigant is precluded from this particular remedy that is injunctive relief."²⁷²

262. *Id.* at 592-93.

263. *Washington* at 268.

264. *Poulson* at 593.

265. *Id.* (citing 15 U.S.C. § 1681t(a) (2006)).

266. *Id.*

267. *See Hamilton*, 642 F. Supp. 2d at 1307; *Smith v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 822, 825-26 (E.D. Tex. 2007).

268. *Smith*, 522 F. Supp. 2d at 825-26.

269. *Id.*

270. *Id.* at 825; *see Washington*, 199 F.3d at 268.

271. *Smith*, 522 F. Supp. 2d at 825-26.

272. *Id.*

Following the trends in its neighboring circuit, the District Court for the Middle District of Alabama in *Hamilton v. DirecTV, Inc.*²⁷³ offered another view of the *Smith* court's interpretation of § 1681h(e).²⁷⁴ The *Hamilton* court noted that even if the plaintiff "may assert a cause of action for defamation against the CRAs, it does not mean that she is entitled to seek injunctive . . . relief under the state law claim."²⁷⁵ It is true that neither the text nor the legislative history explicitly states that an individual filing a common law defamation claim under § 1681h(e) can pursue injunctive relief.²⁷⁶ Just as important, however, neither § 1681h(e) nor any other provision of the FCRA expressly prevents individuals from receiving injunctive relief under state common law.²⁷⁷ Section 1681h(e), in fact, does not explicitly provide for any remedies.²⁷⁸ Federal courts have decided, without Congressional direction, that the monetary remedies available for a violation of the FCRA are sufficient remedies for defamation that occurred at the hand of erroneous information on consumer reports; a harm distinct from a statutory violation.²⁷⁹

Smith v. Equifax illuminates the type of preemption that these federal courts are relying on for their holding: conflict preemption.²⁸⁰ Conflict preemption, the second kind of implied preemption, is recognized when either (a) "compliance with both federal and state [law] is a physical impossibility,"²⁸¹ or (b) the state law stands as an obstacle to, or frustrates, the accomplishment and execution of the full purposes and objectives of Congress.²⁸² The *Hamilton* and *Smith* courts conducted a "frustration" analysis to conclude preemption.²⁸³ As conflict preemption is a subset of implied preemption, the text of the sta-

273. 642 F. Supp. 2d at 1306-07.

274. *Id.* at 1306.

275. *Id.*

276. 15 U.S.C. § 1681h(e).

277. *Id.*

278. *See id.*

279. *See De Armond, supra* n. 9, at 1118-19.

280. *Smith*, 522 F. Supp. 2d at 825-26 (explaining that the court based its decision on the idea that the "FCRA preempts state law to the extent that those laws are inconsistent with FCRA" (quoting *Poulson*, 370 F. Supp. 2d at 593)).

281. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

282. *Gade*, 505 U.S. at 98 (1992) (emphasis added).

283. *Hamilton*, 642 F. Supp. 2d at 1307 ("[T]he court finds that a state law claim that grants a private litigant access to equitable relief would frustrate and conflict with the FCRA."); *Smith*, 522 F. Supp. 2d at 825.

tute is necessarily not clear enough to be relied on its own.²⁸⁴ Instead, congressional intent is the determining factor.²⁸⁵ In all preemption inquiries, if courts are to remain true to the guidelines the Supreme Court has set out, there is a very strong presumption against preempting causes of action that are historically within the domain of the states.²⁸⁶ Defamation, as a tort, has been recognized by Anglo-American law for centuries²⁸⁷ and is an action the Supreme Court has found to fall within the historic domain of the states.²⁸⁸

As *Smith*²⁸⁹ revealed, courts have not allowed private plaintiffs to seek injunctive relief because these courts feel it would “frustrate” Congress’s intent to solely grant the FTC with the power to obtain injunctive relief.²⁹⁰ The *Poulson*, *Smith*, and *Hamilton* decisions rely on language from the FCRA’s savings clause § 1681t(a) as a basis for their “frustration of intent” analysis.²⁹¹ Their reliance is arguably misplaced because that section demands only that state laws “with respect to the *collection, distribution, or use* of any information on consumers, or for the prevention or mitigation of identity theft” are

284. *See Gade*, 505 U.S. at 108.

285. *See id.*; Chemerinsky, *supra* n. 191, at 393.

286. *New York State Conf. of Blue Cross & Blue Shield Plans*, 514 U.S. at 654.

287. *See Goldberg*, *supra* n. 181, at 549 (noting that Sir William Blackstone recognized defamation in his list of personal tort actions in his legal treatises in the sixteenth century).

288. *New York State Conf. of Blue Cross & Blue Shield Plans*, 514 U.S. at 654-55; *see also Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1965) (noting that the tort of defamation is an area that has “been traditionally occupied by the States” as the U.S. Supreme Court has repeatedly recognized that states have an “overriding interest in protecting its residents from malicious libels).

289. *Smith*, 522 F. Supp. 2d at 825-26.

290. *See Hamilton*, 642 F. Supp. 2d at 1307; *Smith*, 522 F. Supp. 2d at 825-26; *Poulson*, 370 F. Supp. 2d at 593. The reliance on the *Washington* court’s reasoning is flawed specifically because the *Washington* decision was incorrect when it found that the FCRA granted the power to seek equitable remedies with the FTC. As noted previously, even the *Washington* court conceded that the FCRA granted the power to seek equitable relief to states’ attorneys general. 15 U.S.C. § 1681s(c)(1)(A). This oversight, while disconcerting, does not cast serious doubt on the *Washington* court’s ultimate determination, because this grant to attorneys general still demonstrates power by a state to seek injunctions for FCRA violations as opposed to individuals seeking injunctions on their own behalf.

291. *Hamilton*, 624 F. Supp. 2d at 1306-07; *Smith*, 522 F. Supp. 2d at 825-26; *Poulson*, 370 F. Supp. 2d at 593.

preempted “only to the extent of the inconsistency.”²⁹² First, the dominant understanding in the courts and commentaries is that “state laws” as written in § 1681t(a) refers only to statutes and state legislation, and *not* common law actions.²⁹³ If § 1681t(a) truly only deals with state statutes, then an injunction for defamation brought under state common law could not conflict with § 1681t(a) because of its very nature as a common law action.

In addition, even if § 1681t(a) does apply to common law, it would still not qualify as frustration preemption, because allowing injunctive relief would not prohibit the accomplishment “and execution of the *full* purposes and objectives of Congress.”²⁹⁴ The *Poulson* court determined that an equitable remedy in this situation would be contrary to Congress’ intent to grant injunctive relief under the FCRA only to the FTC.²⁹⁵ This purpose, however, is not Congress’s “full purpose and objective” for enacting the FCRA. The “full purpose and objective” of the FCRA is “[t]o safeguard the consumer in connection with the utilization of [his] credit.”²⁹⁶ In order to protect consumers, the FCRA set a minimum standard for CRAs to follow²⁹⁷ but purposefully allowed states to control the consumer credit industry within their boundaries,²⁹⁸ and allowed consumers to bring certain common law tort actions, like defamation, via § 1681h(e).²⁹⁹ It seems contradictory that Congress would allow state courts, or federal courts sitting in di-

292. 15 U.S.C. § 1681t(a) (2006) (amended by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 at § 1088, 124 Stat 1376 (July 21, 2010) (emphasis added)).

293. *Joiner v. Revco Discount Drug Ctrs., Inc.*, 467 F. Supp. 2d 508 (W.D.N.C. 2006); *Cisneros*, 293 F. Supp. 2d at 1175; *see also* Conrad, *supra* n. 23, at 593-99. The interpretation of “state laws” as equating only with statutes, and not with common law actions, is supported by the Supreme Court’s acknowledgement that even though since its decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court considers the phrase “state law” to include common law, ultimately the “presumption against preemption might give good reason to construe the phrase ‘state law’ in a preemption provision more narrowly.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992).

294. *Gade*, 505 U.S. at 89 (emphasis added).

295. *Poulson*, 370 F. Supp. 2d at 593. But notice that as noted above, the FCRA also grants injunctive relief to state Attorneys general in 15 U.S.C. § 1681s(c)(1)(A).

296. Pub. L. No. 90-321, 82 Stat. 146 (2003).

297. *See* Low, *supra* n. 13, at 102 n. 97.

298. *See Data of Arizona*, 602 F.2d at 197 (“Thus § 1681t refutes appellant’s argument that in enacting the Fair Credit Reporting Act Congress intended to preempt the field.”).

299. *See* 15 U.S.C. § 1681h(e), §§ 1681n-o.

versity, to hear a state law claim for defamation plead with malice and willfulness, and yet bar the plaintiff from seeking common law remedies. Thus it is not contrary to the FCRA's "full purpose or objectives" to allow individuals to seek injunctive relief, if appropriate, to a consumer suing a CRA under the state common law tort of malicious defamation.

3. *Where Injunctive Relief Is Preempted by Conflict: § 1681i(a)(5) - Treatment of Inaccurate or Unverifiable information*

An arguably more sound way to reach the *Poulson* court's holding is to conduct an "impossibility" preemption analysis instead of a frustration analysis. The Supreme Court has held that even where a cause of action is within a "State's acknowledged power," if it interferes with or conflicts with federal law, then it "must yield."³⁰⁰ The FCRA section that would most closely conflict with a state court's equitable decree to remove defamatory information from a consumer report is § 1681i(a)(5), which controls the "treatment of inaccurate or unverifiable information."³⁰¹ As the FCRA is currently written, an injunction ordering the removal of information from a consumer report would directly prohibit a CRA from being able to later reinsert that deleted information,³⁰² pursuant to § 1681i(a)(5)(B), if that information were later found to be true and accurate.³⁰³ Because the injunction would prevent the CRA from following federal law, the state remedy would be preempted.³⁰⁴

As written, § 1681i(a)(5)(B) allows reinsertion of previously deleted material into a consumer report by a CRA if "the person who furnishes the information certifies that the information is complete and

300. See *Gade*, 505 U.S. at 108 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1962)).

301. 15 U.S.C. § 1681i(a)(5).

302. 15 U.S.C. § 1681i(a)(5)(B) (controlling the circumstances in which contested information can be reinserted into an individual's consumer report).

303. See *Stockton v. TransUnion* (available at <http://valawyersweekly.com/full-text-opinions/2010/08/24/010-8-159-stockton-v-transunion-llc/> CL-2009-17652, at 5-6 (Va. Cir. Ct. July 27, 2010)).

304. See e.g., *McDermott*, 228 U.S. at 136-137 (finding that where a federal Food and Drug Act required maple syrup labels in a manner that directly conflicted with Wisconsin's maple syrup labeling requirements, such that the manufacturer could not comply with both statutes, the federal law prevailed).

accurate.”³⁰⁵ An argument can be made, however, that an injunction to remove information would not make reinstatement under § 1681i(a)(5)(B) impossible if the injunction were made after a judicial determination that the material is defamatory and, therefore, *necessarily* false.³⁰⁶ As long as the information reinserted into a consumer report is correct, an injunction would be improper. But in a situation such as that in *Dennis v. BEH-1*, where a reinvestigation concluded that disputed information was truthful, even though it was actually false,³⁰⁷ an injunction after a judicial determination of the information’s defamatory nature would be suitable and would fill a gap left by the FCRA’s remedies. After all, “[t]o the extent that . . . Congress has not prescribed procedure[s] for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been” preempted.³⁰⁸ In situations where erroneous information remains on an individual’s consumer report after the exhaustion of the FCRA’s remedies,³⁰⁹ and where monetary damages are not sufficient, injunction could provide consumers much needed relief.

IV. *Injunctive Relief Should be Available under State Common Law Defamation to Remove False or Defamatory Information from Consumer Reports*

The current judicial trend finds injunctive relief sought under state common law preempted as a frustration of the FCRA’s purpose.³¹⁰ Even though the *Poulson* court’s preemption analysis action violates a

305. 15 U.S.C. § 1681i(a)(5)(B).

306. *See Phila. Newsp., Inc. v. Hepps*, 475 U.S. 767, 770 (1986) (“As to falsity . . . the common law[] presum[es] that an individual’s reputation is a good one. Statements defaming that person are therefore presumptively false, although a publisher who bears the burden of proving the truth of the statements has an absolute defense.”) (emphasis added).

307. *Dennis*, 520 F.3d at 1070-71.

308. *Linn*, 383 U.S. at 61-62 (quoting *United Constr. Workers v. Laburnam Constr. Corp.*, 347 U.S. 656, 665 (1954)).

309. *See e.g., Dennis*, 520 F.3d 1066; *Lawrence*, 296 F. Supp. 2d at 590 (denying CRA’s preemption defense where consumer brought sufficient evidence to demonstrate the CRA acted willfully by not forwarding documentation that would have corrected consumer’s credit report and by knowingly misleading the consumer into believing that it was verifying the accuracy of the information).

310. *Smith*, 522 F. Supp. 2d at 825-26.

traditional rule of preemption analysis,³¹¹ the current judicial trend in preemption analysis,³¹² combined with Congress's failure to address remedies available under § 1681h(e),³¹³ results in continued confusion and consumer suffering.

Injunctions necessarily impose a heavy burden on the party contesting them.³¹⁴ But they could fill the gap left by the FCRA's remedies³¹⁵ by revitalizing two of the FCRA's fundamental goals: (1) to reduce the potential damage to consumers caused by erroneous information on consumer reports; and (2) to force CRAs and furnishers to increase accuracy in consumer reports.³¹⁶

Being able to pursue and to obtain injunctive relief as a remedy for a successful defamation claim brought under § 1681h(e) would provide an effective and appropriately individualized way to remove false information from an individual's consumer report. Given the FCRA's failure to meet its own goals, Congress should amend the FCRA to

311. *New York State Conf. of Blue Cross & Blue Shield Plans*, 514 U.S. at 655 (“[W]here federal law is said to bar state actions in fields of traditional state [action] . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (internal citations and quotes omitted).

312. Erwin Chemerinsky, *Enhancing Government: Federalism for the 21st Century* 225 (Stanford University Press 2008) (noting that even during the Rehnquist Court, a time commentators thought Federalism would reign, the “Court repeatedly has ruled for preemption of important state laws, even when federal law was silent about preemption or explicitly preserved state laws”).

313. Congress had the opportunity to clarify what remedies are available under § 1681h(e) when it passed the Wall Street Reform bill in Summer 2010. Nevertheless, Congress did not do so. *See Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203 at § 1088.

314. Gallagher, *supra* n. 30, at § 316 (noting that violations of injunctions can result in both civil and criminal forms of contempt).

315. The FCRA was an improvement over the pre-regulatory era, but there is room for much more improvement, and commentators frequently remark on the FCRA's remedial deficiencies. *See e.g.*, Epshteyn, *supra* n. 16, at 1144-45 (noting that the FCRA's 1996 amendments that preempted many state laws, and which were permanently extended in 2003, still failed to provide consumers adequate recourse as the amendments left consumers vulnerable to new threats and undermined the states' traditional role as laboratories of democracy); Feldman, *supra* n. 68, at 484 (noting that the “current civil liability sections of the FCRA do not appear to be an adequate deterrent to noncompliance”); Jacquez & Friend, *supra* n. 7, at 83-84 (noting that lack of accuracy in consumer reports was the “most serious problem plaguing the credit reporting industry” pre-FRCA, and that it remains the most serious problem as amendments to the FCRA have only created a series of “quick fixes”).

316. Blair & Maurer, *supra* n. 25, at 304-05.

specifically allow consumers to seek injunctive relief for a common law defamation action brought via § 1681h(e) when the consumer has exhausted the FCRA's reinvestigation provisions,³¹⁷ a judicial fact finder has declared the information defamatory,³¹⁸ and the case meets the requirements for an injunction.³¹⁹

A. *Obstacle to Injunction: The First Amendment*

The First Amendment guarantee of free speech traditionally poses an obstacle to those seeking to enjoin defamation.³²⁰ The default rule strictly prohibiting the injunctions for defamation as an illegal prior restraint on speech, however, does not apply to consumer credit reports.³²¹ It is a well-established constitutional principle that not all

317. See 15 U.S.C. § 1681i (2006) amended by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 at § 1088. Sections 1681i and 1681h(e), most of the time, go hand in hand. Consumers can only bring suits via § 1681h(e) when the CRA has disseminated a consumer report legally via one of the FCRA's disclosure provisions, namely §§ 1681h, 1681g, and 1681m. There is no statutory provision requiring that consumers exhaust FCRA remedies before filing a suit pursuant to § 1681h(e) because this provision *does not* remedy FCRA violations. It is reasonable, however, to assume that a consumer would attempt to solve the errors through the statutory approach first, and then resort to common law defamation suits through § 1681h(e) as a later resort.

318. See *e.g.*, *Balboa Island Village Inn*, 156 P.3d at 343 (“[A]n injunction following a trial that determine[s] that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint [of speech] and does not offend the First Amendment.”).

319. The requirements for an injunction were set forth by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

547 U.S. 388, 391 (2006).

320. U.S. Const. amend. I; see *Tory v. Cochran*, 544 U.S. 734, 738 (2005) (citing many cases in giving an overview of the reasons why the Supreme Court is wary to grant injunctions that prohibit future speech).

321. *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (holding that “[t]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints” of speech).

forms of speech receive equal First Amendment protection.³²² The Supreme Court has held that types of speech that “involve no matter of public concern,” such as consumer reports,³²³ have a “reduced constitutional value of speech.”³²⁴ As consumer reports generally do not include “matters of general and public interest,” they receive no First Amendment protection against injunctions.³²⁵ Therefore, “consumer credit reports are not protected speech for which under the First Amendment ‘Congress shall make no law’”³²⁶

B. *Injunctive Relief Should be Granted as Remedy Against CRAs Because Relief Under the FCRA is Inadequate in Certain Situations*

An individual’s reputation is important not just to that specific person:³²⁷ it is also important to the individual states, which have an overwhelming interest in their citizens’ reputations.³²⁸ The Supreme Court recognizes each state’s “overriding interest in protecting its residents from malicious libels”³²⁹ and has noted that “[t]he right to redress for someone’s false report of an act has traditionally been in tort, the province of state law.”³³⁰ Moreover, the Supreme Court has held that a state’s overriding interest regarding malicious libels should be recognized, particularly in the context of federal preemption of state laws.³³¹

322. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (“We have long recognized that not all speech is of equal *First Amendment* importance.”).

323. *Id.* at 762 n. 8.

324. *Id.* at 761.

325. *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir. 1973).

326. *Millstone v. O’Hanlon Rpts., Inc.*, 528 F.2d 829, 833 (8th Cir. 1976).

327. *See Greenmoss Builders*, 472 U.S. at 757-58 (“[T]he individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.’” *Id.* (quoting Justice Stewart’s concurring opinion in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966))).

328. *See id.* at 758-60.

329. *Linn*, 383 U.S. at 61.

330. De Armond, *supra* n. 9, at 1115.

331. *Linn*, 383 U.S. at 61-2; *see also Old Dominion Branch No. 496, Natl. Assn. of Ltr. Carriers v. Austin*, 418 U.S. 264, 271 (1974).

When Congress passed the FCRA, it did so with the intent to benefit both the credit reporting industry and its consumers.³³² However, as Congress made gradual amendments to the FCRA, the repeat players' interests—the CRAs and other credit reporting businesses—won out over the consumers'.³³³ Before the 1996 amendments,³³⁴ if a qualified immunity provision blocked the consumer's action against a CRA, the consumer could file suit against those who furnished information to the CRA under state common law, a suit completely outside the FCRA's reach.³³⁵ The scope of remedies under the FCRA have gradually been whittled away, and given the judicial trend to preempt remedies at common law, the FCRA has become a statute that sweeps "away state common law causes of action that protect the dignity and integrity of individuals' reputations."³³⁶ In practice, the FCRA's two civil liability provisions, § 1681n and § 1681o, have revealed themselves over the years to be inadequate surrogates for traditional state law tort actions.³³⁷ In addition, the statute's reliance on post-reporting inquiries to remove erroneous information and improve accuracy³³⁸ is often inadequate because it is very hard to cull erroneous information once it has been released into the "data sea."³³⁹ Thus, the Act, which was supposed to protect consumers and ensure accuracy of their credit reputations, has turned into "not a consumer protection act, but rather a [CRA] protection act."³⁴⁰

The majority rule—which preempts injunctions for common law defamation—forces individuals to only use the FCRA remedial structure that has routinely been shown to provide inadequate remedies.³⁴¹ The consumer can demand that the CRA do an investigation of the

332. Colombani, *supra* n. 36, at 68.

333. Blair & Maurer, *supra* n. 25, at 304 ("In the judicial arena, however, the interests of the parties continue to be asymmetric . . . Evolutionary theory suggests that there will be no predictable development of the legal rules toward efficiency: The rules will develop so as to favor the industry, the party with the ongoing interest.").

334. For a discussion of the amendments to the FCRA by the Consumer Credit Reporting Reform Act of 1996, see Epshteyn, *supra* n. 16, at 1151-54.

335. Maurer & Thomas, *supra* n. 10, at 648.

336. De Armond, *supra* n. 9, at 1115.

337. Elizabeth D. De Armond, *A Dearth of Remedies*, 113 Penn St. L. Rev. 1, 8 (2008).

338. See King, *supra* n. 33, at 866.

339. De Armond, *supra* n. 9, at 1100.

340. *Id.* at 1118.

341. See *supra* text accompanying n. 315.

information in question, and if that fails to address the problem, then the consumer can file a complaint with the FTC.³⁴² Complaints to the FTC, however, rarely result in the relief the consumer needs because courts have interpreted the FTC's power under the FCRA to be very limited—it is discretionary and applicable “only in cases of public interest.”³⁴³ Nearly eighty percent of consumer reports contain mistakes of some kind, and twenty-five percent of those contain “errors sufficiently serious to cause credit to be denied,”³⁴⁴ so individuals should not have to rely on the FTC to enough complaints to be able to enjoin a CRA.

Once there is a judicial finding of defamation, if the consumer meets the requirements for injunctive relief, it may be proper to grant equitable relief to prohibit republication of the defamatory information.³⁴⁵ For the consumer, the most daunting obstacle to obtain an injunction is demonstrating that remedies at law are not sufficient to make the consumer whole.³⁴⁶ Remedies for defamation actions have

342. 15 U.S.C. § 1681i.

343. Philip H. Myers, *Construction and Application of the Fair Credit Reporting Act*, 17 A.L.R. Fed. 675, § 3[c] (2010) (citing *Saucke v. F.T.C.*, 333 F. Supp. 1197, 1199 (N.D. Ga. 1971)). The FTC is prohibited from taking action for violations of the FCRA against a CRA until it has developed a history of violations. *See* 15 U.S.C. § 1681s. In addition, an individual cannot seek a writ of mandamus in order to make the FTC pursue actions against a CRA. *Rush v. Macy's N.Y., Inc.*, 775 F.2d 1554, 1558 (11th Cir. 1985).

344. De Armond, *supra* n. 9, at 1076 (citing Cassidy & Mierzwinski, *supra* n. 10, at 13); *see also* Maurer & Thomas, *supra* n. 10, at 612 (noting that a 1991 consumers union study found an error rate of forty-eight percent out of 161 randomly selected credit reports, nineteen percent of which contained a major error that would have significantly damaged consumers by making them ineligible to receive credit); Jacquez & Friend, *supra* n. 7, at 83 (noting a study conducted in 1989 of 1,500 consumer reports and found a “serious error”—defined as an error that “could, or did, cause the denial of credit, employment or insurance—rate of 43 percent”).

345. *Lemen*, 156 P.3d at 350-51; *Russell*, 218 S.E.2d at 62-63; *Caswell Equip. Co.*, 352 N.W.2d at 9-11; *Sid Dillon*, 559 N.W.2d at 747-48; *O'Brien*, 327 N.E.2d at 755-56.

346. *MercExchange*, 547 U.S. at 391 (explaining that as part of the four requirements to obtain an injunction, the plaintiff must demonstrate “that remedies available at law, such as monetary damages, are inadequate to compensate for that injury”).

always been obscure because it is difficult to assign monetary sums to the damages of amorphous concepts like reputation.³⁴⁷

In the context of defamatory information on a consumer report, the most appropriate time for an injunction would be when exhaustion of the FCRA's reinvestigation procedures fails to remove erroneous information. Such a situation can arise when the CRA refuses to remove the information from the report,³⁴⁸ when the CRA knows the information is incorrect but refuses to reinvestigate, or where the CRA's reinvestigation procedures were "reasonable" according to the FCRA but erroneous information remained on the report and continued to cause harm.³⁴⁹

When seeking to enjoin types of speech that enjoy First Amendment protection, it is crucial to obtain a prior judicial determination of the speech's defamatory nature.³⁵⁰ The First Amendment does not protect consumer reports, so judicial determination of defamatory content would serve a different purpose. It would allow an individual to remove the determination of accuracy from the hands of the CRA, who committed the error in the first place, and instead allow an impartial fact finder to make a finding of law based on all the circumstances. As defamatory speech requires falsity,³⁵¹ the FCRA's goals of increased accuracy³⁵² would necessitate the information's removal from the consumer report.

While the harsh consequences associated with injunctions³⁵³ make them disfavored remedies in most tort actions, they are an excellent solution to the FCRA's remedial gaps. The current FCRA remedies

347. Sack, *supra* n. 182, at § 10-1 (noting that monetary damages are the traditional remedies for a defamation action even though "[t]here is plainly no logical method for expressing any such injury [to reputation] in dollars and cents").

348. *Lawrence*, 296 F. Supp. 2d at 590 (denying CRA's preemption defense where consumer brought sufficient evidence to demonstrate the CRA acted willfully by not forwarding documentation that would have corrected consumer's credit report and by knowingly misleading the consumer into believing that it was verifying the accuracy of the information).

349. *Anderson*, 345 F. Supp. 2d at 972-73.

350. *O'Brien*, 327 N.E.2d at 755 (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967)).

351. *Hepps*, 475 U.S. at 770. "[A]s to falsity . . . the common law[] presum[es] that an individual's reputation is a good one. Statements defaming that person are therefore presumptively false, although a publisher who bears the burden of proving the truth of the statements has an absolute defense." *Id.*

352. Blair & Maurer, *supra* n. 25, at 304-05.

353. See *supra* n. 30, at § 316.

and reinvestigation procedures do not give CRAs enough incentive to ensure accuracy in consumer reports.³⁵⁴ Punitive remedies as strict as injunctions would force CRAs to take greater efforts to ensure accuracy. It is unlikely that CRAs or other credit industry entities would object to injunctive relief under claims of frivolous actions³⁵⁵ for two reasons. First, a consumer would only be able to enjoin information that a court has previously found defamatory. Second, the financial and personal cost a consumer would have to bear in order to establish all the information necessary to prove the necessity of an injunction³⁵⁶ would weed out frivolous claims.

Allowing individuals to pursue injunctions under § 1681h(e) is beneficial for many reasons. It would provide consumers a more effective and individually tailored method to remove and prevent redistribution of defamatory information on their consumer reports. The punishment for violating an injunction is more stringent than any monetary penalties allowed by the FCRA and could therefore better enforce the FCRA's goal of increased accuracy in consumer reports. Congress should modify the FCRA's plain text to allow injunctive relief as a remedy available for a common law defamation suit brought pursuant to § 1681h(e).

354. See Feldman, *supra* n. 68, at 484 (noting that only a few years after the FCRA was enacted into law, the remedies provided by §§ 1681n-o did not provide adequate incentives for CRAs to keep accurate records); De Armond, *supra* n. 9, at 1118 (“Individuals cannot depend upon the Act to protect their reputations, even though the power of [CRAs] to assemble data about (or purportedly about) consumers has swelled, and the data has more power over individuals’ lives than ever.”).

355. See Epshteyn, *supra* n. 16, at 1162 (noting that the credit industry lobbied hard for “absolute preemption of state law, arguing that a patchwork system of conflicting regulations would hurt both commerce and consumers.”).

356. *MercExchange*, 547 U.S. at 391.

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id.

CONCLUSION

Congress passed the FCRA with the laudable goals of increasing transparency in the credit reporting industry, reducing the potential damage to the consumer caused by erroneous information on consumer reports by implementing a framework under which consumers can try to fix errors in reports, and increasing credit reports' accuracy.³⁵⁷ Over the FCRA's nearly forty years in existence, however, the statute that Congress intended to protect consumers has turned into one that instead protects the credit industry.³⁵⁸ Congress's failure to clarify the FCRA's preemptive scope and judicial determinations that have interpreted the statute's preemptive scope broadly are major contributors to the FCRA's failure to adequately protect consumers.³⁵⁹ Thus, given the importance of an individual's credit reputation and the inability of the current FCRA to grant meaningful relief, Congress should alleviate some of the preemption provisions. Keeping the current FCRA remedial structure but modifying the preemption provisions to restore the states to traditional role as protectors of their citizens' reputations³⁶⁰ would be an effective way to fight against "weighting . . . the scales against the individual who stands alone facing a commercial Goliath with the power to destroy . . . through the publication of erroneous reports."³⁶¹

357. Blair & Maurer, *supra* n. 25, at 304-05.

358. See De Armond, *supra* n. 9, at 1118.

359. See Epshteyn, *supra* n. 16, at 1164 (noting that the FCRA's preemption provisions may cause states to "no longer be able to effectively protect their citizens from unforeseen credit reporting dangers").

360. *Robert Welch*, 418 U.S. at 341 (noting that there is a "legitimate state interest underlying the law of libel . . . [that w]e would not lightly require the State to abandon . . . [as] the individual's right to the protection of his own good name [is] . . . 'like the protection of life itself, is left primarily to the individual States[.]'" (quoting *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring))).

361. *Russell*, 218 S.E.2d at 58.