

**Measuring Compensation from Credit Reporting Damage:  
A Comparison of Islamic, Saudi, and American Law in Light of Credit  
Information Reporting Acts**

**By**

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**Mansour Abdulrahman Abdullah Alhaidary**

**Submitted to the School of Law, University of Kansas  
in partial fulfillment of the requirements for the degree of  
Doctor of Juridical Science (S.J.D.)**

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**Abstract:**

Although there was a simple way to practice credit reporting in the past, in its organized and developed form credit reporting is considered new to international society in general. The first act to regulate credit reporting was established in the last quarter of the twentieth century in the U.S.A. The novelty is even more evident in Saudi laws. The first act in Saudi Arabia was declared in 2008. In Saudi Arabia, credit reporting is associated with many legal issues that must be resolved with reference to both *Shariah* and Saudi Arabia law. Consequently, legal and *Shariah* solutions should be provided.

This dissertation is a comprehensive study of credit reporting damage and remedies. It tackles issues related to definitions, history, and mechanisms of credit reporting in one section. In another section, this dissertation examines acts or failures to act as the basis for liability. These acts or failures to act may be performed by credit reporting agencies, users, or other entities or persons. This examination is presented in light of the Fair Credit Reporting Act and the Credit Information Act and weighed against Islamic law to examine validity in Islamic law as the predominant law in Saudi Arabia. This dissertation also seeks to find weakness and strength in both laws and suggest improvements. Proving the breaches is an essential part to recovering damages. Methods and standards of proof in both legal systems have similarities and differences. Some types of damages inflicted upon consumers are unique to credit reporting, while other types of damages are similar to other legal theories. The most challenging issue is the measure of remedies in the credit reporting context. The types of damages shared by other legal theories share the same measurements of remedies. Nevertheless, damages unique to credit reporting have their own remedial measurements.

This dissertation hopefully adds to legal academia, helps the judiciary in Saudi Arabia in interpreting the Credit Information Act, and helps improve deficiencies in the current legal framework of U.S and Saudi legal systems.

Dedication to:  
My Mother: Latifah  
My Father: Abdulrahman  
My Wife: Mishael  
My Daughters: Shadha and Shahad

**Acknowledgment:**

All praises are due to Allah the most gracious and the most merciful. I have neither power nor ability to do anything without his blessings.

I am sincerely thankful to my father **Abdulrahman Alhaidary** whose belief in my potential academia provided me with great confidence in myself. I am gratefully thankful to my mother **Latifah Alhonaihen**. If were to forget anything, I would not forget her tears when I wanted to come to the States. I would not forget her daily prayers for me from when I was young until now. She wants nothing from this life, except the pleasure of Allah, other than her children's' happiness and success.

I am also indebted to my patient wife **Michael Alhidar**. She was patient with me since I was an undergraduate student until the completion of my dissertation. She taught me perseverance and insisted I complete my doctorate degree. I owe my kids **Shadha** and **Shahad** great gratefulness for their patience during my study and writing. I admit that I did not give them the attention they deserve.

I am deeply indebted to my dissertation chairperson Prof. **Mike Kautsch** for accepting my proposal and availing me with his guidance. His comments and amendments inspired me during our conversations in developing this dissertation. His encouraging comments and continuous compliments helped me to complete this dissertation in a timely manner. His flexibility toward changes, additions, and deletions of any part of the dissertation facilitated and accelerated my writing process. Moreover, he was not hesitant to allocate time for meeting and discussion even with his busy schedule and enormous tasks.

I extend my sincere appreciation to the Rice Distinguished Professor, S.J.D director, and Associate Dean for International and Comparative Law Prof. **Raj Bhala** for his continuous support and help. I appreciate his acceptance as a member of my dissertation committee even with his huge responsibilities.

I extend my honest thanks and gratitude to Prof. **Webb Hecker** and Prof. **Mark Johnson** for agreeing to be examiners for my dissertation. Their long experience will provide great insight and improvement.

I thank all my friends who cooperated with me in acquiring references and books from Saudi Arabia, especially those who always encouraged me and always had faith in me.

I also do not want forget to thank **Bobbi Rising** for her excellent English and citation editing and for her valuable comments.

I want to say thank you to every person whom I may forget, and I ask Allah for all of whom I mentioned, and forgot, to grant them happiness, blessing, and salvation in this life and the hereafter.

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**Abbreviations:**

<b>Abbreviation</b>	<b>Stands for</b>
AATO	Afro-Asian Trading Office
ACB	Associated Credit Bureaus, Inc.,
ACDV	Automated Consumer Dispute Verification
CFPB	Consumer Financial Protection Bureau
CIL	Saudi Credit Information Law
CRA	Credit Reporting Agency
CRAFAA	Civil Rights Attorney's Fees Awards Act
CRAs	Credit Reporting Agency
CRDRC	Credit Reporting Dispute Resolution Committee
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act
ECOA	Equal Credit Opportunity Act
FACTA	Fair and Accurate Credit Transactions Act
FBI	Federal Bureau of Investigation
FCRA	Fair Credit Reporting Act
FDCPA	Fair Debt Collection Practices Act
FDIC	Federal Deposit Insurance Corporation
FTC	Federal Trade Commission
Gramm-Leach-Bliley Act	Financial Services Modernization Act of 1999
ICP	International Company Profile
IRS	Internal Revenue Service
MECOS	Middle East Commercial Services, Ltd
NACM	National Association of Credit Management
NAIC	National Association of Insurance
NCUA	National Credit Union Administration
SAMA	Saudi Arabian Monetary Agency
SIMAH	Saudi Credit Bureau
TLA	Truth in Lending Act
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001

## First Chapter: Introduction

Credit reporting is considered novel in international society. The first act to regulate credit reporting was established in the USA in the last quarter of the twentieth century. The novelty of credit reporting is more evident in Saudi Arabia, where the first act was declared with Royal Decree No. M/37 dated July 8, 2008 with title "Credit Information Act"<sup>1</sup> (CIL).

Credit reporting is associated with many legal issues that must be resolved with reference to both *Shariah* and Saudi Arabia law. Consequently, this study addresses both legal and *Shariah* solutions. The aims of the CIL are to: declare constraints on collecting credit information; declare constraints on exchanging credit information; and declare constraints on the protection of credit information from unauthorized usage or disclosure.<sup>2</sup>

### 1.1. Credit Reporting Characterization under Islamic Law

Islamic law, as the predominant law in Saudi, emphasizes clearly good character and fulfillment of any kind of lawful obligation. One of the important issues that Islamic law and teachings emphasize is fulfillment of paying debts. Prophet Muhammad, peace be upon him and all messengers of Allah (pbuh), said: **“Whoever takes the money of people with the intention of repaying it, Allah will repay it on his behalf, and whoever takes it in order to spoil it, then Allah will spoil him.”**<sup>3</sup> This is a great threat to Muslims on a spiritual level.

On the legal and judicial level, Prophet said **“The procrastination [of repayment] of an able person, frees his reputation [as to this regard] and punishment”**<sup>4</sup> This means if an able person is not willing to repay loan and is trying to procrastinate; the other party has the right to speak about his procrastination to other people and warn them about him. The other party has the right to report to authorities that the person is not paying and advising people not to deal with him and the like.<sup>5</sup> A judge on the other hand has the right to impose a punishment upon him in order to deter him and others from doing similarly.<sup>6</sup> I believe that "Credit Reporting" can be used as a way of damaging the financial reputation of a procrastinating person.

In order to reach a valid conclusion regarding liability, wrongful or intentional act of reporting inaccurate information by a credit reporting agency (CRA) must be characterized. These issues are new in the context of credit reporting; however, we can find an analogy in classic Islamic jurisprudence.

Under Islamic Law, the contract to report information between a CRA and a user can be classified as a sale or an *Ijara* contract. This contract can be classified as a sale contract, because CRAs sell credit reports to users in consideration of fees. This contract can also be classified as an *Ijara*<sup>7</sup> contract, because a CRA is hired to collect information for a user.

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<sup>1</sup> SAUDI ARABIA CREDIT INFORMATION LAW (CIL), Royal Decree No. M/37 5 Rajab 1429H / 8.

<sup>2</sup> CIL, article 2.

<sup>3</sup> MUHAMMAD AL-BUKHARI, *TRANSLATION OF SAHIH BUKHARI*, (trans. Mushin Khan) Volume 3, 41/572; MUSLIM BIN AL-HAJJAJ, *BEING TRADITIONS OF THE SAYING AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE ALJAMI-US-SAHIH 25/2387* (trans. Abdul Hamid Siddiqui, Arabic House for Printing, Publishing, and Distribution, Beirut, 1972).

<sup>4</sup> AL-BUKHARI, *supra* note 3, Volume 3, 41/585.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Ijara*, which is the hire or lease, under Islamic law, includes two types: a contract to lease real or personal property and a contract to lease labor; RAJ BHALA, *UNDERSTANDING ISLAMIC LAW (SHARI'A)* 562-65 (LexisNexis 2011).

When a CRA has the information, I believe it is a sale contract, and is a lease contract when the CRA does not have the information.

Concerning the nature of the information, reporting credit information to users can be characterized as a type advice about the personal and financial status of consumers. The Prophet said “*An advisor is trusted*”.<sup>8</sup> This tradition indicates that an advisor is only liable if he betrays the advisee or is negligent in offering the advice.<sup>9</sup>

In Islamic law, antagonization may be a basis of liability. Reporting false information with ill will may be characterized as antagonization. Scholars debate whether a person is liable for antagonizing, with false information, a governor against another person, resulting in economic loss.<sup>10</sup> The first approach is that the antagonizer is only liable if the governor is an oppressor who does not investigate into matters and punish people based on false antagonization.<sup>11</sup> If the governor is a person who investigates into matters, then the antagonizer is not liable even if the governor disgorges the property of others, as disgorgement is based on his investigation and not the antagonization.<sup>12</sup> The second approach is that the antagonizer is not liable in any case because the disgorgement is attributed to the oppressor governor, not to the antagonizer. The general rule of causation provides that when there are two acts, the liability is attached to the immediate one. However, the antagonizer should be prosecuted criminally.<sup>13</sup> The third approach, the *Hanbli* School, is that an antagonizer is liable in any case, and the plaintiff can sue either the governor or the antagonizer.<sup>14</sup>

In the case of the intentional reporting of inaccurate information, I think one can analogize that to antagonization and accordingly hold the CRAs liable for reporting inaccurate information.

## 1.2. Importance of Credit Reporting

The credit information industry is lucrative. In one year, its revenue exceeds three billion dollar in the United States.<sup>15</sup> A basic rule of human behavior explains the importance of credit information. Past performance is the best predictive tool for future performance.<sup>16</sup> Specifically, consumers who have met their financial obligations in the past may be expected to do so in the future. Credit information also enhances a nation’s economy by providing accurate information, which in turn, leads to the appropriate extension or denial of credit. In the U.S., every month, 4.5 billion pieces of information are reported to credit reporting agencies (CRAs) by creditors.<sup>17</sup> Six million times a day, a credit report is requested.<sup>18</sup> CRAs

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<sup>8</sup> NASIRUDDIN ALABANI, SAHIH ALGAMI ASSAGHIR AND ITS ADDITIONS (Authentic Traditions of the Small Collector), at 2/1136, Tradition No. 6700 (The Islamic Office Publishing).

<sup>9</sup> MUHAMMAD ALMARZOQI, LIABILITY OF PERSON’S NEGLIGENCE 156 (1<sup>st</sup> edition, Arab Network for Research and Publishing, 2009).

<sup>10</sup> *Id.* at 148.

<sup>11</sup> *Id.* at 148-49.

<sup>12</sup> *Id.* at 149.

<sup>13</sup> *Id.* at 150.

<sup>14</sup> MUSA ALHAJJAWI, ALIQNA’ IN THE JURISPRUDENCE OF AHMED BIN HANBAL (The Convincing) 2/354, (Abdulatif Alsubki *ed.*, The Knowledge Publishing House).

<sup>15</sup> TRANSUNION WHITE PAPER, THE IMPORTANCE OF CREDIT SCORING FOR ECONOMIC GROWTH 3, *available at* <http://www.transunion.com/docs/interstitial/scoringWhitepaper.pdf>.

<sup>16</sup> Margaret J. Miller, Credit Reporting Systems Around the Globe: The State of the Art in Public Credit Registries and Private Credit Reporting Firms 3, *available at* [http://info.worldbank.org/etools/docs/library/159695/smetech/pdf/Miller\\_CreditReporting.pdf](http://info.worldbank.org/etools/docs/library/159695/smetech/pdf/Miller_CreditReporting.pdf).

<sup>17</sup> NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING at 74 (7th ed. 2010)..

<sup>18</sup> *Id.*



keep more than 400 million credit histories on file.<sup>19</sup> The main CRAs have information on more than 1.5 billion accounts held by more than 190 million people in the U.S.<sup>20</sup> The importance of credit information can be summarized, although not comprehensively, in ten sections.

### 1.2.1. Consumer Access to Credit

Consumers will have access to credit to the extent that credit information is shared. It has been proven the lending rate is higher in countries where there is sharing of the information of debtors.<sup>21</sup> Moreover, in the U.S., information sharing leads to lending diversity. For example, the chance for low-income borrowers to obtain loans increased nearly 70 percent after the passage of the Fair Credit Reporting Act (FCRA thereafter).<sup>22</sup> Also noteworthy is the fact that, since passage of the FCRA, lower down payments are required, and homes ownership among younger households has increased.<sup>23</sup> The flow of credit information is indeed in the interest of the consumers.<sup>24</sup>

### 1.2.2. Making Informed Decisions

With credit information, lenders can make their lending decisions confidently. Lenders in the past relied on their own prediction during interviews with the potential borrowers.<sup>25</sup> However, with the completeness and accuracy of credit information, decisions can be made confidently.<sup>26</sup> On the basis of credit reports, lenders clearly see the behaviors of the borrowers, their histories, and their commitment to pay back. Statistics prove that credit information helps in preventing credit problems.<sup>27</sup> Delinquency of thirty days or more in making mortgages payments was only 3.9 percent during the fourth quarter of 2002.<sup>28</sup> In addition, the delinquency rate for thirty days or more in credit card payments was 4.6 percent.<sup>29</sup> More remarkably, 60 percent of all borrowers never had a late payment in the last seven years.<sup>30</sup>

### 1.2.3. Enhancement of Competition

Credit information sharing encourages entry of new competitors in the credit market.<sup>31</sup> The laws of some countries, such as the U.S., allow lenders to prescreen borrowers. This

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<sup>19</sup> *Consumer Reporting Reform Act of 1994: Hearing Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 103rd Cong. s5136. (1994) (statement of Richard H. Bryan) *Congressional Record Permanent Digital Collection*.

<sup>20</sup> STEVE WEISMAN, 50 WAYS TO PROTECT YOUR IDENTITY AND YOUR CREDIT: EVERYTHING YOU NEED TO KNOW ABOUT IDENTITY THEFT, CREDIT CARDS, CREDIT REPAIR, AND CREDIT REPORTS 127 (2005).

<sup>21</sup> Tullio Japelli & Marco Pagano, Information Sharing, Lending and Defaults: Cross-country Evidence available at <http://www.csef.it/WP/wp22.pdf>

<sup>22</sup> *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: Hearing on "The Importance of the National Credit Reporting System to Consumers and the U.S. Economy" before United States House of Representatives Comm. on Financial Services Subcomm. on Financial Institutions and Consumer Credit*, 8 (2003) (testimony of Michael E. Staten, Director, Credit Research Center, McDonough School of Business, Georgetown University), available at <http://financialservices.house.gov/media/pdf/050803ms.pdf>.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> WEISMAN, *supra* note 20, at 127.

<sup>25</sup> Staten, *supra* note 22, at 13.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 14.

<sup>31</sup> John M. Barron & Michael Staten, *The Value of Comprehensive Credit Reports: Lessons from the U.S. Experience*, in CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY 273, 307 (Margaret J. Miller ed., 2003).

feature allows new lenders to provide their offers to the prescreened consumers; more competition in the credit market and more choices for consumers are the result.<sup>32</sup> Credit cards now are offered without fees or with discounts or promotion offers.<sup>33</sup> The number of credit cards holders increased from 43 percent to 73 percent within an 18-year period (1983-2001).<sup>34</sup>

#### 1.2.4. **Speed and Convenience**

Long and complicated procedures are attributed mostly to the lack of credit information about borrowers. However, with complete and accurate credit information, lenders can make decisions quickly, sometimes within minutes.<sup>35</sup> For instance, during 2001, 48 percent of automobile loan applicants received decisions within an hour. In the same year, twenty-three percent of the applicants received decisions in less than ten minutes.<sup>36</sup>

#### 1.2.5. **Reduction of Credit Cost**

A normal practice, in the absence of credit information, is to increase the interest rate or to ask for collateral to guard against the possibility of default.<sup>37</sup> Interest rates decrease, however, if credit information is available. When the uncertainty associated with the lack of credit information is eliminated, interest rates become lower than they would be otherwise.<sup>38</sup> When lenders know the likelihood loans will be repaid, they are more likely to reduce the borrowing cost. Securitization of loans,<sup>39</sup> available in some countries, increases the cash flow in lender hands, which results in lower credit cost.<sup>40</sup>

#### 1.2.6. **Public Safety**

Credit reports prove to be a useful tool in checking past criminal records of prospective employees, especially in sensitive positions such as school bus drivers or caregivers.<sup>41</sup> The availability of credit information contributes to public safety by stopping crimes, fraud, and identity theft.<sup>42</sup> For example, running background check contributes to help prevent sexual crimes against children who ride school bus. Similarly, identities of elderly people are subject to be stolen by caregivers which can be avoided by running background check.

#### 1.2.7. **Payment Behavior Change**

Credit information sharing incentivizes borrowers to avoid damaging their credit rating. Late payment of their loans may make them high-risk borrowers.<sup>43</sup> A study shows that consumers are more willing to pay their non-financial obligations, such as utility bills, on

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<sup>32</sup> Staten, *supra* note 22, at 16

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 8.

<sup>35</sup> *Id.* at 20; STEVE BUCCI, CREDIT REPAIR KIT FOR DUMMIES 13 (2nd ed. 2008).

<sup>36</sup> Staten, *supra* note 22, at 11.

<sup>37</sup> WEISMAN, *supra* note 20, at 127.

<sup>38</sup> *Id.* at 128.

<sup>39</sup> <http://en.wikipedia.org/wiki/Securitization> Securitization is a “financial practice of pooling various types of contractual debt ... and selling said debt as bonds ... to various investors. The principal and interest on the debt, underlying the security, is paid back to the various investors regularly.”

<sup>40</sup> Staten, *supra* note 22, at 12; Barron & Staten, *supra* note 31, at 307.

<sup>41</sup> Staten, *supra* note 22, at 23.

<sup>42</sup> *Id.*

<sup>43</sup> Barron & Staten, *supra* note 31, at 274.

time if they know the service providers would report payments or defaults to CRAs.<sup>44</sup> The study shows also that service providers, who report fully to CRAs, noted their clients' behavior changes toward payment on time.<sup>45</sup>

### 1.2.8. Reduction of Loan Losses

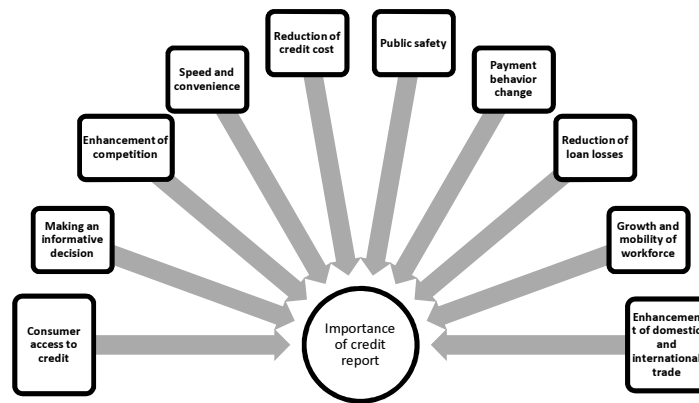
Because of information sharing, lenders can avoid granting loans to borrowers who would default and who would fail to make productive use of their loans.<sup>46</sup>

### 1.2.9. Growth and Mobility of Workforce

Mobility of workers and employees becomes easier with credit information sharing.<sup>47</sup> Human capital can move to any place in the country to take advantage of new opportunities. In the past, people who moved, severing old relationships and establishing new ones, could face difficulty in obtaining credit, because their credit history was unavailable in their new locations.<sup>48</sup> Now, their well-established relationships with their financial institutions in their former locations can be accessed anywhere.<sup>49</sup> After credit information sharing, prospective borrowers would have the same terms and rates as if they were in their previous locations. Credit information sharing encourages mobility that, in turn, results in economic growth.<sup>50</sup>

### 1.2.10. Enhancement of Domestic and International Trade

Credit information sharing leads to broader trade exchange domestically and internationally.<sup>51</sup> Before the introduction of credit information sharing, merchants avoided dealing with out-of-town buyers on a credit basis. The merchants' caution was due to their lack of information about the buyers' creditworthiness. However, after credit information sharing, merchants could learn the creditworthiness of not only out-of-town buyers but even out of continent.<sup>52</sup>



**Figure 1 Importance of Credit Reporting**

<sup>44</sup> Michael Turner et al, Credit Reporting Customer Payment Data: Impact on Customer Payment Behavior and Furnisher Costs and Benefits, Political & Economic Research Council: Information Policy Institute, (2009), at 47.

<sup>45</sup> *Id.* at 34.

<sup>46</sup> Barron & Staten, *supra* note 31, at 306.

<sup>47</sup> *Id.* at 307.

<sup>48</sup> *Id.* at 21.

<sup>49</sup> Staten, *supra* note 22, at 10.

<sup>50</sup> *Id.*; Barron and Staten, *supra* note 31, at 307.

<sup>51</sup> Rafael del Villar et al, *Regulation of Personal Data Protection and of Credit Reporting Firms: A Comparison of Selected Countries of Latin America, the United States, and the European Union*, in CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY 397, 398 (Margaret J. Miller ed., 2003).

<sup>52</sup> Some credit reporting agencies (e.g. Dun & Bradstreet) have dozens of branches outside their original countries.

### 1.3. Legislative History of Credit Reporting Acts

#### 1.3.1. The CIL

The process by which an act is issued in Saudi Arabia is slightly different from most other countries. The legislative power is entrusted to the King, and the Council of Ministers and the *Shura* Council (Saudi Parliament) jointly. An act can be issued in one of three ways. First, an act may be issued by a Royal Order of the King of Saudi Arabia such as the Basic Law of Governance.<sup>53</sup> Second, a minister may propose a bill or regulation related to his ministry to the Council of Ministers.<sup>54</sup> The Council of Ministers, after a review by the Bureau of Experts, reviews a bill or regulations and votes on them article by article and then as a whole.<sup>55</sup> After that, the bill is submitted to the *Shura* Council to study it and vote on it. The bill is submitted to the King and if the two councils agree, the King approves the act. If the two councils disagree, then the King has the power to decide what he deems appropriate.<sup>56</sup> Similarly, the *Shura* Council may suggest a bill or amendments of an existing law, discuss it, and vote on it.<sup>57</sup> After that, the bill or amendment is submitted to the King who in turn submits it to the Council of Ministers. The bill is submitted to the King. If the two councils agree, the King approves the act. If the two councils disagree, then the King has the power to decide what he deems appropriate.<sup>58</sup>

The first credit-reporting act in Saudi Arabia, enacted on July 8, 2008, is to be implemented through regulation. Regulation is to be issued by the appropriate minister in the government. The CIL Implementing Regulation was to be issued no later than 180 days from the date of promulgation of the CIL.<sup>59</sup>

#### 1.3.2. FCRA

In the United States, Congressman Clement Zablocki (Wisconsin) proposed amendments in 1968 to the Truth in Lending Act, which addresses credit reporting issues. However, his proposal was not accepted.<sup>60</sup> Senator William Proxmire (Wisconsin) improved on this proposal and announced his own titled “A Bill to Protect Consumers Against Arbitrary or Erroneous Credit Rating and the Unwarranted Publication of Credit Information” in 1969.<sup>61</sup> The purposes were to guarantee confidentiality and accuracy of consumer information, and to require that CRAs maintain current and relevant information.<sup>62</sup>

Senator Proxmire’s proposal, Senate Bill 823, was called the “Fair Credit Reporting Act” (FCRA). A compromise among competing interests was necessary before the bill could be advanced. The compromise was that consumers would waive their rights to sue CRAs in exchange for having access to files containing their credit information.<sup>63</sup> After the Senate

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<sup>53</sup> Saudi Arabia Basic Law of Governance, Royal Order No. A/90 dated 27 / 8 / 1412 H available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=4>

<sup>54</sup> Law of The Council of Ministers, article 22, Royal Order No. A/13 dated 3 / 2 / 1414 H available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=6>

<sup>55</sup> Law of The Council of Ministers, article 21.

<sup>56</sup> Law of the SHURA Council, article 17, Royal Order No. A/91 dated 27 / 8 / 1412 H available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=5>

<sup>57</sup> Law of the SHURA Council, article 23.

<sup>58</sup> Law of the SHURA Council, article 17, Royal Order No. A/91 dated 27 / 8 / 1412 H available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=5>

<sup>59</sup> The Governor of the Agency shall issue the Implementing Regulation of this Law within one hundred and eighty days from the Law's date of promulgation and it shall be published in the Official Gazette.

<sup>60</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 11.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 14-15.

passed Senate Bill 823, the House-Senate Conference Committee approved it, and both the Senate and the House voted in support of the act in 1970.

### 1.3.2.1. FCRA Amendments

In 1973, 1975, and 1979, Senator Proxmire proposed amendments to the FCRA to solve shortcomings and defects in the act. However, none of these proposals became law.<sup>64</sup> A few modifications to the FCRA were proposed in the form of amendments to laws in such other areas as bankruptcy and child support.<sup>65</sup>

An amendment of the FCRA was proposed on September 1996 in the Senate. The amendment was named “the Consumer Credit Reporting Reform Act of 1996”. Accuracy of consumer credit information was its main concern.<sup>66</sup> In 1997, the FCRA was amended regarding credit report use in an employment context.<sup>67</sup> In 1999, the FCRA was amended as a part of the Gramm-Leach-Bliley Act, which was mainly regarding the regulatory authority of the Federal Trade Commission (FTC), federal banking regulators, and the Federal Reserve Board.<sup>68</sup> In 2001, the FCRA was amended as part of the USA PATRIOT Act<sup>69</sup>, which concerned national security.<sup>70</sup>

In 2003, the Fair and Accurate Credit Transactions Act (FACTA) was proposed and addressed preemption issues, identity theft, accuracy, privacy, furnisher responsibilities, protection of medical information, employer investigations, and other issues. In December 2003, FACTA was passed.<sup>71</sup>

In 2008, the Credit and Debit Card Truncation Clarification Act indirectly amended the FCRA. It mainly allows consumers to sue any person who is willfully not compliant with the requirement of truncating credit or debit card numbers.<sup>72</sup> In the following year, 2009, the Credit Card Accountability, Responsibility, and Disclosure Act added new sections to the FCRA, regarding the deceptive practices of credit reporting, and restricting the use of prescreening of consumers younger than twenty-one years of age.<sup>73</sup>

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was passed. Changes introduced by the Dodd-Frank Act included the creation of a new agency, the Consumer Financial Protection Bureau (CFPB), that assumed many FTC responsibilities, such as rulemaking and enforcement,<sup>74</sup> except enforcing red flag rules, disposal of consumer information rule,<sup>75</sup> and enforcement over small institutions.<sup>76</sup>

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<sup>64</sup> *Id.* at 16.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 17.

<sup>67</sup> *Id.* at 21.

<sup>68</sup> *Id.*

<sup>69</sup> USA PATRIOT Act is an acronym of “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001” that become law in 2001. The USA PATRIOT Act made changes to the following existing acts: the Electronic Communications Privacy Act, Computer Fraud and Abuse Act, the Foreign Intelligence Surveillance Act, the Family Educational Rights and Privacy Act, the Money Laundering Control Act, the Bank Secrecy Act, the Right to Financial Privacy Act, the Fair Credit Reporting Act, the Immigration and Nationality Act, the Victims of Crime Act of 1984, and the Telemarketing and Consumer Fraud and Abuse Prevention Act.

<sup>70</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 21.

<sup>71</sup> *Id.* at 22.

<sup>72</sup> *Id.* at 24.

<sup>73</sup> *Id.* at 25.

<sup>74</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1002, 124 Stat. 1376, (2010) available at: <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>.

<sup>75</sup> U.S.C. § 1088 (a)(2)(D).

<sup>76</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 25.

#### 1.4. Why Credit Reporting Damages?

Credit reporting is typically associated with strong parties such as banks and finance companies. In the absence of monitoring and enforcement of the law, they control the issue of credit reports, and exercise their own judgment in regard to the delinquency, capacity, and creditworthiness of the consumers.

There is a close relationship between the application of credit reporting laws, such as the CIL, and almost every transaction in people's lives. Nobody is able to obtain a loan, buy or lease a car, buy a home, or obtain a credit card without being governed by credit reporting laws.

Credit reporting is very important, but it has many flaws in the form of errors in credit reports, unauthorized use of credit information, and the like, which affect the standing of consumers regarding the terms of a transaction.

One study showed more than fifty percent of the reports studied contained errors, either simple or material.<sup>77</sup> Consumers are inevitably damaged by credit reporting errors, and compensation for such damages is needed. Although affecting negatively the reputation of a consumer may be used in a right way, many consumers may be hurt by this way of reporting because of willful or negligent acts which require us to find a way to redress the consumer who has been hurt by such acts.

#### 1.5. Study Problem

The main issue in this study is how to measure damage attributable to credit reporting errors. How should the consumer be compensated for credit reporting damage under the FCRA and the CIL, considering the CIL is a new act and neither judicial interpretation nor jurisprudential studies are available? Can the consumer be compensated under Islamic law? If so, will the compensation cover all aspects of credit reporting damage? How can we benefit from U.S. law in determining the breach that requires compensation? How can we measure compensation and how much compensation should be granted? One of the goals of this dissertation is to examine the validity of the CIL in accordance with Islamic law, as the governing law, in the Kingdom of Saudi Arabia.

#### 1.6. Structure and Method:

##### *A- Structure:*

After this introductory chapter, Background, chapter two, is intended to supply information to the reader related to the dissertation but not important enough to be part of the body of the dissertation. Chapter two will help the reader to become acquainted with Islamic law resources, important key terms that will be repeated in the dissertation, and a brief history of the industry of credit reporting, resources, mechanism, and cycle of credit information.

Chapter three, Literature Review, is a review of most of the relevant legal literature relating to my dissertation topic in whole or in part. The reader will see how these works are related to my dissertation and how my dissertation differs from those works.

Chapter 4, Credit Reporting Breaches, will define the breaches, then will consist of three sub-chapters:

- Breaches of CRAs,
- Other Breaches, and

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<sup>77</sup> Chi Chi Wu, *Automated Injustice: How A Mechanized Dispute System Frustrates Consumers Seeking To Fix Errors in Their Credit Reports*, 14 N.C. Banking Inst. 139, 144 (2010).

- Credit Reporting Breaches under Islamic Law

Chapter 5, Credit Reporting Damage, will explain the legal definition of damage and damage in the context of credit reporting. The types of damage will be presented and the availability of compensation under U.S., Saudi, and Islamic laws will be analyzed.

Chapter 6, Burden of Proof and Causation, will show who has the burden of proving deviation from reasonable standards and proving damages.

Chapter 7, Credit Reporting Remedies, will present the potential remedies that consumers may gain as a result of credit reporting breaches and ensuing damages.

Chapter 8, Conclusion, will provide to the reader a summary of the dissertation, arguments, results, and recommendations, regarding the current legal framework in the U.S. and Saudi Arabia in light of Islamic law.

***B- Method:***

My dissertation is a theoretical one and does not involve empirical aspects. Although common law tends to practicality by nature, my dissertation does not aim at collecting cases and analyzing them in an empirical framework. This study will examine the following materials:

- U.S. primary and secondary sources including the FCRA, case law, U.S. legislation “statutes, regulations”, legal articles, books, legal dictionaries, annotated law reports, legal treatises, legal encyclopedias, and legal periodicals,
- Primary and secondary Saudi laws including the CIL, legislation, legal articles, books, legal dictionaries, and legal treatises,
- The *Holy Quran*, the traditions of the Prophet, Scholar consensus, analogy, and other sources.

My main method comprises comparison and analysis of laws, and analogy to obtain new rulings that courts may make. The analytical comparison will be presented in chronological stages. First, the dissertation will be divided into several topics based on the subject-matter. Second, the examination in each chapter will start with the rules regulating the respective topic in U.S and Saudi laws. Third, examples or cases supporting the rules will be supplied. Fourth, the strength and weakness of the U.S. and Saudi legal systems’ treatment of credit reporting will be presented. Fifth, the dissertation will offer recommendations to eliminate weaknesses and reform the credit reporting laws in both countries.

I hope my dissertation adds significantly to the field of credit reporting law, and that readers find the information contained herein helpful.

## Second Chapter: Background

In this chapter, I will provide an overview of the Islamic law resources, important definitions, history and resources of credit information, mechanism of credit information analysis and evaluation, and cycle of credit information.

### **2.1 Islamic Law Resources**

Islamic law is derived from a variety of sources. Islamic schools agree on some of them but not others.

#### **2.1.1. Holy Quran**<sup>78</sup>

The *Holy Quran*<sup>79</sup> is the first source of Islamic law.<sup>80</sup> Many Islamic rules are based on verses of the *Holy Quran*. Some rules are based on the wording of specific verses and others on the general meaning of verses that address an issue such as justice, fairness, or morality. Some Islamic rules are mentioned generally in the *Holy Quran* without details but are clarified by the sayings of the Prophet.<sup>81</sup> The meaning of some verses is certain and does not allow for differing interpretations<sup>82</sup>. Other verses are subject to more than one interpretation because of different understandings of the Arabic words.<sup>83</sup> Within the same subject, some of the verses state general rules, while others state specific rules. If the rules are contradicting, the specific controls. However, if there is no contradiction, the specific serves as an exception to the general.<sup>84</sup>

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<sup>78</sup> IAD ALSULAMI, JURISPRUDENTIAL ROOTS (USUL AL FIQH) THAT JURIST IS UNEXCUSED IF DOES NOT KNOW (Tadmoria House, Riyadh, 1<sup>st</sup> ed., 2005); ABBAS SHUMAN, ISLAMIC LEGISLATION SOURCES (Educational House for Publishing, 1<sup>st</sup> ed. 2000).

<sup>79</sup> The *Holy Quran* is compilation of Allah's words that were revealed to the Prophet Muhammad (pbuh) through Archangel Gabriel. The *Holy Quran* has 114 chapters and 6236 verses. The *Holy Quran* is the Scripture of Muslims. It contains law, commandments related to social and moral behaviors, stories, and contains comprehensive monotheistic arguments and proofs of the unity of Allah. The language of the Quran is Arabic. The Arabic text of the *Holy Quran* has remained unchanged over the past centuries. All copies of the *Holy Quran* circulating in the world are identical.

<sup>80</sup> BHALA, *supra* note 7, at 289.

<sup>81</sup> For example, command of establishing prayer is mentioned more than 90 times but the number of prayer or way of prayer is mentioned in detail in the sayings of the Prophet (pbuh).

<sup>82</sup> For example, the command to fast three days during pilgrimage and seven days when the pilgrim goes back to his home (for a person who chooses one way of performing pilgrimage) and is not able to slay an animal. 2:196.

<sup>83</sup> For example, "*quroo*" *Holy Quran* 2:228 means in Arabic both "menstruation and purity of menstruation" even though they have the opposite meaning. However, the sayings of the Prophet clarify the exact meaning of this verse even though scholars do not agree for different reasons. The difference between the two interpretations is if we say that "*quroo*" is the menstruation, then she can remarry only after the end of her third menstruation. If we say that "*quroo*" is the purity of menstruation then she can remarry after the start of her third menstruation because she was divorced in purity (as Islamic law requires) then two cycles of purity have been ended with the start of the third menstruation.

<sup>84</sup> For example, Allah makes the period after which a divorced woman can remarry three "*quroo*" which is either the passage of three menstruations or the passage of three purity of menstruation *Holy Quran* 2:228. This rule should cover every woman. However, another verse specifies generality of the first verse by stating that the period of pregnant woman is the delivery of her baby, so once she delivers her baby she can remarry. 65:4.



### 2.1.2. Tradition of the Prophet: *Sunnah*

The tradition of the Prophet Muhammad is the second source of Islamic law.<sup>85</sup> The tradition of the Prophet is called “*Sunnah*”, which includes sayings of the Prophet, acts of the Prophet, and ratification by the Prophet of sayings or acts done in his presence or with his knowledge.<sup>86</sup> Generally, the two types of *Sunnah* are mass transmitted and lone-narrated transmitted traditions.<sup>87</sup> The mass transmitted tradition is accepted among all Islamic schools as a source of Islamic law. Islamic schools do not differ on the certainty of lone-narrated transmitted traditions<sup>88</sup> as a way of establishing legal rules, but few scholars in the past espoused the view that lone-narrated transmitted traditions are not sources of Islamic law.<sup>89</sup> The *Sunnah* of the Prophet according to the strongest opinion can specify the *Holy Quran*<sup>90</sup>, clarify an abstract verse in the *Holy Quran*,<sup>91</sup> and add new legal rules unmentioned in the *Holy Quran*.<sup>92</sup>

### 2.1.3. Consensus: *Ijma*

The consensus “*Ijma*” is the third source of Islamic law.<sup>93</sup> Consensus is defined as “the unanimous opinion of the recognized religious authorities at any given time on a given legal issue after the death of the Prophet.”<sup>94</sup> Although scholars agree on the concept of consensus, upon the possibility of occurrence of consensus on a legal issue is disagreed. The first approach is that consensus is possible any time. It is not necessary that all scholars speak about the issue. Silent consensus exists on an issue when some scholars who have the ability to speak out do not express an opinion. The second approach is that consensus is not possible. Advocates of this approach point out that scholars live in different places, they have different opinions, and it is not easy to determine whether or when they have reached a consensus on any particular issue. The third approach is that consensus was only possible at the time of the companions of the Prophet. The Prophet’s companions were in reachable places and could agree on any given legal issue. The fourth approach is that one must distinguish between fundamental and non-fundamental legal issues. With fundamental legal issues, consensus is possible because of the clarity of the evidence from the *Holy Quran* or *Sunnah*. With non-fundamental legal issues, it is impossible to reach consensus because of lack of firm evidence.<sup>95</sup>

Scholars who view consensus as possible divide it into verbal, silent, and implied. Verbal consensus is the consensus of all scholars on a legal issue that is expressed verbally. Silent consensus is when scholars opine on legal issues and other scholars do not challenge it with the knowledge and ability to dispute. Implied consensus is derived from the idea that disagreement on a legal issue invalidates all other opinions, except those disagreeing.<sup>96</sup> For

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<sup>85</sup> BHALA, *supra* note 7, at 302.

<sup>86</sup> ALSULAMI, *supra* note 78, at 103; BHALA, *supra* note 7, at 302.

<sup>87</sup> Mass transmitted tradition is a tradition of the Prophet that was transmitted by a mass number of people to a mass number of people whom conspiracy to lie is impossible.

<sup>88</sup> Lone-narrated transmitted tradition is a tradition of the Prophet that is transmitted by trustworthy lone narrators with uninterrupted chains.

<sup>89</sup> ALSULAMI, *supra* note 78, at 111.

<sup>90</sup> For example, the *Holy Quran* rules that inheritance is for children of the deceased 4:11. However, the *Sunnah* specifies that the killer of the deceased, even if he is his son, cannot inherit.

<sup>91</sup> Such as number of prayers, method of prayer, charity minimum requirement, etc.

<sup>92</sup> ALSULAMI, *supra* note 78, at 115. Such as inheritance of grandmother with daughters or prohibition of combination of a woman and her aunt in a polygamous marriage.

<sup>93</sup> BHALA, *supra* note 7, at 313.

<sup>94</sup> ALSULAMI, *supra* note 78, at 124.

<sup>95</sup> *Id.* at 124-125.

<sup>96</sup> *Id.* at 126.

example, when scholars are divided between “A” and “B” approaches, it means that they impliedly agree that approach “C” is not accepted. Consensus is not based on desire, but is based on evidence from the *Holy Quran, Sunnah*, or analogical reasoning.

Scholars disagree on the probity of verbal consensus. The majority of scholars believe that verbal consensus is a source of law.<sup>97</sup> Others believe only consensus of the companions of the Prophet is a source of law.<sup>98</sup> Still others believe consensus is not a source of law at all.<sup>99</sup>

Scholars, too, disagree on the probity of silent consensus. The majority says that silent consensus is a source of law. The silence of other scholars means agreement because of an Islamic rule stating that concealing knowledge once needed is unlawful. Other scholars say that silence is not, by itself, evidence of agreement. Scholars may not speak for different reasons.<sup>100</sup>

Probity of implied consensus is subject to the same types of disagreements. One view is that implied consensus is a source of law. If there are two opinions on a law, the new opinion, rather than the previous conflicting opinion, must be incorrect. The new opinion cannot be considered correct because the community had accepted the previous opinions and the community could not have been wrong.<sup>101</sup> Thus, if this new opinion is considered incorrect, it does not invalidate the previous consensus. Another view rejects probity of implied consensus as source of Islamic law. It is argued that the mere disagreement means there are possibilities of new opinions. When scholars disagree on a law, it means they open the door to other possible opinions. Still another view is that a new opinion can be considered corrected, if it is combined with the previous opinion. However, this approach rejects the new opinion if it rejects the common ground upon which that previous opinion was agreed. For example, when approach “A” is that grandfather inherits the deceased and excludes brothers of the deceased. Approach “B” is that both grandfather and brothers share the inheritance. Approach “C” is not accepted if it deprives the grandfather from inheritance because approaches “A” and “B” allow grandfather to inherit.<sup>102</sup> Finally, the majority does not give preference to consensus of scholars of any given city over the scholars from other cities but rather requires consensus to be from all scholars regardless of their places.<sup>103</sup>

#### 2.1.4. Analogical Reasoning: *Qiyas*

*Qiyas* or analogical reasoning is the fourth source of Islamic law.<sup>104</sup> To apply *Qiyas*, there must be a juridical principle, new legal issue “branch”, and an operative cause found in both juridical principle and the “branch”.<sup>105</sup> *Qiyas* is defined as “establishing a legal rule for a new situation “branch”, similar to the rule of the existing rule “principle”, because of

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<sup>97</sup> They support their opinion with different verses of the Quran, traditions of the Prophet, and logical reasons.

<sup>98</sup> Companion of the Prophet is defined as “a person who met the Prophet, believed in Islam, and died holding that belief.”

<sup>99</sup> ALSULAMI, *supra* note 78, at 128.

<sup>100</sup> Such as fear of oppressive political authority, ignorance of the other opinion, or that he has an undeveloped opinion and has not decided yet.

<sup>101</sup> They support their conclusion by a tradition that the Prophet said: “My community will not agree on an error” but scholars disagree on the authenticity of this tradition.

<sup>102</sup> ALSULAMI, *supra* note 78, at 132

<sup>103</sup> *Id.* at 137; BHALA, *supra* note 7, at 318. I mean the consensus of people of the city of the Prophet (peace be upon him), which some scholars of Malki school considers consensus of its scholars as a source of law regardless of disagreement of other scholars.

<sup>104</sup> BHALA, *supra* note 7, at 319.

<sup>105</sup> *Id.* 319-20.

existence of similar cause.”<sup>106</sup> Therefore, when a scholar has a new legal issue that is not mentioned in the previous three primary sources, a scholar can establish a legal rule for the new issue by analogizing this new issue “the branch” to another legal issue “the principle”, provided that both share the same cause. For example, narcotics are not mentioned in the primary sources; however, scholars found that narcotics are illegal like alcohol. Alcohol is the principle, narcotics are the branch, and they share the same cause which is that both affect the mind. Therefore, narcotics are illegal as alcohol is illegal. The level of cause is irrelevant. Few scholars disagree on the probity of *Qiyas* as a source of Islamic law. All Islamic schools except a few individual scholars accept *Qiyas* as a source of Islamic law.<sup>107</sup>

From the foregoing, one can see that the first two sources are undisputed. Though the third and fourth sources are disputed, the dispute is not strong. In the following sources, the dispute is clearer.

### **2.1.5. Act or Opinion of the Prophet’s Companions**

Islamic schools differ on whether acts or opinions of a companion of the Prophet (pbuh) are a source of law. The acts and opinions disputed are those opinions of the companions that reasonable persons may differ on, when no challenge from other companions to the opinions is reported. Islamic schools take either of two approaches in examining the acts or opinions of a companion of the Prophet as a source of law. The first approach accepts companion acts or opinions as a source of law because of the high probability that the companion learned what he or she is reporting from the Prophet even without disclosing that it came from the Prophet. In addition, companions of the Prophet were the closest people to him and knew his teaching and the meaning of his sayings and acts.<sup>108</sup> The second approach rejects companion acts or opinions as a source of law. Advocates of this approach argue that companions are fallible and their acts or opinions may be result from their own thought, which has no preference over the opinion of other scholars.<sup>109</sup> The third approach is that companion acts or opinions are a source of law only when they are not challenged and are widely accepted among the other companions.<sup>110</sup>

### **2.1.6. Legislation of the People Before Islam**

Legislation of the people before Islam, namely Jews and Christians or other monotheistic religions, is a debated source of law. Legislation means the legal provisions that were imposed upon people before Islam through their holy books and their Prophets. This debate applies only when Islamic law is silent on an issue, and the legal rule of people before Islam does not contradict established Islamic law. In addition, this practice must be conveyed through *Holy Quran* or authentic *Sunnah*. For example, Allah says in the story of the Prophet Joseph that “*They said: "We have lost the (golden) bowl of the king and for him*

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<sup>106</sup> ALSULAMI, *supra* note 78, at 160-168. The principle, branch, and the cause have conditions that must be met in order for the *Qiyas* to be valid. Scholars have more than nine ways to know that the “cause” is what Allah or the Prophet meant as a cause of the principle rule. For example, Allah or the Prophet may specify the cause of a legal rule. For example, a person must ask for permission before getting into a room or house. The Prophet states the cause of such permission is to keep the privacy of the owner from being invaded by the person seeing what is not wanted to be seen. Also important is the scholars’ consensus on a cause of a legal rule. For example, scholars agree that the cause of financial guardianship on an orphan is minority; therefore, guardianship on an orphan in regards to marriage has the same cause because of minority.

<sup>107</sup> ALSULAMI, *supra* note 78, at 173.

<sup>108</sup> *Id.* at 186.

<sup>109</sup> *Id.* at 187.

<sup>110</sup> *Id.*

who produces it is (the reward of) a camel load; and I will be bound by it."<sup>111</sup> Thus, the practice of the prophet Joseph was that it is lawful to reward a person who finds a lost thing. In addition, a person can be a guarantor of the reward giver if the reward is not given to the finder of the lost thing. In this example, the practices are from a monotheistic religion before Islam, conveyed to us through the *Holy Quran*, and do not contradict established Islamic law. Still scholars differ on considering these legal rules as a source of Islamic law.<sup>112</sup>

### 2.1.7. Jurist Preference: *Istihсан*

Scholars differ on the definition of *Istihсан*; thus, they differ on its probity as a source of Islamic law.<sup>113</sup> Some scholars define it as “evidence that is triggered in the mind of jurist without ability to explain it.” This definition is often rejected because it opens the door to everyone to choose a legal ruling without any legal basis.<sup>114</sup> The second definition is that *Istihсан* is “abandoning analogical reasoning for the public interest”<sup>115</sup> or “any evidence in contrast to analogical reasoning.”<sup>116</sup> The majority of scholars reject *Istihсан* if it is based on the first definition. They also deny that *Istihсан* is an independent source of Islamic law if based on the other definitions. *Istihсан* based on those definitions is choosing one form of evidence over the other, or it is part of the other sources, thus, it is not an independent source of Islamic law.<sup>117</sup>

### 2.1.8. Presumption of Existence or Non-Existence of Facts: *Istishab*

Scholars also differ on whether a presumption of the mere existence or non-existence of facts is a source of Islamic law. *Istishab* means literally that a person is not obligated to do something until proof comes to change this presumption.<sup>118</sup> For instance, a person is free of debt until the debt is proven. There are four types of *Istishab*. First, there is the presumption of non-existence of an obligation. For example, it is presumed that no debt exists when there is no proof of debt. Second, there is a presumption of existence of a ruling because there is no proof that the ruling has changed. A husband does not need to prove the continuity of the marriage if the wife contends the divorce without proof.<sup>119</sup> Third, there is a presumption of generality of a ruling with the possibility of specificity by another proof. For instance, a legal rule banning something applies to all people until a group of people is excluded based on a specific legal rule. Fourth, there is a presumption of continuity of consensus governing an issue until there is other proof. For example, scholars agree that a person may use a dry ablution<sup>120</sup> if he does not find water. However, when he sees the water during his prayer, does he have to abort his prayer and do ablution with water? Scholars who adhere to the presumption of continuity of consensus contend that prayer with dry ablution is valid based on consensus, therefore, validity is presumed in the absence of specific proof of invalidity.<sup>121</sup>

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<sup>111</sup> *Holy Quran* 12:72.

<sup>112</sup> ALSULAMI, *supra* note 78, at 190-192.

<sup>113</sup> BHALA, *supra* note 7, at 340.

<sup>114</sup> ALSULAMI, *supra* note 78, 194.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 199.

<sup>119</sup> *Id.* at 200.

<sup>120</sup> Dry ablution is a method of performing ablution before prayer instead of using water to wash body parts. A person uses land soil in a specific way in the case of inability to use water either because of the unavailability of water or because of harm that water may cause.

<sup>121</sup> ALSULAMI, *supra* note 78, at 200.

The majority of scholars consider the first three types of *Istishab* as a source of Islamic law even though they differ about some of the details.<sup>122</sup> A minority of scholars believe *Istishab* is a source in the case of denial, but not positive proof. For instance, when a person is lost and no one knows whether he is dead or alive, he is presumed to be alive under *Istishab*. Nevertheless, he cannot receive a portion of inheritance if one of his relative dies during his absence. Although his death is denied, his rights are not enforced in the absence of proof that he is alive.<sup>123</sup> The strongest opinion is that the fourth type of *Istishab* is not a source of law because it is using what is agreed upon to justify what is being debated. In addition, the consensus ends when a condition of the consensus is missing. For example, the consensus that one may use dry ablution is conditioned upon the unavailability of water; therefore, this consensus ends when he sees water during his prayer and cannot be used to justify a resolution of the debated issue.<sup>124</sup>

### 2.1.9. Unrestricted Public Interest: *Masalih Al-Mursalah*

Establishing legal rules based solely on interest is debated among scholars. There are three types of interest. The first is called nullified interest. It cannot be the basis for a legal rule, because legislators<sup>125</sup> explicitly or impliedly may reject it.<sup>126</sup> For example, a borrower's payment of interest on a loan benefits the lender, but the lender's benefit cannot be the basis for a legal rule because interest is invalid according to *Holy Quran* and *Sunnah*. The second type of interest is one that *Holy Quran*, *Sunnah*, or *Ijma* considers valid. This is an application of *Qiyas*, such as the interest of guarding minds by prohibiting narcotics. Third, there is unrestricted interest, which legislators neither reject nor consider specifically, but its type in general is considered under Islamic law. For instance, Islamic law has no specific rule on building prisons; however, interest of rehabilitating wrongdoers is considered in general under Islamic law. This is the type of interest that is debated as a source of Islamic law. For example, there is no specific rule either accepting or rejecting traffic lights under Islamic law. However, since traffic lights play an important role in guarding life and property, installing traffic lights protects interest.<sup>127</sup>

One approach tends to accept unrestricted interest as a source of law. Advocates of this approach support their position with proofs from the *Holy Quran*, *Sunnah*, and acts of the companions of the Prophet.<sup>128</sup> For unrestricted interest to be a source of Islamic law, they require that four conditions be met. First, the interest must be certain or highly assumed. If the interest is neither certain nor highly assumed, then such interest cannot be a source of Islamic law.<sup>129</sup> Second, the interest must not contradict established Islamic rules from the *Holy Quran*, *Sunnah*, or consensus.<sup>130</sup> Third, the interest cannot be considered if it contracts another interest that is equal or greater.<sup>131</sup> Fourth, the interest must be for a whole group of people, not tailored for private individuals.<sup>132</sup> For example, enacting regulations to protect

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<sup>122</sup> *Id.* at 201.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 202.

<sup>125</sup> Legislator in Islamic law in general means Allah or the Prophet. However, when there is no evidence from the *Holy Quran*, *Sunnah*, or consensus (*Ijma*), then scholars are the legislators.

<sup>126</sup> ALSULAMI, *supra* note 78, at 205.

<sup>127</sup> *Id.* at 206.

<sup>128</sup> *Id.* at 208.

<sup>129</sup> *Id.* at 209; BHALA, *supra* note 7, at 341.

<sup>130</sup> ALSULAMI, *supra* note 78, at 209; BHALA, *supra* note 7, at 342.

<sup>131</sup> ALSULAMI, *supra* note 78, at 209. We may honor such interest if the result of balancing between equal interests is in favor of it.

<sup>132</sup> ABDULA'L ATWAH, INTRODUCTION TO SHARIAH POLICY 149-150 (Imam Univ. Press, 1<sup>st</sup> ed., 1993); BHALA, *supra* note 7, at 342.

wealthy investors is not an interest that should be honored because it is not serving the people as a whole.

#### **2.1.10. Blocking Means that May Result in Evil: *Sadd Al Dharai***

Scholars' blocking means that may result in evil is a disputed source of Islamic law. First, scholars do not dispute that means that certainly result in evil should be blocked.<sup>133</sup> Second, scholars also do not dispute that means that serve an interest and may cause some evil should not be blocked if the interest is greater than the evil.<sup>134</sup> Third, scholars do dispute blocking means that serve an interest but that an individual is using to achieve an evil end. For instance, sale of grape to a manufacturer of intoxicating wine, which prohibited in Islam, is disputed. Sale of grape serves an interest of sale of an allowed item on the one hand, but it leads to an evil end on the other hand. Fourth, similarly, scholars dispute blocking means that an individual uses to serve an interest and that leads to an unintended evil. For example, exchanging gifts serves an interest by promoting love and kindness among people. However, gifts to judges are prohibited because this may lead to injustice and bias because of the gift.<sup>135</sup>

One approach tends to consider blocking the means in the third and fourth as a source of Islamic law.<sup>136</sup> Advocates of this approach support their position with proofs from the *Holy Quran*, *Sunnah*, acts of companions, and reasoning. A second approach rejects considering blocking means in those cases as a source of Islamic law. Blocking means cannot be used as source of law itself but only primary sources can block those means.<sup>137</sup> Blocking the means as mentioned, entails allowing means when obligations cannot be performed without them. Thus, scholars have developed a rule that states, "means to perform obligations take the ruling of obligations if obligations cannot be performed without them."<sup>138</sup>

### **2.2. Textual Semantic of Command and Ban**

One must know the textual semantic of command and ban of the *Holy Quran* and *Sunnah* in order to gain a better understanding of why scholars dispute some textual semantic of evidence from the *Holy Quran* or *Sunnah*. Knowledge of textual semantic helps us interpret the codes and statutes through decoding their text and trying to get the most benefit from them. I will show briefly the allusions of command and ban.

The first issue is whether a command means "obligatory compliance" or "recommended compliance". The majority of scholars believe that command entails obligatory compliance unless accompanied by a presumption that obligatory compliance is not meant. The minority of scholars tend to interpret command as recommended compliance.<sup>139</sup> The second issue is whether the compliance with a command should be immediate or gradual, if no presumption is made either way.<sup>140</sup> The third issue is whether compliance should be repeated or is required just once, again, if no presumption is made either way.<sup>141</sup> The fourth issue is whether a command of a third party means the third party is commanded by the first order. For example, when "A" commands "B" to command "C" to pay charity, is "C" commanded

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<sup>133</sup> ALSULAMI, *supra* note 78, at 211.

<sup>134</sup> *Id.* at 212.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 213.

<sup>139</sup> *Id.* at 222.

<sup>140</sup> *Id.* at 226.

<sup>141</sup> *Id.* at 231.

by “A”’s command or not.<sup>142</sup> The fifth issue is whether a command to act, by itself, is a ban of the opposite act.<sup>143</sup> The sixth issue is whether a command after a ban entails obligatory compliance, recommended compliance, or mere neutrality.<sup>144</sup>

In regards to the “ban”, there are similar issues to those of “command.” The first issue is whether the ban, without a presumption, entails strict prohibition or only reprehensibility.<sup>145</sup> The second issue is whether “ban” entails continuous compliance. The third issue is whether “ban” entails immediate compliance.<sup>146</sup> The fourth issue is whether “ban” means, by itself, a command of doing the opposite.<sup>147</sup> The fifth issue is whether the “ban” after a command means a prohibition or mere neutrality.

The most important issue is whether the ban invalidates the action if the action is done contrary to the ban. Scholars differentiate between ban against the action itself and ban against an attribute of the action. If the ban is against the action itself, then the ban entails invalidity. For instance, the sale of pork under Islamic law is prohibited because the pork itself is impure; therefore, a ban of selling pork entails invalidity of the sale because impurity cannot be corrected.<sup>148</sup> Ban against an attribute of a transaction, but not the transaction itself, is disputed whether it entails invalidity or not. For example, fasting itself is not prohibited but fasting the day of *Eid* “Muslims festival” is invalid.<sup>149</sup> Finally, if the ban is against a circumstance related to the transaction then a dispute arises.<sup>150</sup> In one approach, for example, when one uses usurped water to wash his body parts for ablution, the ablution is valid because the ban is directed toward usurping, not to the ablution. In an alternative approach, however, the ablution is invalid because the condition of ablution, which is to use lawful means to wash the body, is missing.

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<sup>142</sup> *Id.* at 249.

<sup>143</sup> *Id.* at 253.

<sup>144</sup> *Id.* at 259.

<sup>145</sup> *Id.* at 273. Although “prohibition” and “reprehensibility” are both discouraged, “prohibition” entails punishment and “reprehensibility” does not.

<sup>146</sup> *Id.* at 275.

<sup>147</sup> *Id.* at 276.

<sup>148</sup> *Id.* at 280.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 281.

## 2.3. Terms Definitions

Terms must be defined carefully. Legal rights and obligations will be established according to such definitions. In this section, I will provide definitions of terms that will be repeated in the dissertation.

### 2.3.1. Definition of Credit Information

Credit information must be defined carefully. Legal rights and obligations will be established according to that definition. Unlike the CIL, credit information has not been defined explicitly in the FCRA.<sup>151</sup> The FCRA rather defines credit report, which implies a definition of credit information.<sup>152</sup>

The CIL<sup>153</sup> defines credit information as “Information and data on consumers with respect to credit transactions thereof such as loans, installment purchase, lease, credit sale, credit cards, and their commitment to payment.”<sup>154</sup> The Implementing Regulation of the CIL shortens the definition to be only “Information and data on consumers with respect to credit transactions”.<sup>155</sup>

The FCRA defines a credit report as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, 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.”<sup>156</sup>

From the preceding definition, one can infer that credit information in the FCRA is “Information related to consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.”

When one compares the definitions of the CIL and the FCRA, one can see that the FCRA is broader than the CIL. Broadening or narrowing the scope of credit reporting depends on the legislators' intent. I believe Saudi legislators were aware of the scope of the FCRA, but they intended not to follow it because of cultural differences. For example, adopting personal characteristics or mode of living as elements of a credit report may cause social disagreement among people by reporting private information. It is not usual in Saudi Arabia to ask people about personal characteristics or mode of living of their relatives or friends except in marriage situations. If the custom were otherwise, and if people were to ask about one another's employment or the like, social disagreement could result. Actions that could lead Saudi lawmakers try to avoid enacting laws that would provoke social conflict.

### 2.3.2. Definition of a Credit Report

Drafters of the CIL have not distinguished between “credit record” and “credit report” when defining credit report. The CIL defines a credit record as “a report issued by credit companies containing consumer credit information.”<sup>157</sup> Note that the CIL identifies a credit report as a “credit record”. In fact, the credit record should be the “consumer file” not the “credit report” of the consumer. The record of credit information is where all of consumer's credit information is kept in, which is the appropriate definition of the “file”. The FCRA defines the “file” to mean “all of the information on ... consumer recorded and retained by a

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<sup>151</sup> 15 U.S.C. § 1681 (1971).

<sup>152</sup> 15 U.S.C. § 1681a(d) (2006).

<sup>153</sup> CIL, article 1.

<sup>154</sup> CIL, article 1.

<sup>155</sup> CIL Implementing Regulation, article 1. Issued by SAMA's Governor.

<sup>156</sup> 15 U.S.C. § 1681a(d).

<sup>157</sup> CIL, article 1.



consumer reporting agency regardless of how the information is stored.”<sup>158</sup> In addition, the “report” is not a record but rather a snapshot of the “record”. A commentator notes that “report” is what is taken from the file and communicated to third parties.<sup>159</sup> Therefore, “credit report” is a derivative of the “file”.<sup>160</sup> Nevertheless, the CIL defines credit report correctly by stating that it is a “report” containing consumer credit information.

The FCRA defines credit report as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, 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.”<sup>161</sup>

One can see that the CIL defines credit report without mentioning what type it may be, the method by which it may be communicated, or the purpose it may be served for. It ought to be defined as the FCRA does by dividing the report into a regular credit report and investigative report. Even if the investigative report is not applicable in Saudi, it can be defined as an impermissible one. For instance, obtaining information related to character or mode of living should be stated as an impermissible purpose. Moreover, considering oral communication or any communication to be a credit report is essential, in order to avoid disseminating consumer information orally without imposing liability or penalty. For instance, when an employee of CRA communicates information about the consumer through the phone, this conveyed information is considered theoretically not credit report. Finally, permissible purposes should be stated to limit the use of consumer credit information only to needed and legitimate purposes.

The FCRA defines an investigative report as “a [credit] 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.”<sup>162</sup> Therefore, an investigative report deals mainly with information that is related to personal information, not related to financial status that is obtained through personal interview with acquainted people.

### **2.3.2.1. Credit Report Criteria Under the CIL**

From the definition of a credit report in the CIL, one can expect the application of the CIL to depend on whether certain criteria are met.

Under the CIL, the definitions of credit information and credit report are interdependent as credit report is a product of credit information and credit information is the material of credit report. Credit information includes data on consumers with respect to credit transactions such as loans, installment purchase, lease, credit sale, credit cards, and their commitment to payment are credit information. A credit report must meet the following criteria:

- 1- It must be credit information related to consumer creditworthiness (either individual or legal person).<sup>163</sup>

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<sup>158</sup> 15 U.S.C. § 1681a(g).

<sup>159</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 29.

<sup>160</sup> *Id.*

<sup>161</sup> 15 U.S.C. § 1681a (d-1)

<sup>162</sup> 15 U.S.C. § 1681a (e).

<sup>163</sup> BLACK'S LAW DICTIONARY, (9TH ED. 2009). Legal person (artificial person, moral person, fictitious person, juristic person, juridical person) is defined as “An entity, such as a corporation, created by law and given

- 2- It must be in writing in either electronic or paper forms.
- 3- It must be issued by a licensed CRA.

### **2.3.2.2. Credit Report Criteria under the FCRA**

From the definition of a credit report in the FCRA, one can expect such a report to meet certain criteria.

#### **A- The Seven Factors of a Credit Report**

A credit report must be related to one of seven factors: consumer creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.<sup>164</sup> Any slight connection to any of these criteria will be sufficient. For instance, a court held that a communication stating that no credit information or insufficient credit information is available is within the definition of credit report under the FCRA.<sup>165</sup> Information such as one's name, address, social security number and the like are not likely to be credit report because they do not bear on one of the seven factors above.<sup>166</sup> However, if a CRA provides a list of names of creditworthy people to a user, such a list will be a credit report because it bears on a consumers' creditworthiness.<sup>167</sup> Age information constitutes a credit report because age bears on a consumer's credit capacity.<sup>168</sup>

#### **B- CRA Communication**

Credit information must be communicated by a CRA in, an oral, written, or any other way. Credit information kept in file but not communicated is not a credit report.<sup>169</sup>

#### **C- Permissible Purposes**

Credit information must be used or expected to be used or collected for permissible purposes.<sup>170</sup> The ultimate use is not conclusive on whether or not the information is a credit report, so long so the information was collected, used, or expected to be used for a permissible purpose.<sup>171</sup> Assuming the ultimate use as determinative, then users can use a credit report for impermissible purposes and be outside the scope of the FCRA because their purpose is impermissible. Congress did not intend for this to happen.<sup>172</sup> The purpose of collecting information is determined by the reasonable expectations of the CRA. If the CRA expects the information to be used for a purpose that is permissible under the FCRA, the information will be a credit report regardless of its ultimate use.<sup>173</sup>

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certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.”

<sup>164</sup> 15 U.S.C. § 1681a(d)(1).

<sup>165</sup> *Reynolds v. Hartford Fin. Servs. Group Inc.*, 435 F.3d 1081, 1085 (9th Cir. 2006).

<sup>166</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 31.

<sup>167</sup> *Id.* at 32. Although, a court held that a listing of bankruptcy is not a consumer report. However, when contemplating “bankruptcy” in the definition of a consumer report, it is clear that such heading bears on consumers' creditworthiness, therefore, should be a consumer report. *Reynolds v. LeMay Buick-Pontiac-GMC-Cadillac, Inc.*, 06-C-292, 2007 WL 2220203, at \*3 (E.D. Wis. July 30, 2007).

<sup>168</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 32.

<sup>169</sup> *Id.* at 29.

<sup>170</sup> Permissible and impermissible purposes will be explored in the fourth chapter.

<sup>171</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 34.

<sup>172</sup> *Id.* at 35.

<sup>173</sup> *Id.* at 37.

#### **D- FCRA Protects Individuals**

Credit information must be for an individual person, not a business entity.<sup>174</sup> A court held a business entity could not collect damages that resulted from negligence of a CRA under the FCRA because the act is designed to protect individuals.<sup>175</sup>

#### **2.3.2.3. Content of Credit Reports**

##### **A- Content of Credit Reports under the FCRA**

- **Personal Information:** name, age, social security number, home and business addresses, job, previous addresses, marital status, and spouse's name.<sup>176</sup>
- **Financial Information:** estimated income, home and car values, bank accounts, credit accounts, payment histories, credit limit, and mortgage.<sup>177</sup>
- **Public Records Information:** tax lien, bankruptcy, child support delinquencies, and court judgment.
- **Other information:** such as who requested the credit report during the last two years if for employment purpose or for one year if for other purposes, and credit score or any consumer's statement.<sup>178</sup>

##### **B- Content of Credit Reports under the CIL**

- **Personal Information:** name, national identification number, marital status, home and work addresses, educational qualifications, and personal details. It adds the name of a legal person, commercial record number, address, and any other information.
- **Financial Information:** previous and outstanding debts, granted guarantees, the extent of late and on time payment of any owed or disputed amounts, any defaulted accounts that are late or settled or charged off, any installment purchase, deferred payment sale, any financing product.
- **Public Records Information:** credit-based suits, dissolution and liquidation suits, insolvency or bankruptcy suits, insufficient fund checks, and governmental debts.
- **Other information:** who has requested the credit report during the last two years, and any other information that may affect the credit capacity or creditworthiness of consumers.<sup>179</sup>

##### **C- Content of Credit Reports in Saudi Arabia (Saudi Credit Bureau "SIMAH")**

- **Personal Information:** name, birth date, national identification number, marital status, gender, nationality, home and business addresses, phone numbers, and job.
- **Financial Information:** actual income, credit account, defaulted loan as principle, defaulted loan as a guarantor, and notices of any changes or dispute.
- **Public Records Information:** tax lien, bankruptcy, and court judgment.
- **Other information:** such as who has requested the credit report during the last two years.<sup>180</sup>

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<sup>174</sup> 15 U.S.C. § 1681a(c).

<sup>175</sup> *Tilley v. Global Payments Inc.*, 603 F. Supp. 2d 1314, 1329 (D. Kan. 2009).

<sup>176</sup> WEISMAN, *supra* note 20, at 129.

<sup>177</sup> *Id.*; Barron & Staten, *supra* note 31, at 288; NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 75.

<sup>178</sup> 15 U.S.C. § 1681a(d)(1); WEISMAN, *supra* note 20, at 128; NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 75.

<sup>179</sup> CIL Implementing Regulation, article 16.

<sup>180</sup> [http://www.simah.com/News\\_Images/rte\\_SAMPLEAR1.JPG](http://www.simah.com/News_Images/rte_SAMPLEAR1.JPG)

#### 2.3.2.4.Types of Credit Reports

There are different types of credit reports, such as tenant credit reports, employment credit reports, check approval credit reports, insurance reports, risk assessment reports, and many other types of credit reports.<sup>181</sup> However, for the purpose of categorization, credit reports can be divided into two main categories; the nature of the report, and the subject of it.

##### A- Types of Credit Reports in Regards to its Nature

The credit report can be, in regard to the nature, either a general or investigative report.<sup>182</sup> As noted earlier, a general credit report is defined in the FCRA and the CIL.<sup>183</sup> Unlike the FCRA, however, the CIL does not introduce the investigative report.

A credit report can be a general and an investigative report at the same time if it contains information on a consumer's character, general reputation, personal characteristics, or mode of living. In addition, a regular credit report cannot be investigative when it does not contain personal information related to character, general reputation, personal characteristics, or mode of living.

An investigative report, in addition to information contained in a regular credit report, contains information related to a consumer's character, general reputation, personal characteristics, or mode of living as the FCRA defines it.<sup>184</sup>

##### B- Types of Credit Reports in Regards to the Subject of Reports

The credit report can be about either a consumer or commercial subject. A credit report is an integral part of many transactions such as a basic loan or employment.<sup>185</sup> On the other hand, a commercial credit report concerns transactions that involve thousands or millions of dollars. Financial institutions examine, through a commercial report, solvency, credit behavior, and financial capacity of a client before granting loans. The most important and respected credit agency in commercial credit reporting is Dun & Bradstreet.

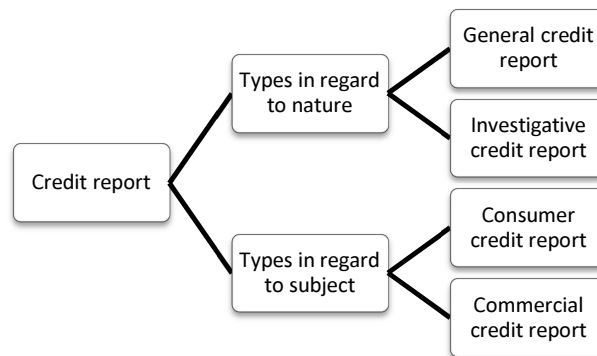


Figure 2 Types of Credit Reports

<sup>181</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 42-47.

<sup>182</sup> 15 U.S.C. § 1681a(d); 15 U.S.C. § 1681a(e).

<sup>183</sup> 15 U.S.C. § 1681a (d)(1).

<sup>184</sup> 15 U.S.C. § 1681a (e).

<sup>185</sup> Staten, *supra* note 22, at 11.

### 2.3.2.5. Exclusions

Both credit report information and excluded credit information fall under the definition of “credit report”. However, for practical reasons, the FCRA excludes certain types of communication from credit reports. The CIL, however, does not contain such exclusions. When credit information qualifies as credit report, the FCRA applies in full force. Yet, for information to be excluded it has to meet certain conditions. Once excluded, the FCRA’s rules do not apply to them. Nevertheless, the excluded communication becomes protected credit report again and loses the attribute of being “excluded” if any condition is missing.

#### **A- Report of First-Hand Experience**

According to the FCRA, any information provided to a CRA by a person who has information of first-hand transactions or experiences with a consumer does not constitute a credit report. The purpose of this exclusion is to allow those who have first-hand information to provide it without fearing that restrictions and responsibilities of CRAs would apply to them.<sup>186</sup> For example, when an employer reports to a CRA that a person worked with him and provides information related to his performance, this communication is not considered a credit report.<sup>187</sup> However, if the first-hand experience is related somehow to information that it is not first-hand experience, then the information is not excluded. For instance, if a company reports its cancellation of credit based on information received from an outside source, this is considered a type of credit report.<sup>188</sup> It is worth mentioning that if first-hand information is not transmitted by first-hand experience furnishers to CRAs but to other users who consequently deny credit to a consumer, they do not have to notify the consumer of the adverse action.<sup>189</sup> This exclusion also applies if persons think that they have first-hand information but do not.<sup>190</sup>

#### **B- Sharing First-Hand Experience with Affiliates**

The FCRA permits persons related by a common ownership or affiliated by corporate control person to share information about first-hand experience about consumers who choose not to opt out of such sharing.<sup>191</sup> This shared information is excluded from being a credit report even if the affiliate who is communicating the information is not the affiliate who dealt with the consumer in the first place.<sup>192</sup>

#### **C- Report of Other Information among Affiliates**

The FCRA excludes other information that may be shared among persons related by common ownership or affiliated by corporate control if a consumer agrees that they may share disclosed information. The chance must be given to the consumer to prevent such

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<sup>186</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 50.

<sup>187</sup> Carolann G. Hinkle, FTC Informal Staff Opinion Letter (July 9, 1998), *available at* <http://www.ftc.gov/os/statutes/fcra/hinkle.shtm> ; A. Dean Pickett, FTC Informal Staff Opinion Letter (July 9, 1998), *available at* <http://www.ftc.gov/os/statutes/fcra/pickett.shtm> ; *Nikou v. INB Nat. Bank*, 638 N.E.2d 448, 453 (Ind. Ct. App. 1994) (Ind. App. 5 Dist., 1994). The court held that information supplied by a bank to a CRA regarding its first-hand experience with the consumer was not within the definition of a consumer report under the FCRA.

<sup>188</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 50.

<sup>189</sup> *Id.* at 51.

<sup>190</sup> *Smith v. First Nat'l Bank of Atlanta*, 837 F.2d 1575, 1578 (11th Cir. 1988). (The court held that bank reporting of first-hand information is excluded from the definition of “credit report” under the FCRA even though the bank was mistaken in the belief.)

<sup>191</sup> 15 U.S.C. § 1681a (d)(2)(a)(i-ii). (Provides, "(1) report containing information solely as to transactions or experiences between the consumer and the person making the report; (ii) communication of that information among persons related by common ownership or affiliated by corporate control").

<sup>192</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 51.

information from being circulated among those persons related by common corporate ownership or affiliated by corporate control.<sup>193</sup> For example, a bank and an insurance company may be affiliated with each other. It is common practice for such affiliates to share information about clients; however, they have to obtain the consumer's consent before they share first-hand experience information.<sup>194</sup> The purpose of this exclusion and the previous exclusion from being a credit report is to allow the flow of information from those who have the experience without being exposed to the stringent restrictions of CRAs.

#### **D- Communication of Decision**

The FCRA excludes the communication of any authorization or approval of a specific extension of credit, directly or indirectly, by an issuer of a credit card or similar device from being a credit report.<sup>195</sup> For example, communicating such information to a merchant is excluded from being a credit report.<sup>196</sup> Likewise, when a bank, the issuer of the client's card, denies or approves a transaction, communicating such denial or approval to the merchant is excluded from being a credit report.

#### **E- Communication of Decision Requested by a Third Party**

When a credit decision is requested by a third party and communicated to a consumer directly or indirectly, this is excluded from being a credit report. For instance, a consumer may want to buy a car from a dealer on an installment basis and the dealer may ask a bank to finance the deal. When the bank conveys its decision to the dealer, such communication is excluded from being a credit report.<sup>197</sup> However, the car dealer has to provide to the consumer the name and address of the bank. The bank, in turn, has to make all of the required disclosures to the consumer under the adverse action notice requirements.<sup>198</sup>

#### **F- Communication on Procurement of Employees**

Any communication made by a person for the purpose of procuring an employee for an employer, or procuring an employment opportunity for a person and used only for that purpose, such communication is excluded from being a credit report. However, certain conditions must be met to qualify for the exclusion:

- 1- The person must regularly be performing such procurement, such as employment agencies;
- 2- Communication falls under the definition of an investigative consumer report if there is no exclusion;

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<sup>193</sup> 15 U.S.C. § 1681a (d)(2)(a)(iii). (Provides, "communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons").

<sup>194</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 52.

<sup>195</sup> 15 U.S.C. § 1681a (d)(2)(b). (Provides, "any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device").

<sup>196</sup> *Wood v. Holiday Inns Inc.*, 508 F.2d 167 (5th Cir. 1975). (The court held that providing a decision of extension or denial of credit does not turn the person to CRA).

<sup>197</sup> 15 U.S.C. § 1681a (d)(2)(c). (Provides, "any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section § 1681m").

<sup>198</sup> 15 U.S.C. § 1681a(d)(2)(c); 15 U.S.C. § 1681m (a); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 56. More information regarding adverse action notice definition is in chapter 4.

- 3- The consumer provides oral or written consent to the nature and scope of the communication before collection of the information;
- 4- The consumer provides oral or written consent to communicating the information to the prospective employer;
- 5- The consumer receives certain disclosures from the agency;
- 6- The person provides written confirmation of the consent of the employee within three days;
- 7- The person does not make an inquiry that if made by a prospective employer of the consumer would violate any applicable Federal or State equal employment opportunity laws or regulations;
- 8- The person discloses in writing to the consumer, no later than five business days after receiving any request from the consumer for such disclosure, the following: the nature and substance of all information in the consumer's file at the time of the request except for the source of information;<sup>199</sup>
- 9- The person notifies the consumer in writing of the consumer's right to request the information above; and
- 10- The information is not used for other purposes.<sup>200</sup>

#### **G- Certain Communication of Employee Investigations**

Communication is excluded from being an investigative report if it meets the following:

- 1- The communication is made to an employer in connection with an investigation of suspected misconduct relating to employment, or in compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization,<sup>201</sup> or any preexisting written policies of the employer; and
- 2- The communication is not made for the purpose of investigating a consumer's creditworthiness, credit standing, or credit capacity;
- 3- The communication is not provided to any person except: an employer or an agent of the employer, any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government, to any self-regulatory organization with regulatory authority over the activities of an employer or employee,<sup>202</sup> or as otherwise required by law;<sup>203</sup> and
- 4- Required disclosures are to be made.<sup>204</sup>

The purpose of this exclusion is to enable employers to investigate misconduct of their employees, such as sexual harassment, without fearing a civil suit by the victim or a civil suit by the harasser.<sup>205</sup>

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<sup>199</sup> Mr. Douglas G. Hahn, FTC Informal Staff Opinion Letter (July 8, 1998), *available at*: <http://www.ftc.gov/os/statutes/fcra/hahn-pt.shtm>

<sup>200</sup> 15 U.S.C. § 1681a(o).

<sup>201</sup> 15 U.S.C. § 1681a (x)(3). The FCRA defines the term "self-regulatory organization" to include, "any self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of (1934)), any entity established under title I of the Sarbanes-Oxley Act of 2002, any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission."

<sup>202</sup> 15 U.S.C. § 1681a (x)(1).

<sup>203</sup> 15 U.S.C. § 1681f. The FCRA permits a consumer reporting agency to furnish "identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency."

<sup>204</sup> 15 U.S.C. § 1681a(x)(2).

<sup>205</sup> See Ryan Peck, *Employers Cornered Between Sexual Harassment and The Fair Credit Reporting Act*, 12 Fall Kan. J. L. & Public Pol'y 69, 72. Before amendments, an employer cannot fire the harasser without an investigation; meanwhile, conducting investigation without the accused approval was not permitted. He will be facing the civil liability if he fires the accused or face the liability if he does nothing to protect the victim.

### 2.3.3. Definition of Public Records

Public records are one of the main sources of credit information. A public record section can be inserted into any credit report. Information on the public record is more reliable than any other source, as it is usually scrutinized and authenticated before it becomes public.

The CIL defines public records as “credit information records maintained by governmental entities such as records of funds and banks offering governmental loans, judiciary authorities, governmental committees, and bankruptcy and insolvency records and the like.”<sup>206</sup> Therefore, information in the hand of abovementioned bodies is public records. In Saudi Arabia, records maintained by the following bodies are considered public records:

- **Governmental funds and banks offering governmental loans:** such as the Real Estate Development Bank, the Industrial Development Bank, the Human Resources Development Fund, the General Investment Fund, the Saudi Arabian Agriculture Bank, and the Saudi Bank for lending.
- **Judiciary authorities:** such as the Supreme Court, Appellate Courts, General Courts, Penal Courts, Administrative Supreme Court, Administrative Appellate Courts, and quasi-judiciary committees. However, any other information not related to credit standing such as criminal charges is not part of a credit report under the CIL.
- **Governmental committees:** It is not clear what is meant by governmental committees in the definition. However, it can be construed to cover any governmental committee that is formed to investigate any case related to finance, such as a committee formed to investigate investment frauds that have been widely spread in Saudi in the last several years. Any information that comes from such governmental committees that falls under the definition may be considered credit information.
- **Bankruptcy and insolvency records:** It is not clear what is meant by this term as nothing is known by this term in Saudi laws. Bankruptcy and insolvency are handled in courts so declarations of bankruptcy and insolvency of any person is considered a judiciary one and is not “special records.”

The FCRA does not define public records. For an example of a definition, I turned to Kansas law, which defines public records as “any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund.”<sup>207</sup>

The CIL and Kansas definitions differ in scope. The CIL limits the scope of public records to those governmental bodies that have any information related to creditworthiness or solvency of a consumer. In addition, in Saudi Arabia, most public records are not available except to those who have legitimate interests in obtaining such records. In contrast, the Kansas Open Records Act defines public records more broadly. However, the Kansas Open Records Act exempts a number of public records from disclosure.

### 2.3.4. Definition of Credit Reporting Agency<sup>208</sup>

According to statistics, in the U.S., 75 percent of mortgage lenders and 80 percent of financial institutions in 2003 relied heavily on credit scoring information provided by CRAs.<sup>209</sup> The FCRA’s drafters developed a detailed definition of a CRA unlike the CIL’s

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<sup>206</sup> CIL, article 1.

<sup>207</sup> Kan. Stat. Ann. § 45-217(f).

<sup>208</sup> Credit reporting agency is known as credit reporting agency, credit bureaus, or credit reference agencies for consumer reporting, and mercantile agencies, credit companies, credit associations, or merchants’ protective associations for commercial reporting.

<sup>209</sup> <http://business.highbeam.com/industry-reports/business/credit-reporting-services>



drafters. The FCRA's drafters focused on activities that are characteristic of a CRA rather than an individual or a business entity. The fruits of vigilant drafting are clear.

The CIL defines a CRA as "credit information companies licensed to collect, maintain credit information on consumers and provide the same to members upon request."<sup>210</sup> The FCRA defines a CRA more elaborately as "any person"<sup>211</sup> 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."<sup>212</sup>

It is unclear what constitutes "regularly engages" under the definition of a CRA. The FTC staff Commentary says that "providing consumer credit information one time is not sufficient to meet the definition."<sup>213</sup> Courts addressed the issue more clearly. A court held that since "regular basis" has not been defined in the FCRA, the court could look into the Fair Debt Collection Practices Act (FDCPA) as an analogous statute. The FDCPA uses a similar phrase in one consumer protection act. Therefore, "regular basis" means "at fixed and certain intervals, regular in point of time." It means "usual, customary, normal or general ... Antonym of casual or occasional."<sup>214</sup>

Under the FCRA, assembling or evaluating information reported to third parties is a characteristic of a CRA. The FCRA does not define "assembling," although the FTC Staff Opinion states that collecting or gathering, as the common meaning of "assembling" must be used.<sup>215</sup> Furnishing collected information to third parties is an indispensable element of CRA activities. Therefore, furnishing the information by an employee to an employer, or by an agent to a principal, is not within the definition. However an independent contractor is within the definition.<sup>216</sup> Similarly, furnishing information to a joint lender or a joint user is not within the definition as they are mere users of the information for a permissible purpose.<sup>217</sup>

The definitions of CRA in the CIL and FCRA differ in an important way. Unlicensed CRAs are out of the scope of the CIL.<sup>218</sup> Therefore, when for instance, a person or a charitable organization (legally not a company under Saudi law) regularly collects information regarding consumers and supplies it to a third party, that person or charitable organization is not a CRA under the CIL. Hence, obligations and liability that are provided by the CIL will not be available because this practice is out of the CIL's scope.<sup>219</sup> It is, indeed, a punishable practice to engage in credit reporting without a license.<sup>220</sup> Conversely, the FCRA governs all such possibilities because of the way the drafters defined CRAs.

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<sup>210</sup> CIL, article 1.

<sup>211</sup> 15 U.S.C. § 1681a (b). (Defines, "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.")

<sup>212</sup> 15 U.S.C. § 1681a(f).

<sup>213</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 805.

<sup>214</sup> *Johnson v. Fed. Express Corp.*, 147 F. Supp. 2d 1268, 1275 (M.D. Ala. 2001). (The court held that providing handwriting analysis for one time does not constitute "regular basis")

<sup>215</sup> Richard LeBlanc, FTC Informal Staff Opinion Letter (June 9, 1998) *available at*: <http://www.ftc.gov/os/statutes/fcra/leblanc.shtml>

<sup>216</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 60.

<sup>217</sup> *Id.* at 61.

<sup>218</sup> A license may be granted to a company that provides the followings: founders' names and shares, article of incorporation, proof of payment of shares, copies of founders' IDs, detailed description of the operating system, a feasibility study, operation plan, company structure, and payment of Saudi Riyal 50,000.

<sup>219</sup> Remedies may be available under other legal principles.

<sup>220</sup> CIL, article 12-13.

It is worth mentioning that the FCRA definition of CRAs does not cover governmental bodies that provide information to whoever requests it whether or not for a fee. It is possible that a governmental body with public records is considered a CRA under a literal reading of the definition; however, legislators do not intend to include governmental bodies holding public records under the definition of CRA.<sup>221</sup> Being a CRA requires keeping information confidential, unless for permissible purposes of the FCRA, which is contrary to the governmental function of providing public records.<sup>222</sup>

#### **2.3.4.1. CRA Criteria under the CIL**

Under the CIL, a natural person cannot be a CRA. The FCRA's approach is more practical and pragmatic than the CIL's. Legislators in Saudi Arabia are predisposed to impose many restrictions on any given industry for protection of the public. While legislators in Saudi Arabia should focus on imposing restrictions and preventing non-specialists from engaging in credit reporting, they should also take into consideration other circumstances. It is possible that persons will engage in credit reporting illegally or unknowingly, and their acts may fall under the definition of credit reporting. Although the CIL imposes penalties upon persons who engage in such acts,<sup>223</sup> criminalization of their acts is not sufficient.

Many issues related to the definition of CRA are unresolved, such as usage of information, damages resulting from such usage, and the like. It is true that such issues will be treated under different legal theories, but what is the benefit of an act if the act does not solve issues that the act is designed to solve?

An entity qualifies as a CRA if it meets these criteria:

- 1- It must be a company. A legal definition of company is not stated in the CIL while the CIL Implementing Regulation states that it should be a public joint stock company with capital of no less than fifty million Saudi Riyal.<sup>224</sup>
- 2- It must be licensed by the Saudi Arabian Monetary Agency (SAMA).
- 3- It must collect, maintain, and provide credit information about consumers to members<sup>225</sup> to its exchange agreement.

Many forms of CRAs under the FCRA are not CRAs under the CIL such as creditors, natural persons, governmental subdivision or agency, collection agencies, and the like as they do not satisfy the criterion of being a company or being licensed or both.

#### **2.3.4.2. CRA Criteria under the FCRA**

Under the FCRA, any person can be a CRA if the person meets certain requirements. In drafting the FCRA, legislators were mainly concerned with the protection of consumers.

Any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity can be a CRA if it:<sup>226</sup>

- 1- Regularly engages in whole or in part;

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<sup>221</sup> *Ollestad v. Kelley*, 573 F.2d 1109, 1110 (9th Cir. 1978). (The court held that the FCRA does not apply to records held by federal agencies because of the absence of evidence of Congressional intent to include federal agencies within the statutory definition of "consumer reporting agency.")

<sup>222</sup> Ms. Gail Goeke, FTC Informal Staff Opinion Letter, (June 9, 1998) *available at*: <http://www.ftc.gov/os/statutes/fcra/goeke.shtml>

<sup>223</sup> CIL, article 12-13.

<sup>224</sup> CIL, Implementing Regulation, article 3. Fifty million Saudi Riyals equals \$13,333,333. (3.75 SR = \$1).

<sup>225</sup> CIL, article 1. Members are defined as "Any government or private entity which is party to a credit information exchange contract with at least one credit information company."

<sup>226</sup> 15 U.S.C. § 1681a(f).

- 2- In the practice of assembling or evaluating consumer credit information or other information on consumers;
- 3- For the purpose of furnishing consumer reports to third parties and
- 4- Uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Consequently, a CRA may take many forms and it is not limited to an entity declaring itself a CRA. For instance, a creditor may become a CRA by regularly assembling and evaluating credit information about consumers and providing it to third parties.<sup>227</sup> Another example is a collection agency, which may become a CRA if it regularly provides information about consumers to third parties.<sup>228</sup> Check guaranty agencies, check approval agencies,<sup>229</sup> and tenant screening companies can be CRAs.<sup>230</sup> Finally, detective employment agencies, employers, college placement offices, attorneys, accident reporting bureaus, and telephone companies are CRAs if their activities meet the FCRA definition.<sup>231</sup> At least, they may be CRAs as long as the information they convey to third parties is not about first-hand experience.<sup>232</sup>

The FCRA imposes additional obligations on nationwide CRAs. Nationwide CRAs are CRAs that compile and maintain files on a nationwide basis. They have to provide free annual disclosure,<sup>233</sup> maintain a toll-free telephone number,<sup>234</sup> maintain notification systems with other reporting agencies for opt-out regarding prescreening practice,<sup>235</sup> implement automated reinvestigation systems,<sup>236</sup> include fraud and active military alerts,<sup>237</sup> review complaints transmitted by the FTC and provide reports,<sup>238</sup> develop and maintain procedures regarding identity,<sup>239</sup> submit an annual summary report to the FTC on consumer complaints received by the agency on identity theft or fraud alerts,<sup>240</sup> and refrain from using any means to circumvent treatment as a nationwide CRA.<sup>241</sup>

Finally, there are nationwide and non-nationwide specialty CRAs that provide credit information regarding specific fields such as medicine and that may include residential histories, check-writing histories, employment histories, and insurance claims.<sup>242</sup> Resellers of credit information are treated under the FCRA as CRAs but they have lesser obligations than CRAs.

### 2.3.5. Definition of User of Credit Report

Neither the FCRA nor the CIL defines a user of credit reports. Under the CIL, however, a member of a CRA can be a user or a furnisher of information or both. A member is defined

<sup>227</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 68.

<sup>228</sup> *Id.* at 69.

<sup>229</sup> *Mangum v. Action Collection Serv., Inc.*, 2006 WL 2224067, at \*2 (D. Idaho Aug. 2, 2006). (The court granted motion for discovery stating that “publishing a list of consumers from whom retail businesses should not accept checks ... ventures beyond the realm of mere debt collection and into the realm of consumer reporting”).

<sup>230</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 43.

<sup>231</sup> *Id.* at 70-71.

<sup>232</sup> *Id.* at 69.

<sup>233</sup> 15 U.S.C. § 1681j(a).

<sup>234</sup> 15 U.S.C. § 1681m(a)(2)(A).

<sup>235</sup> 15 U.S.C. § 1681b(e)(6).

<sup>236</sup> 15 U.S.C. § 1681i(a)(5)(D).

<sup>237</sup> 15 U.S.C. § 1681c-1(a)-(c).

<sup>238</sup> 15 U.S.C. § 1681i(e)(3).

<sup>239</sup> 15 U.S.C. § 1681s(f)(1).

<sup>240</sup> 15 U.S.C. § 1681s(f)(3).

<sup>241</sup> 15 U.S.C. § 1681x.

<sup>242</sup> 15 U.S.C. § 1681a(w).

as “any governmental or private entity which is party to a credit information exchange contract with at least one credit information company.”<sup>243</sup> Therefore, any entity that has a contract with a CRA to receive or furnish credit information is considered a user of a credit report.

One may infer from FCRA sections that, in general, a user of credit reports is “person who uses a credit report for a purpose.” The purpose does not have to be a permissible one to fall under the definition. Using credit report for any purpose is considered as usage.<sup>244</sup> One commentator defines users as “those who purchase consumer reports from reporting agencies and even on occasion those who use information about consumers obtained from non-consumer reporting agencies.”<sup>245</sup> Courts differ in defining a user of credit reports. When considering whether the use of a credit report was lawful, some courts have not focused on the definition of a user of the report but rather looked at the purpose of the use. For example, a court held that obtaining a credit report on an employee’s spouse without a permissible purpose is a violation. The court did not discuss whether the person who obtained the credit report was a user or not.<sup>246</sup> Other courts found that the mere requesting and obtaining of a credit report even without putting it to a particular use, qualified a person to be a “user”. In one case, a defendant’s obtained a credit report for a purpose of verification that a charge had been received and recorded was considered as “use”.<sup>247</sup> Moreover, the court held that the mere obtaining of a credit report constitutes use under the FCRA.<sup>248</sup> Another court considered whether a person is expected to use a credit report. If that person is expected to use it in the ordinary course of business, then that person is a user of a credit report.<sup>249</sup> It is not clear whether replacement of “any user” with a “any person” in many sections of the FCRA after amendments would change the courts’ interpretation of the “user” definition or not. Examples of users of credit reports are creditors, governmental agencies, debts collectors, employers and the like.<sup>250</sup> A divorce attorney and a private investigator qualify as users under the FCRA.<sup>251</sup>

### **2.3.6. Definition of Furnisher of Credit Information**

As mentioned earlier, the CIL’s definition of members covers both the user and furnisher of credit information. Therefore, any entity is a furnisher if it has a contract to exchange information with a CRA or to supply information to a CRA. The FCRA does not define furnisher of information. Commentators offer a definition, although it is circular, because it characterizes furnisher as “a person who furnishes information to a consumer reporting agency.”<sup>252</sup> Case law defines “furnishers” as “an entity, which transmits information concerning a particular debt owed by a particular consumer to consumer reporting agencies ...”<sup>253</sup> It is worth mentioning that since information shared by affiliate companies is excluded from the definition of credit report, affiliate companies are not furnishers of information.<sup>254</sup>

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<sup>243</sup> CIL, article 1.

<sup>244</sup> 15 U.S.C. § 1681e.

<sup>245</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 27.

<sup>246</sup> *Zamora v. Valley Federal Sav. & Loan Ass'n of Grand Junction* 811 F.2d 1368, (10th Cir. Colo. 1987).

<sup>247</sup> *Zeller v. Samia*, 758 F. Supp. 775, 779 (D. Mass. 1991).

<sup>248</sup> *Id.*

<sup>249</sup> *Northrop v. Hoffman of Simsbury Inc.*, 134 F.3d 41, 49 (2d Cir. 1997).

<sup>250</sup> 15 U.S.C. § 1681b(b)(1); 15 U.S.C. § 1681e(3); 15 U.S.C. § 1681m(g).

<sup>251</sup> *Berman v. Parco*, 986 F. Supp. 195, 198 (S.D.N.Y. 1997).

<sup>252</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 222.

<sup>253</sup> *Carney v. Experian Info. Solution Inc.*, 57 F. Supp. 2d 496, 501 (W.D. Tenn. 1999); *DiMezza v. First USA Bank*, 103 F. Supp. 2d 1296, 1299 (D.N.M. 2000).

<sup>254</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 223.

### 2.3.6.1. Method of Furnishing Information

Furnishers of information provide credit information to CRAs in paper form or in electronic form depending on the contract governing their relationship. Furnishers supply information in paper form if they are small or have no technical infrastructure. Some governmental agencies also supply credit information in paper form.<sup>255</sup> In the case of regular reporting, furnishers use an electronic form such as Metro 2 Format.<sup>256</sup> If furnishers want to make corrections to information reported earlier, then they may use Universal Data form in making corrections.<sup>257</sup> Finally, furnishers use Automated Consumer Dispute Verification (ACDV) of e-OSCAR system in dispute investigations.<sup>258</sup>

### 2.3.7. Definition of Consumer

The FCRA defines consumer as an “individual”,<sup>259</sup> which excludes legal entities from being protected by the FCRA, although they are protected by states’ laws.<sup>260</sup> “Individual” covers any individual not only individuals involved in consumer transactions that are related to personal, family or household credit.<sup>261</sup> It is worth mentioning that a consumer must be identifiable, otherwise, the FCRA would not apply.<sup>262</sup> It is likely, though not certain, that the FCRA applies in the case of a credit report on a sole proprietorship as a business entity.<sup>263</sup> The CIL defines consumer broadly to include both individual and legal entities. A “consumer” is defined as “any natural or corporate person engaging in a credit transaction.”<sup>264</sup> Requiring engaging in a credit transaction to be a consumer, would exclude categories of people who have no credit transactions even though credit information is being circulated about them. This in turn, leaves them with no protection under the CIL. For instance, it is possible that a credit report could be issued about a person by mistake because of a similarity in names; hence, the person would not be protected by the CIL under the applicable definition because that person is not engaging in a credit transaction.

I suggest that both the FCRA and the CIL define “consumer” in a precise way. The FCRA should define consumer as “an individual who is the subject of a credit report.” Consumer under the CIL should be defined as an “individual or business entity about whom the credit report is issued”. By adopting my suggestion, the scope of the FCRA and the CIL will be the same as legislators intended them to be but the definition will be more precise. My suggestion is not intended to change the scope of “consumer” under both acts.

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<sup>255</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 224.

<sup>256</sup> Metro 2 is a standard automated format for furnishing information to consumer reporting agencies created by Consumer Data Industry Association. It has different fields and segments to be filled and submitted electronically to credit reporting agencies.

available at: <http://www.cdiaonline.org/Metro2/content.cfm?ItemNumber=853&pnItemNumber=506>

<sup>257</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 245. Universal Data Form is a form contains codes of status of an account and any changes thereof used by CRA to document disputes raised by consumers.

<sup>258</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 256.

<sup>259</sup> 15 U.S.C. § 1681a(c).

<sup>260</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 786 (1985).

<sup>261</sup> 72 Fed. Reg. 61424 (Oct. 30, 2007).

<sup>262</sup> *McCready v. eBay Inc.*, 453 F.3d 882, 889 (7th Cir. 2006). (The court held that a consumer must be identifiable, therefore, the plaintiff is not within the meaning of the FCRA because of anonymity in eBay website).

<sup>263</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 30.

<sup>264</sup> CIL, article 1.

## 2.4. History and Resources of Credit Information

### 2.4.1. History of Credit Information in General

Credit information results from accounting, which can be traced back before the invention of writing.<sup>265</sup> Activities associated with accounting included sales, leases, loans and the like. Every debt related to a tangible thing or service was symbolized in tokens. Tokens were kept in sealed envelopes containing debtors' accounts. This practice developed over time after the invention of writing.<sup>266</sup> Credit information is very old. Merchants were keeping information on defaulters, procrastinators, and bankrupt people. Accounting or bookkeeping is not a sole practice in one culture but in most if not all cultures.<sup>267</sup> Historically, credit information disseminated through networks made up of family, kinship, marriage, religious people and other means.<sup>268</sup>

I believe it is human nature to disparage a person who does not fulfill his promises. Disparagement serves as a means of revenge on one hand and a means of alerting others not to deal with him on another hand. Islamic jurists discussed this matter in detail in *Hagr*, which is the garnishment of properties and the money of debtors. Ibn Qudamah says, "It is recommended to announce garnishment to the public, so people may avoid dealing with a bankrupt person."<sup>269</sup> Announcement of garnishment is considered these days to be a sort of public record.

One can divide the modern industry of providing credit information into two types: corporate credit information agencies and individual credit information agencies. Individual credit information agencies existed before corporate credit information agencies. The first organization<sup>270</sup> was founded in 1801 and was called Britain's Society of Mutual Communication for the Protection of Trade. Its purpose was to exchange information on consumers for no profit. It involved more than two thousand members who agreed to supply information about their clients in regards to creditworthiness.<sup>271</sup>

The abovementioned organization was an example of an industry group that shares information. In the U.S., third party providers of credit information started via corporate credit information agencies. They started in 1820, and existed earlier than individual credit information agencies, which did not start until 1870.<sup>272</sup> Corporate credit information agencies emerged in 1820 but were not successful until 1841 when an entrepreneur named Lewis Tappan started his own credit agency to serve his business and other merchants. Tappan established his agency in 1841 four years after the financial crisis hit the U.S. in 1837.<sup>273</sup> Tappan was an abolitionist, and many people who believed the end of slavery would affect their business boycotted him. Tappan had to extend credit to run his business. Extending credit required keeping record of clients and judging their creditworthiness. He

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<sup>265</sup> Salvador Carmona & Mahmoud Ezzamel, *Accounting and Forms of accountability in ancient civilizations: Mesopotamia and ancient Egypt*, 20 *Accounting, Auditing & Accountability J.* 177, at 180 (2007).

<sup>266</sup> *Id.* at 185-86.

<sup>267</sup> *Id.* at 185.

<sup>268</sup> Rowena Olegario, *Credit Reporting Agencies; A Historical Perspective*, in *CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY* 115, 118 (Margaret Miller ed., 2003).

<sup>269</sup> 4 *IBN QUDAMAH ALMAQDISI, ALMOGNI* 353 (Cairo Library, 1968).

<sup>270</sup> One article mentions an older organization but the author asks not to cite her article as the article still in the initial stage.

<sup>271</sup> Rowena Olegario, *Credit-Reporting Agencies: Their Historical Roots, Current Status, and Role in Market Development*, 8, available at: [http://siteresources.worldbank.org/INTWDRS/Resources/477365-1257315064764/2429\\_olegario.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/477365-1257315064764/2429_olegario.pdf)

<sup>272</sup> Josh Lauer, *The Good Consumer: Credit Reporting and Invention of Financial Identity in the United States, 1840-1940*, (2008) (unpublished Ph.D. dissertation); Olegario, *supra* note 271, at 10.

<sup>273</sup> Olegario, *supra* note 271, at 11.

discovered credit reporting could be a good business. Other merchants turned to Tappan for advice about their clients and their creditworthiness, which led him finally to expand his business and open branches in other cities.<sup>274</sup>

In 1849, a new company, Bradstreet emerged. Bradstreet merged later with Lewis Tappan's credit reporting agency in 1933 to be Dun & Bradstreet,<sup>275</sup> the biggest credit reporting agency in the whole world. National Association of Credit Management (NACM) was founded in 1896 to arrange efforts, standardize, and lobby for the interest of the industry.<sup>276</sup> Associated Credit Bureaus, Inc., (ACB) developed a procedure to share information among credit bureaus in 1906.<sup>277</sup>

In the U.S., there are four major credit agencies for consumer and corporate information, although there are hundreds of smaller agencies.

### **Dun & Bradstreet**

Bradstreet was founded as a rival to Lewis Tappan's credit reporting agency in 1849. The Lewis Tappan agency made many changes before it merged with Bradstreet. Tappan turned over his credit agency to his former clerk, Benjamin Douglass, who in turn turned over the agency after several years to his brother-in-law Robert Graham Dun. They were competitors until they decided that merger was in the best interest of their two entities and the industry. The merger was accomplished in 1933 and the business is now known as Dun & Bradstreet.<sup>278</sup>

The importance of Dun & Bradstreet is not debatable. Its statistics are considered not only official resources but also are used by governmental agencies to formulate policies in the U.S.<sup>279</sup>

### **Equifax**

Equifax is one of the major credit agencies in the U.S. that provides both personal and corporate credit information. Equifax also has branches in more than fifteen countries in North and South America and Europe.<sup>280</sup>

The brothers Cator and Guy Woolford founded Equifax in 1898. It has been named "Retail Credit" which was changed later to Equifax in 1979.<sup>281</sup>

### **Experian**

Experian also is another of the major credit agencies in the U.S. Experian was founded in 1901, and it was known formerly as Cleveland Cap Screw Co. It has branches in more than fifty countries worldwide.<sup>282</sup>

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<sup>274</sup> Lauer, *supra* note 272, at 43.

<sup>275</sup> Olegario, *supra* note 271, at 20.

<sup>276</sup> *Id.* at 36.

<sup>277</sup> Robert M. Hunt, A Century of Consumer Credit Reporting in America, Federal Reserve Bank of Philadelphia, (2005), at 11 available at : <http://www.philadelphiafed.org/research-and-data/publications/working-papers/2005/wp05-13.pdf>

<sup>278</sup> Available at [http://www.dnb.com/us/about/company\\_story/dnbhistory.html](http://www.dnb.com/us/about/company_story/dnbhistory.html) as on 07/13/2010.

<sup>279</sup> Olegario, *supra* note 271, at 21.

<sup>280</sup> Available at [http://www.equifax.com/about\\_equifax/company\\_profile/en\\_us](http://www.equifax.com/about_equifax/company_profile/en_us) as on 07/13/2010.

<sup>281</sup> Available at <http://www.fundinguniverse.com/company-histories/Equifax-Inc-Company-History.html> as on 01/12/2011.

<sup>282</sup> Available at <http://www.fundinguniverse.com/company-histories/Experian-Information-Solutions-Inc-company-History.html> as on 01/12/2011.

## **TransUnion**

TransUnion is one of the more recent credit information agencies in the U.S. It was founded in 1968 and its services cover both personal and corporate credit information. TransUnion has branches in more than twenty-five countries.<sup>283</sup>

As mentioned earlier, there are hundreds of CRAs in the U.S., but, most of them are small or medium size. They are either supplying information to the major credit agencies or buying services from them in order to provide it to their own clients.

### **2.4.2. Credit History in the Kingdom of Saudi Arabia**

The Kingdom of Saudi Arabia is a new country in comparison to other countries such as the U.S.. Saudi Arabia was formed Sep. 19<sup>th</sup>, 1932.<sup>284</sup> Saudi Arabia started almost every commercial development either by creating it or by importing it from others.

Saudi Arabia started the credit information industry late. One can divide the history of credit information in Saudi Arabia into two segments; private sector efforts and chambers of commerce efforts. The following paragraphs will explain these two segments, noting that little public information is available.

#### **2.4.2.1. Private Sector Efforts**

##### **A- Banks in Saudi Arabia**

Historically, credit reporting in most countries began with banks sharing negative information about their customers.<sup>285</sup> One can say that banks were the first entrants into the credit information industry in Saudi Arabia. Banks began in Saudi Arabia in 1885 when a British banking company opened a branch in Jeddah.<sup>286</sup> Many Saudi and foreign banks were established after that.<sup>287</sup> After the establishment of SAMA on April 20, 1952, it fully supervised the banking sector.<sup>288</sup>

SAMA established many departments, one of which is the Banking Inspection Department, which controls a registry that connects banks operating in Saudi Arabia. When the SAMA registry was started, every bank was required to provide information on defaulted individuals and corporations. The SAMA registry then provided information about any applicant to the requesting bank. It was not like current credit reporting agencies, but was mere scattered negative information in paper form. The process for delivering information to the requesting bank took a long time and required much procedure. In 1998, SAMA felt it was important to hand over the task to a private entity under its supervision. After several meetings and consultations with the International Bank and Experian credit reporting company, SAMA agreed to the establishment of a new company owned by Saudi banks in Saudi Arabia which is known as SIMAH.<sup>289</sup>

##### **B- Saudi Credit Bureau (SIMAH)**

SIMAH was founded by ten national banks in Saudi Arabia in 2002 and started operating in 2004.<sup>290</sup> SIMAH inherited the SAMA registry. SIMAH operates professionally

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<sup>283</sup> Available at <http://www.transunion.com/corporate/aboutUs/whoWeAre/history.page> as on 01/12/2011.

<sup>284</sup> Available at <http://www.info.gov.sa/portals/kingdom/KingdomHistory.html> as on 01/12/2011

<sup>285</sup> Barron & Staten, *supra* note 31, at 274.

<sup>286</sup> Available at [\\_](#)

<sup>287</sup> ABDULMAJID ABBODAH, BANKING SYSTEM IN SAUDI ARABIA at 1 (Pub. Admins. Inst., Riyadh, 1<sup>st</sup> ed., 1990).

<sup>288</sup> Available at <http://en.wikipedia.org/wiki/Jeddah> as on 01/12/2011.

<sup>289</sup> Interview with Mr. Adel Altwaijri, Public Relations and Marketing Manager, SIMAH (July 20, 2010).

<sup>290</sup> Available at [http://www.simah.com/cms/cms\\_page.aspx?page\\_id=15](http://www.simah.com/cms/cms_page.aspx?page_id=15) as on 01/12/2011.



in a way that is comparable to other credit agencies worldwide. SIMAH works alone in the private sector of credit reporting industry in Saudi Arabia until this date.

SIMAH's objectives are:

- Encouraging credit culture on all sides, including consumer and commercial;
- Generating a credit environment based on transparency and providing reliable and up-to-date credit information;
- Helping credit providers to make right and objective finance decisions by providing them with collected, categorized, and analyzed credit information so that they can measure their clients' credit history and solvency;
- Helping clients to have accountable, diversified banking services. At the top is credit facility with less cost and obligations;
- Creating the best environment for creditors to make quick and the best finance decisions;
- Reducing payment risks; and
- Raising client awareness of benefits from their credit history by less commissions and requirements."<sup>291</sup>

The SIMAH board of directors consists of ten members representing their banks: Saudi British Bank, National Commercial Bank, Saudi Hollandi Bank, Banque Saudi Fransi, Riyad Bank, Arab National Bank, Samba Bank, Al Rajhi Bank, Saudi Investment Bank, and Bank AlJazira.

SIMAH started operating in 2004, so it existed four years before the enactment of the CIL on July 2008. SIMAH and its subscribing members adhere to a strict Code of Conduct, which in most aspects meets or exceeds the CIL itself.

The role of SIMAH is the same as any other CRA. SIMAH collects information, assembles credit reports, and supplies them to its members without interfering in the assessment of the consumer's creditworthiness.<sup>292</sup>

SIMAH, unlike chambers of commerce and industry in Saudi Arabia, provides an array of services, consumers' reports, commercial reports, and added-value services. SIMAH provides different types of credit reports which are; consumer credit reports (standard), miscellaneous reports, negative credit reports, and credit monitoring. Also SIMAH provides consumer scoring, specialized technical services, and a database for the insurance sector.<sup>293</sup>

### **C- Credit Centers of Commercial Chambers**

In Saudi Arabia, like any other country, lack of information led to many issues related to repaying debts, which gradually resulted in lack of trust and confidence among merchants. This in turn slowed commerce. Chambers of commerce and industry, represented by merchants, took the lead in setting up credit centers to help chambers of commerce and industry's members.<sup>294</sup>

Even though credit reporting was started earlier by banks, banks in Saudi Arabia keep information related to banking sectors only. Banks do not have credit information related to automobile loans, for instance. Banks were unwilling to share information in their databases with any other sectors. Therefore, chambers of commerce and industry in Saudi Arabia established credit centers to cover the needs of other sectors that were uncovered by bank databases. Therefore, one can say that credit centers played an important role in establishing

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Riyadh Chamber of Commerce and Industry, Credit Information Center, Credit Center Services 3 (brochure).

the credit information industry in Saudi Arabia. Except for banking industry credit information, credit centers are the corner stone of the industry by having non-banking credit information.<sup>295</sup>

To be more precise, not all chambers of commerce in Saudi Arabia have credit information centers. There are only three main chambers: Riyadh Chamber of Commerce and Industry, Eastern Province Chamber of Commerce and Industry, and Jeddah Chamber of Commerce and Industry. Each is in an important location. Riyadh is the capital of Saudi Arabia, and Eastern Province is the commercial port on the east side of Saudi Arabia. Jeddah is the commercial port in the west.<sup>296</sup>

#### **a- Credit Center in Riyadh Chamber of Commerce and Industry**

Because of the demand on the national market, the Credit Center in Riyadh Chamber of Commerce was founded in 1994 to establish a trusted independent center to gather and enable members to share information in many sectors in the credit industry. The objectives of establishing the center were: to combat the exploitation of trust and credit, to combat defaulting and procrastinating of paying debts back, to reduce credit risks, to enhance reliability of a national market, and provide credit information to help make better credit decisions.<sup>297</sup>

The Credit Center achieves its vision and mission through providing and receiving information to and from its subscriber members. The Center has an “Exchange of Credit Information System” to which members add information, or they may use information provided by other members in judging the creditworthiness of any credit applicant.<sup>298</sup> Members are responsible if the information is not accurate. Members of the system include hire purchase companies, car-dealers, rent-a-car companies, real estate finance companies, real estate leasing companies, medical companies, tourism companies<sup>299</sup>, and any other types of companies that provide credit services.

The Credit Center in Riyadh Chamber of Commerce also works on settling disputes between consumers and credit providers. Both sides accept this service, as the Credit Center in Riyadh Chamber of Commerce is considered neutral and impartial.<sup>300</sup>

#### **b- Credit Center in Eastern Province Chamber of Commerce and Industry**

The Credit Center in Eastern Province Chamber of Commerce and Industry was founded in 2004 to serve the needs of the national market. Its start is considered late in comparison to the Credit Center in Riyadh Chamber of Commerce and Industry. The objectives for establishing the Credit Center in Eastern Province are similar to those of Riyadh Chamber. They are: to create a good environment of credit facilities, to enhance reliability of credit dealings, to limit chances of defaulting and bad debts, to combat the exploitation of trust and credit, to mitigate pressure on governmental bodies that deal with credit problems, to provide accurate information about every credit extension, and to accelerate decisions about credit extensions.<sup>301</sup>

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<sup>295</sup> Interview with Mr. Abdullah Alnua'im, Credit Manager, Riyadh Chamber of Commerce and Industry, (Aug. 20, 2009).

<sup>296</sup> I could not find any information about the Jeddah Chamber of Commerce and Industry and they did not respond to my emails.

<sup>297</sup> Riyadh Chamber of Commerce and Industry, *supra* note 294.

<sup>298</sup> *Id.* at 5.

<sup>299</sup> *Id.* at 5.

<sup>300</sup> *Id.* at 15.

<sup>301</sup> [http://www.etiman.org.sa/Info\\_Center/Notes.htm](http://www.etiman.org.sa/Info_Center/Notes.htm). The link was working until the middle of 2010 which seems to be removed after.

Only members of such systems may obtain more information; therefore, not being a member, I could not find more information about how the system works in the Eastern Province Chamber of Commerce and Industry. Nevertheless, as it is under the umbrella of the Saudi Council of Chamber of Commerce and Industry, I assume that the Credit Center in Eastern Province Chamber of Commerce and Industry works in a similar way to the Credit Center of Riyadh Chamber of Commerce and Industry.

The Credit Center in Eastern Province Chamber of Commerce and Industry serves the followings sectors: car-dealers, rent-a-car companies, real estate companies, furniture companies, home appliances and electric supplies companies, credit cards and checks companies, Saudi telecom companies, lending sector, private banks, and public banks.<sup>302</sup>

#### **D- Other Credit Reporting Agencies**

I found on the website of the Export-Import Bank of the United States that there are twelve credit agencies in Saudi Arabia. They are: Afro-Asian Trading Office (AATO), Alhabashi for Trading Credit Information Agency, AMB Information Ltd., ARGUS Information Service, Bürgel, Dun & Bradstreet, Graydon, International Company Profile (ICP), Infokredit Salem al Khadl Company Credit Information Agency, International Information & Trading Services, Middle East Commercial Services, Ltd (MECOS), and Schimmelpfeng.<sup>303</sup>

However, after I ask internally in SAMA I found none of the foregoing CRAs are licensed to engage in credit reporting in Saudi Arabia. SAMA is the sole competent authority that licenses CRAs in Saudi Arabia. It may be that there are unofficial offices that practice credit reporting or conduct investigations for others who want to deal with Saudi companies or invest in Saudi Arabia.

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<sup>302</sup> Available at [http://www.etiman.org.sa/Info\\_Center/Notes.htm](http://www.etiman.org.sa/Info_Center/Notes.htm). The link was working until the middle of 2010 which seems to be removed after. It is clear that there is an overlapping and repetition in the foregoing list of beneficiary of those services, however, I enlisted them as they did.

<sup>303</sup> When I checked the link again as on 11/2012, I found a different list in which all Saudi credit reporting agencies have been removed. Available at : <http://www.exim.gov/pub/ins/pdf/eib99-08.pdf>

### **2.4.3. Resources of Credit Information at a Glance**

CRAs cannot secure credit information about consumers without cooperation of other sectors and entities. In sum, most sources of credit information are furnishers of information to CRAs. In the following, I will summarize some important sources of credit information from which CRAs usually procure information.

#### **2.4.3.1. Consumer**

A consumer is one of the sources of credit information. Consumers provide creditors with personal information, annual and monthly incomes, employer, employment location, current outstanding debts, credit cards, loans, and the like.<sup>304</sup>

#### **2.4.3.2. Creditors**

An entity that provides financing and extends credit to consumers is a source of credit information.<sup>305</sup> It usually has a contract with a CRA to furnish such information on creditors' clients in regards to their credit status. Some examples of creditors are banks, auto financing companies, installment sales companies, hire purchase companies, credit cards issuers, mortgage companies, postpaid services providers, and Internet or cable service providers.<sup>306</sup>

#### **2.4.3.3. Collection Agencies**

Creditors often retain collection agencies to collect amounts due from their clients or sell debts to collection agencies.<sup>307</sup> Collection agencies usually supply debtor information to CRAs in case of default or delinquencies so negative information appears in consumer credit reports.<sup>308</sup>

#### **2.4.3.4. Public records**

Public records are reliable sources of information about judgment in civil courts, bankruptcy, criminal conviction, and the like with dates limitations.<sup>309</sup> In Saudi Arabia, information held by governmental funds and banks, judiciary authority, governmental committees, and the like are sources of public records.<sup>310</sup>

#### **2.4.3.5. Employers**

In an investigative credit report, employers play an important role through the information they provide. The FCRA provides many sections regulating information related to employment, employees, or employers. Even though information not related to credit capacity or credit standing provided by an employer to a CRA is excluded from being a credit report, the same information is considered part of a credit report when provided by a CRA to third parties or provided for other purposes not excluded under the FCRA.

The CIL does not mention any provision related to information related to employment. The scope of credit information is not intended to contain such information. The Implementing Regulation, however, allows credit information to be collected from previous and current employer.<sup>311</sup>

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<sup>304</sup> ZAID RAMADAN & MAHFOUZ JAWDAH, CREDIT RISK MANAGEMENT, at 262 (The United Arab Company for Marketing and Supplies, 2008).

<sup>305</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 76.

<sup>306</sup> CIL Implementing Regulation, article 1 and 32; NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 76.

<sup>307</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 230.

<sup>308</sup> *Id.* at 268.

<sup>309</sup> 15 U.S.C. § 1681c (1); 15 U.S.C. § 1681d (d)(3); 15 U.S.C. § 1681k(a)(2); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 76.

<sup>310</sup> CIL, article 1; CIL Implementing Regulation, article 1 and 32. *See* page 48, *supra*, for more details.

<sup>311</sup> CIL Implementing Regulation, article 32.

#### **2.4.3.6. Relatives and Friends**

An investigative credit report is what is based on interviews bear on a consumer's character, general reputation, personal characteristics, or mode of living with a person acquainted to the consumer. An interview may be conducted with an employer or relatives and friends. Specific factual information about a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency should not be included.<sup>312</sup>

#### **2.4.3.7. Others**

Other possible sources of information include persons such as lawyers, insurers, landlords, and doctors. They may furnish information to CRAs occasionally.<sup>313</sup>

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<sup>312</sup> 15 U.S.C. § 1681a(e).

<sup>313</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 222.

## 2.5. Mechanism of Credit Information Analysis and Evaluation at a Glance

The FCRA defines credit score as “a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default ...”<sup>314</sup> Another definition says a credit score is a “numerical calculation intended to represent the specific level of risk that a person or entity brings to a particular transaction.”<sup>315</sup> Creditors, in analyzing and evaluating their clients’ creditworthiness and capacity, rely on scoring systems to determine eligibility for loans, jobs, services, or even how much a person is authorized to withdraw from a bank’s ATM.<sup>316</sup> A credit score is like an abbreviated credit report.<sup>317</sup> A credit score is believed to be helping an underserved market segment, making the credit extension much faster, and reducing the cost of essential services such as insurance, mortgage, or credit cards.<sup>318</sup> There are different scoring systems in the U.S. however; two systems are mostly used by CRAs.

Before going into detail, I will indicate the difference in interest rates that may be a result of the scoring systems. For example, the interest on borrowing \$300,000 in a fixed rate mortgage for 30 years is illustrated in table 1.

Score	Rate	Monthly Payment
500-579	10.22 percent	\$2,682
580-619	9.259 percent	\$2,470
620-659	6.624 percent	\$1,921
660-699	5.814 percent	\$1,763
700-759	5.530 percent	\$1,709
760-850	5.308 percent	\$1,667

**Table 1**

So, it is a \$1015 difference between the lowest tier and the highest tier. The difference is 37 percent of the amount paid by the lowest tier and a discount of 60 percent for the highest tier in comparison to the amount paid.<sup>319</sup>

### 2.5.1. FICO Scoring System

The FICO scoring system is a product of Fair Isaac Corporation. Fair Isaac Corporation started in the 1950s by creating a scoring model that helped predict the likelihood of consumer payment of debts.<sup>320</sup> FICO uses a series of equations applied on derived information from consumer data to anticipate payment behavior of a consumer.<sup>321</sup> This scoring model is mostly used by CRAs even though they have their own scoring systems that have been created for them by Fair Isaac Corporation.

FICO scoring ranges from 300 to 850 and the higher score the better.<sup>322</sup> If a credit score is over 660, the score is considered less risky and will be accepted in many places.<sup>323</sup> If a credit score is between 620 and 660, the score is problematic and extra review of an

<sup>314</sup> 15 U.S.C. § 1681g(f)(2)(A)(i).

<sup>315</sup> Ian O’Neill, *Disparate impact, federal/state tension, and the use of credit scores by insurance companies*, 19:2 LOYOLA CONSUMER L. REV. 151, 152 (2007).

<sup>316</sup> WEISMAN, *supra* note 20, at 135.

<sup>317</sup> BUCCI, *supra* note 35, at 13.

<sup>318</sup> TRANSUNION WHITE PAPER, *supra* note 15, at 6.

<sup>319</sup> BUCCI, *supra* note 35, at 110.

<sup>320</sup> WEISMAN, *supra* note 20, at 133.

<sup>321</sup> BUCCI, *supra* note 35, at 37.

<sup>322</sup> WEISMAN, *supra* note 20, at 135

<sup>323</sup> *Id.*

application is needed.<sup>324</sup> If a credit score is less than 620, the problem will be greater and the difficulties of obtaining credit at favorable terms or obtaining credit at all is an issue.<sup>325</sup>

Until 2001, the formula of the FICO scoring system was a secret. Creditors feared that debtors would manipulate the formula's factors if they knew them.<sup>326</sup> Factors affecting scores are divided into five categories; payment history, amounts owed, length of credit history, new credit and type of credit used.<sup>327</sup> None of the factors consider race, sex, religion, age, or marital status.<sup>328</sup>

Below are the factors divided by percentage.

**Payment History:** *Thirty five percent.* This is the most important factor.

- Account payment information on specific types of accounts such as credit cards, retail accounts, etc.;
- Presence of adverse public records, collection items, and delinquencies;
- Severity of delinquency;
- Amount past due on delinquent accounts or collection items;
- Time since delinquency, adverse public records, or collection items;
- Number of past due items on file;
- Number of accounts paid as agreed.

**Amounts owed:** *Thirty percent.* This is no less important than payment history.

- Amount owing on accounts;
- Amount owing on specific types of accounts;
- Lack of a specific type of balance, in some cases;
- Number of accounts with balances;
- Proportion of credit lines used;
- Proportion of installment loan amounts still owing.

**Length of Credit History:** *Fifteen percent.*

- Time since accounts opened;
- Time since accounts opened, by specific type of account;
- Time since account activity.

**New Credit:** *Ten percent.*

- Number of recently opened accounts, and proportion of accounts that are recently opened, by type of account;
- Number of recent credit inquiries;
- Time since recent account opening, by type of account;
- Time since credit inquiry;
- Re-establishment of positive credit history following past payment problems.

**Types of Credit Used:** *Ten percent.*

- Number of (presence, prevalence, and recent information) on various types of accounts.<sup>329</sup>

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<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> BUCCI, *supra* note 35, at 37; WEISMAN, *supra* note 20, at 134.

<sup>327</sup> Available at <http://www.myfico.com/crediteducation/whatsinyourscore.aspx> as 01/15/2010.

<sup>328</sup> WEISMAN, *supra* note 20, at 136.

<sup>329</sup> *Id.*

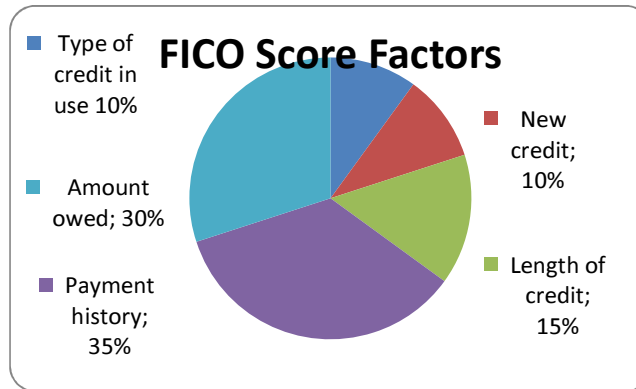


Figure 3: FICO Score Factors

### 2.5.2. VantageScore System

The three largest CRAs, which are Equifax, TransUnion, and Experian, developed their own scoring system in 2003-2005, called VantageScore.<sup>330</sup> Major CRAs created VantageScore based on studies of more than fifteen million credit files of anonymous consumers. They unified credit characteristics so the outcome of each reporting agency will be almost the same. Variance did still exist even with this scoring system because of data differences in each CRA, which may be greater or lesser than the others CRAs.<sup>331</sup>

VantageScore is important because this scoring system is based on all of three major CRA files. Unlike FICO, which reflects the three major CRAs individually, VantageScore shows the score the consumer has in all of the major credit reporting agencies in unified credit characteristics. In FICO scoring, a consumer may have a different score in each credit agency.

VantageScore ranges from 501 to 990 and the higher score the better. VantageScore consists of six factors taken into consideration when scoring is created as illustrated in figure 4.

**Payment History:** *twenty eight percent*, includes length of payment history includes repayment behavior (satisfactory, delinquency, and derogatory).

**Utilization:** *twenty-three percent*, includes percentage of credit amount used/owed on accounts.

**Balances:** *nine percent*, includes amount of recently reported balances (current and delinquent)

**Depth of Credit:** *nine percent*, includes length of credit history and types of credit.

**Recent Credit:** *thirty percent*, includes number of recently opened credit accounts and credit inquiries.

**Available Credit:** *one percent*, includes amount of credit available.<sup>332</sup>

<sup>330</sup> Available at <http://www.experian.com/consumer-information/vantagescore-lender-faqs.html> as 01/15/2010.

<sup>331</sup> Available at <http://www.vantagescore.com/about/vantagescoremodel/> as 01/15/2010.

<sup>332</sup> Available at <http://www.vantagescore.com/docs/the-score-2011-october.pdf> as 01/12/2020.



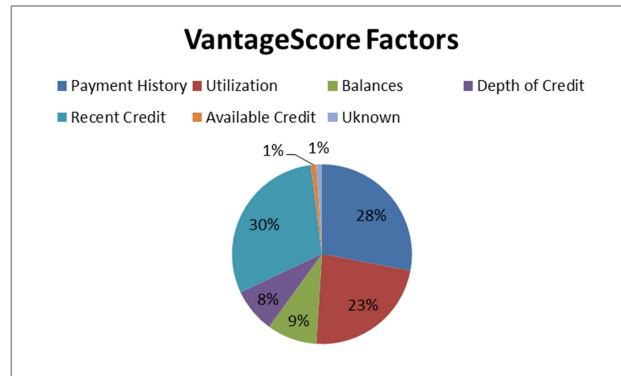


Figure 4: VantageScore Factors

## 2.6. Cycle of Credit Information at a Glance

The credit information cycle starts when a consumer starts any credit application.<sup>333</sup> A creditor will contact a CRA, which in turn provides any available information to the creditor. If no information is available, then the CRA creates a file for the consumer and adds the new application information to the file.<sup>334</sup> With enough information in the file, a CRA can create a score representing the risk of default of a particular consumer. When a new lender asks about a consumer, the lender will receive a credit report generating new information, which in turn will be added to consumer's credit file.<sup>335</sup>

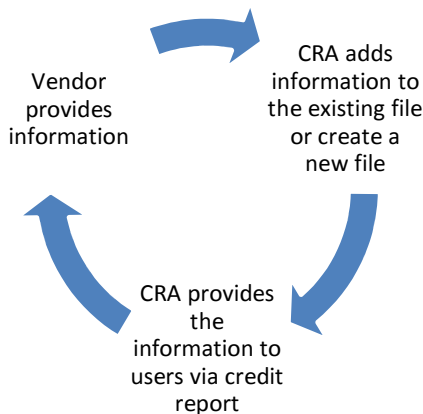


Figure 5: Credit information Cycle

<sup>333</sup> MARK FURLETTI, AN OVERVIEW AND HISTORY OF CREDIT REPORTING, at 9 (2002), Available at [http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2002/CreditReportingHistory\\_062002.pdf](http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2002/CreditReportingHistory_062002.pdf)

<sup>334</sup> WEISMAN, *supra* note 20, at 128; Email from Equifax, to Mansour Alhaidary (Jan. 7, 2011). “Be aware in order to establish an American file, you can apply for credit with American companies who are reporting members of Equifax. Most major credit card companies e.g. American Express, MasterCard, Visa and Discover are reporting members of Equifax. Once opened the account with the Bank or Credit Card Company, these companies report the information to the Credit Bureau's like us. Be also advised that not all companies choose to report account information to Equifax. Those that do report on a regular basis appear on your credit file. If there is a company that does not appear on your credit file, it is likely that the particular company does not have an established relationship with us. If you make a request, Equifax will check to see if an established relationship exists. If so, the account will be added to your credit file. If not, you will be notified.”; FURLETTI, *supra* note 321, at 9.

<sup>335</sup> Jarl G. Kallberg & Gregory F. Udell, *Private Business Information Exchange in the United States*, in CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY 203, 206 (Margaret J. Miller ed., 2003).

### **Third Chapter:**

#### **Literature Review**

Kenneth Baker was one of the victims of credit reporting industry. His suicide was a result of the horrible credit reporting system.<sup>336</sup> Of course, not many consumers will end up like Baker; nonetheless, they are facing hardships and difficulties because of faulty credit reports. Credit reporting plays an essential role in the consumer credit industry. A good credit report enables consumers to obtain credit fairly and easily. Moreover, credit reporting affects employment decisions.<sup>337</sup> However, CRA reports are full of mistakes and inaccuracies.<sup>338</sup> Laws such as the FCRA<sup>339</sup> are available to protect the subjects of credit reports.

#### **Criteria**

In this chapter, I provide a summary of the literature published in the field of credit reporting. The literature is extensive; nevertheless I tried to cover the articles most relevant to my dissertation topic, with few exceptions. I omitted relevant articles published prior to the amendments of the FCRA of 1996 and 2003 if the issues discussed are amended or resolved. I also omitted relevant articles that do not provide significant contributions to the field such as reiterating the FCRA without valuable comments or notes but rather pointing out the new sections that are added in a thematic way without providing their opinion or thoughts. Finally, I omitted relevant articles that deal with the subject in general but not in the context of credit reporting. I reviewed articles that contain both amended and non-amended issues.

#### **Scope**

I classify the content of the different topics under headings in a thematic review rather than chronologically, although I use chronological order within the same theme. Sometimes it was difficult to find commonality among the headings; however, the common attribute is that all of them are under the FCRA umbrella. I will provide no personal view, comments, or opinion in this chapter but rather the authors' views and thoughts. My comments and opinions are left to the substantive portion of my dissertation. The following topics all relate to the FCRA

- Definitions and terms
- Permissible purposes
- Use of credit report for employment purposes
- Adverse action
- Disclosure
- Duty to reinvestigate in case of consumer dispute
- Consumer private right of action under section 1681s-2(b),
- Conflicting interpretations of section 1681e (b)

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<sup>336</sup> Wu, *supra* note 77, at 140. Baker's file was mixed with another person whose financial history was bad. He tried unsuccessfully several times to fix the errors and to get his mortgage approved but could not. He became depressed because of the repeated rejections and embarrassment, which led him to suicide leaving a note that a credit report "destroyed his life".

<sup>337</sup> *Id.* at 139.

<sup>338</sup> *Id.* at 143.

<sup>339</sup> 15 U.S.C. § 1681u.

- Common law defamation claim
- Burden of proof
- Attorney liability
- Attorney fees
- Successful action as prerequisite to recover damages
- Statutory damages in class actions
- Types of measurable credit damages
- Preemption

## Trend

It seems the trend is to evaluate or criticize court decisions in light of the FCRA. Only one article,<sup>340</sup> dealt substantially with issues related to the FCRA itself even though those issues have not been brought before courts. I think it is important to discuss issues even though not related to cases in order to help courts deciding cases and avail of the literatures instead of blaming judges aftermath if their decisions were wrong. As said, if our foresight were as good as our hindsight, we would never make mistakes.

### 3.1. Definitions and Terms

Some definitions and terms used in the FCRA need clarification to reflect the true meaning of the act. One commentator criticized some of the definitions and terms of the FCRA as either vague or non-inclusive.<sup>341</sup> For instance, the definition of the consumer as an “individual”<sup>342</sup> is not clear. A sole proprietor in his business capacity is not considered a consumer under the definition of the FCRA because of his business practice; however, he is an individual who should be protected by the FCRA as FCRA’s scope is to protect individual consumers.<sup>343</sup> Another example is the meaning of the “nature and scope of the investigation”.<sup>344</sup> Section 1681d-b, which applies to CRA and users, provides: “Any person who procures or causes to be prepared an investigative consumer report on any consumer shall...make a complete and accurate disclosure *of the nature and scope of the investigation requested ...*” (Emphasis added).<sup>345</sup>

Also, the terms “reasonable ground to believe”<sup>346</sup> and “reason to believe”<sup>347</sup> have not been defined in the FCRA.<sup>348</sup> Section 1681e(a) provides: “No consumer reporting agency may furnish a consumer report to any person if it has *reasonable grounds for believing* that the consumer report will not be used for a purpose listed . . .” (Emphasis added). It seems that the term in section 1681b contradicts the same term used in section 1681e which provides that: “No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a

<sup>340</sup> Charles M. Ullmant, *Liability of Credit Bureaus After The Fair Credit Reporting Act: The Need For Further Reform*, 17 Vill. L. Rev. 44, 59 (1972).

<sup>341</sup> Ullmant, *supra* note 340, at 59.

<sup>342</sup> 15 U.S.C. § 1681a(c).

<sup>343</sup> Ullmant, *supra* note 340, at 59.

<sup>344</sup> 15 U.S.C. § 1681d(b).

<sup>345</sup> Ullmant, *supra* note 340, at 64.

<sup>346</sup> 15 U.S.C. § 1681e(a).

<sup>347</sup> 15 U.S.C. § 1681b(a)(3).

<sup>348</sup> Ullmant, *supra* note 340, at 65.

purpose listed in section § 1681b of this title”.<sup>349</sup> Moreover, “legitimate business need” term is open to question, as it is not clear what constitute a “reasonable ground to believe” of the legitimacy of the business need. The commentator mentioned other examples that were resolved in the subsequent amendments of FCRA Such as excluding governmental agencies from falling under the definition of credit reporting agencies which was added later.

### 3.2. Permissible Purposes

Although the FCRA lists the permissible purposes for which a user may obtain a credit report on consumers, commentators are debating whether those purposes are exclusive or whether similar purposes are permissible too. In addition to the civil liability of obtaining credit reports for impermissible purposes under false pretenses, criminal liability is also imposed although it is difficult to prove. The FCRA does not resolve issues related to third party use of credit reports for impermissible purposes, obtaining a credit report for mixed multiple purposes: permissible and impermissible, or obtaining a credit report for impermissible purposes under false pretenses from a user not a CRA.

The FCRA<sup>350</sup> regulates companies that issue credit reports on consumers and users who use the reports in making their credit-related decisions.<sup>351</sup> The FCRA specifies permissible purposes for issuance of the reports. For example, the FCRA permits a company to issue a consumer credit report if the company has reason to believe the recipient “intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished”.<sup>352</sup> The FCRA clearly lists the permissible purposes;<sup>353</sup> however, some argue that an insurance claim can be one of the permissible purposes. Yet, one commentator notes that obtaining a credit report for an insurance claim is not a permissible purpose as nothing in the legislative history supports that.<sup>354</sup>

The FCRA provides criminal liability for any person who knowingly and willfully obtains information about a consumer from a CRA under false pretenses.<sup>355</sup> Proving willfulness and knowledge is difficult.<sup>356</sup> The outcome is relatively clear when a person under false pretenses obtains a credit report, however, the outcome is not clear when a person obtains a credit report for a permissible purpose and decides later to use it for an impermissible purpose. The issue is the same when a person has multiple purposes some of

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<sup>349</sup> *Id.* at 66. I summarized the author’s view although I do not see any conflict between those sections.

<sup>350</sup> 15 U.S.C. § 1681u

<sup>351</sup> 15 U.S.C. § 1681b.

<sup>352</sup> 15 U.S.C. § 1681b(a)(3).

<sup>353</sup> 15 U.S.C. § 1681b. (Provides, “(a) In general. Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court ... (2) In accordance with the written instructions of the consumer ... (3) To a person which it has reason to believe: (A) intends to use the information in connection with a credit transaction ... ; or (B) ... for employment purposes; or (C) ... underwriting of insurance ... ; or (D) ... determination of the consumer's eligibility for a license or other benefit ... (E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or (F) ... has a legitimate business need for the information (4) In response to a request by the head of a State or local child support enforcement ... (5) To an agency administering a State plan ... (6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration ...”).

<sup>354</sup> Elwin Griffith, *The Quest For Fair Credit Reporting and Equal Credit Opportunity in Consumer Transaction*, 25 U. Mem. L. Rev. 37, 47 (1994).

<sup>355</sup> 15 U.S.C. § 1681q.

<sup>356</sup> Ullmant, *supra* note 340, at 67.

which are impermissible.<sup>357</sup> It is noteworthy that there is no criminal liability if a person obtains a credit report from a user under false pretenses or when a user discloses the information to another person who has no permissible purpose.<sup>358</sup> In addition to the criminal liability, that FCRA provides in case of obtaining a credit report under false pretenses, using credit report can trigger the civil liability of the requesting user.<sup>359</sup>

### 3.3. Employment Purposes

The FCRA states that in order for a user to obtain a consumer credit report, users must have a permissible purpose. One of the permissible purposes is to obtain a credit report to determine a person's eligibility for employment, promotion, or employment related purposes.<sup>360</sup> A survey shows that thirty five percent of companies use credit checks in pre-employment screening.<sup>361</sup> Employers tend to believe that employees are less likely to steal from them and be more productive if they have good credit scores<sup>362</sup>. Another important aspect is that employers may be liable for negligence for hiring violent or dangerous employees.<sup>363</sup> An employer has no right to obtain such a report without obtaining the employee's oral or written consent and informing the employee of the nature and scope of the communication.<sup>364</sup> However, there is no proven relationship between the credit score and job performance.<sup>365</sup>

One commentator notes that one of the biggest flaws of the FCRA is the inability of the FCRA to stop employers from conditioning employment opportunities on the attainment of the employee credit report. He asserts that in most types of jobs, a credit report has no relevancy.<sup>366</sup> The commentator refutes employers' assertions of using credit reports as a performance predictive tool. The contention that employees with good credit scores are less likely to steal because they manage their financial responsibilities wisely is groundless. Poor credit history may be attributed to many reasons; some are not the employee's fault. For example, credit reports are full of errors and mistakes or are a mix of files. Thus, a credit report cannot predict the performance of the employee. Likewise, a poor credit score may be due to ignorance of how the credit scoring system works, such as having only one credit card and spending most of its limit or by canceling an old credit card.<sup>367</sup>

The commentator states that protection given to the employees through the FCRA sections<sup>368</sup> is meaningless. If an employer complies with the FCRA, there is no protection for the consumer.<sup>369</sup> The employer can take an adverse action against the employee by firing,

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<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 67-68.

<sup>359</sup> David Worsley, *Fair Credit Reporting Cases illustrate Risks for Credit Reporting Agencies, Creditors, and Lawyers*, 56 Consumer Fin. L.Q. Rep. 68, 74 (2002).

<sup>360</sup> 15 U.S.C. § 1681b. (Provides that in order to furnish a credit report: "any consumer reporting agency may furnish a consumer report under the following circumstances and no other: ... to a person which it has reason to believe ... intends to use the information for employment purposes").

<sup>361</sup> Kelly Gallagher, *Rethinking The Fair Credit Reporting Act: When Requesting Credit Reports for Employment Purposes Goes Too Far*, 91 Iowa L. Rev. 1593, 1599 (2006).

<sup>362</sup> *Id.* at 1595.

<sup>363</sup> *Id.* at 1599.

<sup>364</sup> 15 U.S.C. § 1681b(2)(a)(i) and (ii).

<sup>365</sup> Gallagher, *supra* note 361, at 1599.

<sup>366</sup> *Id.* at 1596.

<sup>367</sup> *Id.* at 1600.

<sup>368</sup> 15 U.S.C. § 1681b(2)(a)(i) and (ii).

<sup>369</sup> Gallagher, *supra* note 361, at 1608.

demoting, or not accepting him as an employee in his company even if his credit score is irrelevant to his performance. It is a new type of discrimination yet a lawful one.<sup>370</sup>

In addition to the inaccuracy issue in credit reports, allowing a credit report check on every job without distinction is problematic. While employers' interest in knowing off-duty habits of the employees may be reasonable in financially sensitive positions, it seems unnecessary and unreasonable in other positions.<sup>371</sup> Off-duty conduct has little if nothing to do with the performance of employees. Based on this premise, obtaining a credit score when it is irrelevant for the job position is an unnecessary invasion of privacy.<sup>372</sup>

Another problem arises with people who live in poor neighborhoods. Because they are living in those neighborhoods, they have limited access to credit. One study shows credit is denied to black applicants more than twice as often as white applicants who share the same circumstances and qualifications. Without credit black people may not be able to improve their credit, and getting jobs becomes more difficult. Further, people without jobs are more likely to default and suffer bad scores on their credit report. They cannot get out of this vicious cycle.<sup>373</sup>

The author further discusses the possibilities of holding employers liable under different theories if they condition their offer of employment on a credit report. First, the employee may bring tort action for a common law privacy invasion. Regardless of preemption provisions,<sup>374</sup> at least one court held that an employee might recover if the employer obtains a credit report for an impermissible or illegal purpose and uses the report in violation of common law privacy rights.<sup>375</sup>

Second, an employee may prevail under a disparate impact claim. In *Griggs v. Duke Power Co.*,<sup>376</sup> the U.S. Supreme Court found unlawful disparate impact discrimination even if there was no intent to discriminate. Disparate impact discrimination is defined as employment "practices that seem facially neutral in the treatment of different groups, but in fact falls more harshly on one group than another". The defendant employer required a high school diploma and a particular test score in order to get the job. This requirement seemed neutral, but disproportionately affected black people as only 12% of them at that time held a high school diploma, and only 6% passed the test, while white people suffered no disparate impact. The court ruled that the plaintiff satisfied the cause of action of a disparate impact claim, because the employer required tests that had no significant relevance to job performance. In the credit report context, an employee in a poor neighborhood with a low credit score can successfully bring a disparate impact claim if he proves that the use of a

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<sup>370</sup> *Id.* at 1603.

<sup>371</sup> *Id.* at 1604.

<sup>372</sup> *Id.* at 1605.

<sup>373</sup> *Id.* at 1608.

<sup>374</sup> 15 U.S.C. § 1681(h)(e). (Provides, "no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to §§ 1681g, 1681h, or 1681m of this title or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report, except as to false information furnished with malice or willful intent to injure such consumer").

<sup>375</sup> Gallagher, *supra* note 361, at 1610.

<sup>376</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, at 431-432 (1971).

credit score for employment decisions will result in a disparate impact for people who live in poor neighborhoods, and the credit score has no significant relevance to job performance.<sup>377</sup>

In cases with possible mixed motivations, the employee has to prove with direct evidence discrimination on the basis of race, color, sex, religion, or national origin. If there is no direct evidence, the court will apply a disparate impact framework. To meet the prima facie requirements, the employee must prove that he belongs to the discriminated minority, that he was rejected despite his qualifications, and that after his rejection the position was still open to applicants. One court found the prima facie case was satisfied when an employer refused to hire an employee because he failed a credit check.<sup>378</sup> Nevertheless, if the employer shows that there is a legitimate non-discriminatory reason to take the adverse action, then there is no liability.<sup>379</sup>

The author finally proposes changes to the FCRA to limit employer usage of credit reports in making employment decisions. One proposed is that the FCRA should be amended to limit employer use of credit reports in employment decisions when the information is of a little relevancy to the job's duties. An alternative proposal is to limit, not the usage, but rather to require employers to show the relevancy of a credit report to job duties. Under this proposal, employers have to prove that credit reports are a performance predictor, thus they would be allowed to discriminate on that basis. Otherwise, the presumption is that the credit report has no relevancy to job duties and no discrimination is allowed.<sup>380</sup>

### 3.4. Adverse Action

The FCRA requires users of information who take adverse action based in whole or in part on the credit report against the consumer to notify the consumer of such adverse action.<sup>381</sup> The FCRA defines adverse action by referring to the Equal Credit Opportunity Act (ECOA)<sup>382</sup> and by defining it within the FCRA itself.<sup>383</sup> One can conclude from both

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<sup>377</sup> Gallagher, *supra* note 361, at 1612. Moreover, the author stated that a court held that practice of refusing to hire a person with a criminal history is prohibited because of its adverse impact against African-American at a higher rate than white people.

<sup>378</sup> *Id.* at 1613.

<sup>379</sup> *Id.* at 1617.

<sup>380</sup> *Id.* at 1619. The author commented that this proposal will enhance the accuracy of credit report as well. When CRA know that employers need more accurate credit reports to be predictive in employment context, they will enhance their standard in turn as employers will be less interested in credit reports full of errors to use it as a predictive tool.

<sup>381</sup> 15 U.S.C. § 1681(m). (Provides, "If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall (1) provide ... notice of the adverse action to the consumer; (2) provide to the consumer ... (A) the name, address, and telephone number of the consumer reporting agency... that furnished the report to the person; and (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and (3) provide to the consumer an oral, written, or electronic notice of the consumer's right ...").

<sup>382</sup> 15 U.S.C. § 1691 701(d)(6). (Defines adverse action as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested ...").

<sup>383</sup> 15 U.S.C. § 1681(m). (Defines adverse action as "(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance; (ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee; (iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section § 1681b; and (iv) an action taken or determination that is (I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer,

definitions that adverse action means any action taken against the interest of the consumer. It is also possible for the consumer to take an adverse action against another consumer based on information received from a CRA or from other sources. If the source is the CRA, the FCRA will apply. If the source is other than CRA, the FCRA will not apply.<sup>384</sup> One commentator notes how unfortunate it is that the exercise of a consumer's right can only be resolved after there is an adverse action against him.<sup>385</sup>

In two recent U.S. Supreme Court decisions, *Safeco Insurance Co of America v. Burr*<sup>386</sup> and *Edo v. GEICO Casualty Co.*,<sup>387</sup> the court provided more guidance as to the meaning of adverse action. Further discussion of the impacts of the cases is in the fourth chapter.

### 3.5. Disclosure

Under the FCRA, disclosure of certain information is required to different persons in different circumstances.<sup>388</sup> When preparing an investigative report, a CRA is required to disclose to the consumer “that an investigative consumer report including information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made ...”<sup>389</sup> The requirement is extended when one CRA discloses information to another CRA.<sup>390</sup>

### 3.6. Duty to Reinvestigate

Reinvestigation is a duty of a CRA and furnisher when a consumer disputes the accuracy and completeness of his credit report.<sup>391</sup> This obligation is triggered in the case of denying a consumer's credit. A consumer has the right to dispute both the accuracy and completeness of his information. A consumer's dispute is presumed bona fide. Therefore, a CRA shall not deny him this right of dispute. If a consumer's dispute results in finding of inaccuracy, a CRA has to delete such information or correct it accordingly. If nothing is changed after the

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or in connection with a review of an account under section § 1681b; and (II) adverse to the interests of the consumer”.

<sup>384</sup> Ullmant, *supra* note 340, at 66.

<sup>385</sup> *Id.*

<sup>386</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

<sup>387</sup> *Edo v. GEICO Casualty Co.*, 512 F.3d 566 (2008).

<sup>388</sup> For example: § 1681e(c), § 1681g, § 1681h, § 1681j, § 1681u, § 1681v, § 1681d.

<sup>389</sup> 15 U.S.C. § 1681d (a).

<sup>390</sup> Ullmant, *supra* note 340, at 62.

<sup>391</sup> 15 U.S.C. § 1681(i). (Provides, “(A) In general. Subject to subsection (f), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

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

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



reinvestigation, the consumer has the right to add a statement explaining his side of the story.<sup>392</sup>

One commentator unveils shocking information concerning the procedure of reinvestigation by CRAs and creditors. First, credit reports are full of errors, as studies showed.<sup>393</sup> The major errors in credit reports are mixing files,<sup>394</sup> consequences of identity theft,<sup>395</sup> and errors by the furnishers of information, such as incorrect payment history, incorrect balance, misapplication of payment or data entries,<sup>396</sup> or re-aging of stale information by changing the delinquency date.<sup>397</sup>

Second, the author criticizes the current reinvestigation procedure. The FCRA imposes two levels of protection to consumers. A CRA must follow a reasonable procedure to assure maximum accuracy and allow the consumer to dispute inaccuracy in their credit reports.<sup>398</sup> She claims that the first level of protection, which is to follow a reasonable procedure to assure maximum accuracy, fails in many cases, which is evident in the high percentage of errors in the credit reports. The second level of protection, which is to allow the consumer to dispute inaccuracy in their credit reports, is not conducted properly, as CRAs are relying on an automated system full of flaws.<sup>399</sup>

Third, she goes through the technical procedure and finds that the reinvestigation procedure used by CRAs does not meet the FCRA requirement and that CRAs have no incentive to fix errors in consumer credit reports but because of the FCRA requirements.<sup>400</sup>

### 3.7. Section 1681s-2-(b) Consumer Private Right of Action

In *Dornhecker v. Ameritech Corporation*,<sup>401</sup> the court held that a private right of action exists under the FCRA implicitly according to a four-factor test. First, a plaintiff must be member of the class the FCRA aims to protect. Second, the legislative history of the FCRA indicates Congress does not intend to limit civil liability under section 1681s(2)(b).<sup>402</sup> Third, granting this private right of action would not frustrate the purpose of the FCRA. Fourth, Congress intended the FCRA to co-exist with state consumer protection laws.<sup>403</sup>

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<sup>392</sup> Griffith, *supra* note 354, at 85.

<sup>393</sup> Wu, *supra* note 77, at 143.

<sup>394</sup> *Id.* at 146.

<sup>395</sup> *Id.* at 149.

<sup>396</sup> *Id.* at 150.

<sup>397</sup> *Id.* at 153.

<sup>398</sup> *Id.* at 155.

<sup>399</sup> *Id.* at 155-56.

<sup>400</sup> *Id.* at 181

<sup>401</sup> *Dornhecker v. Ameritech Corporation*, 99 F. Supp. 2d 918 (N.D. Ill. 2000).

<sup>402</sup> 15 U.S.C. § 1681s (2)(b). (Provides, "In general, after receiving notice pursuant to section § 1681i of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall (A) conduct an investigation with respect to the disputed information; (B) review all relevant information provided by the consumer reporting agency pursuant to section § 1681i; (C) report the results of the investigation to the consumer reporting agency; (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly (i) modify that item of information; (ii) delete that item of information; or (iii) permanently block the reporting of that item of information").

<sup>403</sup> Worsley, *supra* note 359, at 68.

### 3.8. Conflicting Interpretation of Section 1681e(b)

Courts are split in interpreting section 1681e (b) which provides “Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates”.<sup>404</sup> This threatens the rights of consumers. Some courts require a CRA to report technically accurate information even if such information is incomplete or misleading. Other courts held that a CRA did not satisfy the “maximum possible accuracy” requirement if they report correct yet misleading information. It is debated whether to incorporate “completeness” into “accuracy” or keep them as different standards. Both methods in treating this section will be shown in the following paragraphs. The author believes that the split requires congressional action to amend the FCRA to show the intended meaning.

However, courts differ in defining the required accuracy. Some courts require a CRA to report technically accurate information even if such information is incomplete or misleading.<sup>405</sup> Other courts held that a CRA did not satisfy the “maximum possible accuracy” requirement if they report correct but misleading information.<sup>406</sup> All agreed on the rule that creditors update and correct information in cooperation with the CRA.

### 3.9. Common Law Defamation Claim

Protection of freedom of speech is relevant in common law defamation claims. Courts allowed private plaintiffs in defamation cases to recover presumed and punitive damages although no malice was shown if the defamatory statement was not a matter of public concern.<sup>407</sup> Common law defamation claims are preempted by the FCRA unless malice or willfulness is proven.<sup>408</sup> The FCRA preempts state common law claims related to defamation, invasion of privacy, or negligence.<sup>409</sup> However, for those claims to be preempted, they must be based on information disclosed pursuant to the FCRA disclosure requirements.<sup>410</sup>

Prior to the FCRA, the solution for the victims of false credit reports was to bring a defamation claim in a state court. Victims were faced with two problems: the secrecy of the CRA and the qualified privilege for the CRA. Under the qualified privilege, a consumer needed to prove actual malice and actual damages in order to prevail. The rationale behind this qualified privilege is to allow the credit reporting industry to flourish.<sup>411</sup> After the FCRA, a court denied the qualified privilege and doubted the need to advance commerce by protecting the CRA.<sup>412</sup> The court relied on the FCRA and noted that a time changes and law

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<sup>404</sup> 15 §1681e(b)

<sup>405</sup> Griffith, *supra* note 354, at 64; Neil Vanderwoude, *The Fair Credit Reporting Act: Fair for Consumer, Fair for Credit Reporting Agencies*, 39 Sw. L. Rev. 395, 401 (2009).

<sup>406</sup> Elizabeth O’Brien, *Minimizing The Risk of The Undeserved Scarlet Letter An Urgent Call to Amend Section 1681e(b) of The Fair Credit Reporting Act*, 57 Cath. U. L. Rev. 1217, 1219 (2008).; Vanderwoude, *supra* note 405, at 400.

<sup>407</sup> David B. Katz, *First Amendment Defamation Private Individual May Recover Presumed and Punitive Damages Without A Showing of Actual Malice - Dun & Bradstreet Inc., v. Greenmoss Builders Inc.*, 16 Seton Hall L. Rev. 785, 786 (1986).

<sup>408</sup> Meghan McClure, *Adverse Action Notices Under The FCRA: The Supreme Court Provides Guidance*, 12 N.C. Banking Inst. 273, at 298-99 (2008).

<sup>409</sup> 15 U.S.C. § 1681h (e).

<sup>410</sup> 15 U.S.C. § 1681h (e).

<sup>411</sup> Virginia G. Maurer, *Common Law Defamation and The Fair Credit Reporting Act*, 72 Geo. L.J. 95, 100-01 (1983).

<sup>412</sup> *Id.* at 102.

changes with it. The court cited FCRA as evidence of change and thus it is the time for a shift from protecting CRAs to protecting consumers.<sup>413</sup>

Overcoming the qualified privilege in 1681h(e) by proving actual malice is difficult. Proving negligence would be comparatively simple.<sup>414</sup> Depending on whether a court is guided by state or federal law, a consumer may need to prove ill will, bad faith, or a conscious disregard for the truth or the rights of the others.<sup>415</sup> Courts in some cases have tried to lower the standard from malice to negligence. Their focus has been on the reasonableness of the conduct of the CRA and not the state of mind.<sup>416</sup> One court held the qualified privilege is overcome if the CRA fails to investigate whether information is false.<sup>417</sup> Another court shifted the burden to the CRA to show the CRA had reasonable grounds to believe in the truth of a false credit report in order to benefit from the qualified privilege.<sup>418</sup>

In general, a common law defamation claim is in the plaintiff's favor. The falsity of the statement and the harm to the reputation is presumed unless rebutted.<sup>419</sup> The U.S. Supreme Court introduced new standards, which will be discussed in the fourth chapter.

A commentator believes that the FCRA provides recovery for defamation claims but in the form of negligence.<sup>420</sup> Under the FCRA, a consumer may prevail if he proves either that CRA procedure is not reasonable to assure the maximum possible accuracy as FCRA requires or the procedure is reasonable to assure the maximum possible accuracy in general, but procedure fails in the consumer's report.<sup>421</sup>

The author then compares and contrasts the theory of recovery in common law defamation claims and under the FCRA. He concluded that the chance of recovery under the FCRA is higher than the common law claims because of broader range of cases. Further, the FCRA precludes defendants from bringing certain defenses that would work under common law claims.<sup>422</sup>

Under the common law, a plaintiff needs to prove that the defendant published a defamatory statement concerning the plaintiff, and that it was understood by its recipient to be defamatory. The plaintiff must also prove he sustained damages because of that statement. He is entitled to a verdict unless the defendant proves an affirmative defense that is not overcome by the plaintiff.<sup>423</sup>

Under the FCRA, to recover for negligence the plaintiff must allege and prove that the defendant breached a legal duty and the breach of the duty caused actual loss or damages. Courts added to the foregoing that the information in the report be false and adverse.<sup>424</sup> In comparing both theories, it seems clear that defamation theory inquires into the motive or the equivalent, while the negligence theory inquires into the reasonableness of the conduct or procedure but not into the motives.<sup>425</sup>

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<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 104.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> Katz, *supra* note 407, at 789-90.

<sup>420</sup> Maurer, *supra* note 411, at 114.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 115.

<sup>423</sup> *Id.* at 115-16.

<sup>424</sup> *Id.* at 116.

<sup>425</sup> *Id.* at 117.

Concerning the injury and damages, the author compares both theories. Under defamation theory, the injury to the plaintiff is presumed. If the defendant proves qualified privilege, then the plaintiff needs to prove actual damages to recover. However, if the defendant is protected under the First Amendment, then the *New York Times* malice requirement applies.<sup>426</sup>

Finally, the author compares defamation theory and negligence theory in regard to truth and accuracy. Under defamation theory, the truth is a viable defense to defamation. The burden of proving truth or falsity is on the plaintiff in his trial to overcome the qualified privilege or First Amendment protection.<sup>427</sup> Under negligence theory, the author asserts that courts are not willing to accept actions under section 1681o if the information is true even though the procedure followed was unreasonable. Therefore, both defamation and negligence theory provide the same protection for the defendant if the information is true.<sup>428</sup>

After evaluating both theories the author concludes that the negligence theory under the FCRA is better than defamation theory in terms of balancing the parties' interests. The author states that the interested parties in credit reporting are individuals as subjects, subjects as a group, CRAs, and credit reports users.

The interest of individuals, "the subjects of the credit report", is obvious.<sup>429</sup> If the information in the report is positive, the individual may be unconcerned about its accuracy. If the information is negative, the individual will be concerned about it, however, if it is accurate but negative individual has no authority in requesting it not to be included. The individuals may be denied access to credit without valid reason or may be treated as high risk clients. Thus, credit's terms will be unfavorable to individuals. The embarrassment or injury to reputation may affect the social life of the subjects.<sup>430</sup>

The subjects as a group have an interest in the accuracy of the reports. Accuracy will lead to fair allocation of benefits and resources. They benefit from the availability of information, reducing the cost of investigation, as the cost will be spread around the whole group.<sup>431</sup>

Credit report users also have interest in the accuracy of credit reports as it represents the actual estimation of risk. However, users are concerned about inaccurate positive information more than inaccurate negative information. If the information is inaccurately negative, they already take the precaution by raising the interest. However, inaccurately positive incurs needless high risk.<sup>432</sup>

On the other side, CRA interests are dependent on the interests of the users of credit reports. Because users are concerned about inaccurate positive information more than inaccurate negative information, a CRA has an incentive to produce errors in their reports so that users receive inaccurate negative information, thus, users may avoid unnecessary high risk.<sup>433</sup>

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<sup>426</sup> *Id.* at 120.

<sup>427</sup> *Id.* at 123-24. The author meant by negligence theory the negligence action that is provided by FCRA to protect consumers. However, the defamation theory is the defamation common law action.

<sup>428</sup> *Id.* at 124.

<sup>429</sup> *Id.* at 127.

<sup>430</sup> *Id.* at 127-28.

<sup>431</sup> *Id.* at 128.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

How does defamation theory and negligence theory respond to the conflict of interests? The author compares them and concludes that negligence theory under the FCRA balances between the conflicting interests fairly.

Under the defamation theory, if the qualified privilege is denied, the CRA will bear the whole risk. The subjects will benefit from the credit industry in general such as an access to credit or availability of information, while they bear no risk. If the CRA will share the positive information only, that will raise costs and affect the development of the industry. On the other hand, the users of credit reports will pay more for the credit reports and in turn raise the lending cost. This cost will be passed on to consumers.<sup>434</sup> Common law created the qualified privilege for that reason. However, the qualified privilege will benefit the CRA and users while consumers, the subjects of the reports, have no mean to prevent such errors.<sup>435</sup>

Under the negligence theory, the courts have been given wide discretion in examining the procedures of a CRA on a case-by-case basis. Furthermore, errors are expected in credit reports. Therefore, the FCRA did not allow recovery for every error but only for those with negligence or willfulness. Based on that allocation, the CRA bears the risk they created with negligence or willfulness and consumers bear the risk of unintentional or accidental errors.<sup>436</sup>

The author finalizes his paper by analyzing this theory under two paradigms of liability: reciprocity and fault. Based on reciprocity, the CRA places the subject at risk. However, the subject places no risk on the CRA. It is true that the subject will benefit from the credit industry in general, but he is a stranger to the agency that harms him.<sup>437</sup> Based on fault, the court should consider the magnitude of the loss discounted by the probability of the occurrence. If the value of the credit report is greater than the cost of precautions, the CRA should be liable. If the cost of precautions is greater than the value of the product, then the CRA should not be liable.<sup>438</sup>

### 3.10. Burden of Proof

The plaintiff generally has the burden of proof in any case. In the context of credit reporting claims, initially the consumer has the burden of proof. Some suggest the burden should be shifted to the CRA to prove that it followed reasonable procedure to assure maximum possible accuracy.

Burden of proof issue becomes more important with the new anti-terrorism act “USA PATRIOT Act” which allows the government to access credit information more easily. Two main issues may arise. First, a CRA will face flood of suits for supplying private credit information to governmental agencies. Second, more people will invade consumers’ privacy.<sup>439</sup> Accordingly, one commentator asserts that courts should consider proving the existence of inaccurate information in the CRA records as a satisfaction of the burden of proof shouldered upon them.<sup>440</sup>

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<sup>434</sup> *Id.* at 129.

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* at 130.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* at 130-31.

<sup>439</sup> Jennifer Cuculich, *Who Bears The Burden of Proof Under The Fair Credit Reporting Act Consumer May Bear The Biggest Burden In This Climate Of Heightened National Security*, 14 Loy. Consumer L. Rev. 305, at 306 (2006).

<sup>440</sup> *Id.* at 306.

### 3.11. Attorney Liability

Attorneys have obtained credit reports on opposing parties, witnesses, or jurors, prior to, or during, litigation.<sup>441</sup> Some of the purposes were to challenge the credibility of the opposing party or counsel, to see whether suing the opposing party would be worthwhile, and to ascertain his or her ability to pay a judgment,<sup>442</sup> or to locate a witness or juror.<sup>443</sup>

In addition to the preceding permissible purposes, court decisions reveal some purposes that are permissible even though not explicit in the FCRA. For example, a company may issue a report if needed in connection with litigation that involves debt collection.<sup>444</sup> A company also may issue a report so that a party to the litigation can verify that negative information was removed from the report, as part of a settlement agreement.<sup>445</sup> Courts also allow an attorney to obtain a credit report on a prospective client, and the attorney will represent the client in personal, family or household matters.<sup>446</sup>

If attorneys improperly obtain a credit report or misuse one, they may be liable for actual damages, statutory damages, punitive damages and reasonable attorney fees. The FCRA provides for such remedies in noncompliance cases.<sup>447</sup> To establish non-compliance by an attorney, a plaintiff must plead and prove that: the attorney violated the FCRA knowingly and willfully, the attorney's purpose for obtaining the report was impermissible, and the attorney failed to disclose to the CRA his or her actual purpose.<sup>448</sup>

An attorney may be sued for allegedly using a credit report in a way that violates the FCRA. Assuming the report is within the definition of the FCRA, the attorney risks liability if he does not use the credit report in accordance with the act. The FCRA does not provide a definition of "use". Consequently, courts differ in defining the meaning of "use". One approach by the courts says obtaining the credit report does not constitute a "use",<sup>449</sup> while another approach is retaining or obtaining the credit report is considered as a "use".<sup>450</sup> Another approach observes that the plain language of the FCRA maintains a distinction between "obtaining" and "using." Thus, the courts take the position that "using" is different from merely obtaining.<sup>451</sup> One commentator suggests that in accordance with the statutory objectives protecting consumer privacy, the language may be construed to mean "publicity" under the state common law invasion of privacy. Thus, using the credit report by an attorney within the litigation is permissible so long as the attorney does not disclose the credit information to persons outside the lawsuit.<sup>452</sup>

Attorneys may defend their use of a credit report by saying it served professional or commercial purposes and therefore is outside the scope of the FCRA. Courts respond differently to such a defense and an attorney may be in risk in some jurisdictions. Another

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<sup>441</sup> T. Leigh Anenson, *Attorney Liability Under The Fair Credit Reporting Act: The Limits of Zealous Representation*, 23 Ann. Rev. Banking & Fin. L. 431, 441 (2004).

<sup>442</sup> L. Bryan Burns, *Bakker v. McKinnon: Attorney Faces Punitive Damages for Obtaining Credit Reports on Adverse Litigant*, 53 Ark. L. Rev. 73, 81 (2000).

<sup>443</sup> Matthew S. Criscimagna, *Attorneys Beware: Obtaining Credit Reports On Opposing Party May Lead to Punitive Damages: Bakker v. McKinnon*, 64 Mo. L. Rev. 1037, 1049 (1999).

<sup>444</sup> Anenson, *supra* note 441, at 438; Criscimagna, *supra* note 443, at 1049.

<sup>445</sup> *Id.* at 439.

<sup>446</sup> Criscimagna, *supra* note 443, at 1049.

<sup>447</sup> 15 U.S.C. § 1681n; 15 U.S.C. § 1681o.

<sup>448</sup> Anenson, *supra* note 441, at 436.

<sup>449</sup> *Id.* at 443.

<sup>450</sup> *Id.* at 444.

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* at 446.

defense is the use of a credit report as a legitimate business need as the FCRA allows. Courts take one of three approaches to such a defense. First, some courts limit the business need to a need related to the transactions enumerated. Thus, “legitimate business need” means any need related to the permissible purposes in the FCRA. Another approach extends the applicability of “legitimate business need” to similar transactions to those enumerated as long as they constitute legitimate business needs.<sup>453</sup> The latter approach reasons that such liberal construction supports Congress’s intent not limiting the transactional scope of the FCRA.<sup>454</sup> Alternatively, the third approach opens the door to transactions widely and includes any type of transaction with a legitimate business need. This approach contradicts the plain language of the FCRA which provides limitations.<sup>455</sup>

As to what constitutes “use” under the FCRA, there are different approaches. One approach considers the ultimate use of the credit report. Accordingly, if the report is used ultimately for professional or commercial purposes, then it is not a credit report as defined in the FCRA and should be outside of the scope of the FCRA.<sup>456</sup> This approach has been criticized because of its contradiction to the plain language of the FCRA. Ignoring the purpose of collecting this information leads to the exclusion of reports Congress intended to cover.<sup>457</sup> Under this approach, a CRA can disseminate information for non-statutory purposes even though such information was collected for statutory purposes though disseminating information for non-statutory purposes is prohibited under FCRA. This approach leads to inconsistency within the FCRA sections.<sup>458</sup>

Alternatively, another approach considers the purpose of collecting credit information at the time of collection. Consequently, if the information at the time of collection is meant to be used for FCRA purposes, then it does not matter that the ultimate use is not one of the FCRA’s listed purposes.<sup>459</sup> Under the latter approach, reaching a different conclusion and allowing users of credit reports to escape liability based on the ultimate use would frustrate the objectives of the FCRA. One court reasoned “because of the circular definition of ‘consumer report’ section 1681b’s limitations on dissemination of consumer reports are essentially rendered meaningless if the ... determination of whether a report is a consumer report is made solely by looking at the reason for which the report is requested.”<sup>460</sup> Another court reasoned that the FCRA could not be applied only to activities of a CRA when the consumer applies for credit, insurance, or employment. Otherwise, the CRA would be free to continue the very practice the act was designed to prohibit.<sup>461</sup>

One commentator asserts that approaches, original collection purpose approach and ultimate use approach, apply, yet to different defendants. If the defendant is the CRA, the original collection purpose should apply to cover a wide variety of reports and to restrict dissemination of information. Moreover, original collection purpose should apply if the defendant is the user of the information and knows or should have known of the original collection purpose.<sup>462</sup> If the defendant is the user of information who has no knowledge of

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<sup>453</sup> Griffith, *supra* note 354, at 57, Mary A. Bernard, Houghton v. New Jersey Manufacturers Insurance Co. : A Narrow Interpretation Of The Scope Provisions Of The Fair Credit Reporting Act Threatens Consumer Protection, 71 Minn. L. Rev. 1319, 1360 (1987).

<sup>454</sup> Bernard, *supra* note 453, at 1360.

<sup>455</sup> *Id.*

<sup>456</sup> Anenson, *supra* note 441, at 448; Burns, *supra* note 442, at 78; Bernard, *supra* note 453, at 1335.

<sup>457</sup> Bernard, *supra* note 453, at 1345.

<sup>458</sup> *Id.* at 1346.

<sup>459</sup> Griffith, *supra* note 354, at 50.

<sup>460</sup> Anenson, *supra* note 441, at 450

<sup>461</sup> *Id.* at 450, Criscimagna, *supra* note 443, at 1046; Griffith, *supra* note 354, at 50.

<sup>462</sup> Bernard, *supra* note 453, at 1348.

the original collection purpose, then actual use should apply, as it is not fair to hold him liable for the motives of the CRA.<sup>463</sup>

The safe harbor for the attorney is to investigate the opposing parties, witnesses, or jurors without requesting a credit report,<sup>464</sup> to disclose the impermissible purpose to the CRA,<sup>465</sup> to request the credit report during the discovery stage,<sup>466</sup> or to find a source of evidence other than a credit report.<sup>467</sup>

The other element of establishing the case is to prove that the attorney has violated the FCRA knowingly and willfully. Knowledge of the violation is essential. However, willfulness means something more than knowledge. Courts have taken different approaches in defining what constitute “willfulness”. One approach is to say that willfulness includes knowledge of the violation and motivation to harm the consumer.<sup>468</sup> Alternatively, willfulness has been viewed as intentional conscious disregard of the rights of another. Under this approach, malice is not required to prove willfulness.<sup>469</sup> The willfulness requirement was found to be satisfied in one case when a defendant requested the report from the CRA and certified false or incomplete reasons for requesting the credit report.<sup>470</sup> The willfulness element is also debated, however, after the U.S. Supreme Court decision in *Safeco Insurance Co. Of America v. Burr* the definition is no longer disputed.

After proving the violation and willfulness, the consumer must prove a causal link between the violation and the damages.<sup>471</sup> One easy way to prove these damages is intentional infliction of emotional distress. Unlike a state common law claim, intentional infliction of emotional distress can be proven easily as no expert testimony is required. Plaintiff’s testimony is sufficient. Attorney risk has increased as courts have ruled that actual damages are not a prerequisite to collect punitive damages.<sup>472</sup> It is worth mentioning that injunctive relief is not available for consumers under FCRA.<sup>473</sup>

One analyst of the FCRA concludes that the scope of punitive damages in the act is unsurpassed. Unlike similar acts, the FCRA does not impose a cap on damages nor provide guidance, standards or factors for determining the basis of imposition of punitive damages. For example, the FDCPA<sup>474</sup> does not provide explicitly for punitive damages but rather uses ‘additional damages’ which are not to exceed \$1000. The FDCPA spells out factors to be considered in awarding ‘additional damages’ such as intent, frequency of violation, nature of the violation, or number of affected people.<sup>475</sup> Another example is the ECOA. The ECOA provides for punitive damages explicitly, and factors to be considered such as actual damages, persistence of failure to comply, resources of the creditors, number of people affected, and the intention of the creditor. Moreover, the punitive damages under the ECOA cannot be greater than \$10,000.<sup>476</sup>

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<sup>463</sup> *Id.* at 1355.

<sup>464</sup> Anenson, *supra* note 441, at 452.

<sup>465</sup> *Id.* at 441.

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 452.

<sup>469</sup> Burns, *supra* note 442, at 82.

<sup>470</sup> Anenson, *supra* note 441, at 453.

<sup>471</sup> *Id.* at 456; Worsley, *supra* note 359, at 70.

<sup>472</sup> Anenson, *supra* note 441, at 458, Burns, *supra* note 442, at 83.

<sup>473</sup> Worsley, *supra* note 359, at 72.

<sup>474</sup> Fair Debt Collection Practices Act (FDCPA). 15 U.S.C. §1692

<sup>475</sup> Worsley, *supra* note 359, at 88.

<sup>476</sup> Equal Credit Opportunity Act (ECOA) 15 U.S.C. § 1691.



Attorneys cannot avoid liability by simply directing another person to obtain the credit report.<sup>477</sup> Courts have held that attorneys may be held liable on one of two bases: agency principles, or construction of the FCRA itself. The first approach determines the liability based on the agency principles of, apparent,<sup>478</sup> express or implied authority, or *respondet superior*.<sup>479</sup> The policy behind such a decision is to prevent any delegation of authority to another person to avoid liability.<sup>480</sup> Other courts relied on legislative text, structure, and purposes of the FCRA to hold the attorney liable. They contemplated the spirit of the FCRA trying to find causes of action within the act, rather than importing causes of action from state laws or any other legal theories not mentioned explicitly in the FCRA.<sup>481</sup>

Even after a consumer meets his burden of proof, the attorney may have defenses. Commentators state three defenses that may help the attorney. The first defense is the statute of limitations. The FCRA provides that action shall be brought “not later than the earlier of (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs”.<sup>482</sup> Courts differ as to when the time for the statute of limitations begins to run. One approach is to find that the statute of limitations runs from the issuance of the credit report that related to the violation. Another approach is to find that the statute of limitations runs from the existence of damages, as the damages are the basis of the liability. The third approach is that the statute of limitations runs from the day of the attorney’s negligent or willful failure to comply with the FCRA.<sup>483</sup> One court held the statute of limitations runs from the date of the consumer’s knowledge of the violation.<sup>484</sup>

As a second defense, an attorney may plead absolute immunity under state common law. The attorney must prove obtaining the credit report had a reasonable relation to the litigation.<sup>485</sup> For federal law, absolute immunity is granted to the attorney who represents the government if the representation is related to a judicial or quasi-judicial proceeding.<sup>486</sup>

For the third defense, qualified immunity may be granted if the attorney obtained a credit report in the course of representing his client in good faith and without malice.<sup>487</sup> For federal law, the same immunity is granted to public attorneys unless the attorney knows or ought to know he is violating a person’s clearly established statutory or constitutional rights.. For instance, if the public attorney is acting with malice, he is likely to have violated statutory rights, which the public attorney knows or ought to know.<sup>488</sup>

One possible obstacle to the assertion of immunity defenses is preemption. The FCRA declares that it preempts inconsistent state law. As a result, some courts hold that there is an inherent inconsistency with the FCRA as immunity frustrates the FCRA’s objectives and prevents consumers from enjoying the rights granted to them.<sup>489</sup> On the other hand, one commentator suggests that the FCRA preempts state common law claims but not state common law defenses that may be pleaded if not inconsistent with the FCRA. He concluded

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<sup>477</sup> Anenson, *supra* note 441, at 458; Griffith, *supra* note 354, at 81.

<sup>478</sup> Worsley, *supra* note 359, at 75.

<sup>479</sup> Anenson, *supra* note 441, at 441.

<sup>480</sup> *Id.* at 459.

<sup>481</sup> *Id.* at 462.

<sup>482</sup> 15 U.S.C. § 1681p.

<sup>483</sup> Anenson, *supra* note 441, at 464-66.

<sup>484</sup> Worsley, *supra* note 359, at 70.

<sup>485</sup> Anenson, *supra* note 441, at 466.

<sup>486</sup> *Id.* at 470.

<sup>487</sup> *Id.* at 475.

<sup>488</sup> *Id.* at 476.

<sup>489</sup> *Id.* at 478.

that if the court is more likely to consider the policy and standards of immunities to be consistent with the FCRA, immunities will be granted even if there is a violation of the FCRA. However, if the court is more likely to consider claims against attorneys on a case-by-case basis, courts will grant the immunity if there is no violation, and reject it if there is a violation.<sup>490</sup>

All the articles reviewed show that attorneys are at risk for all types of damages in FCRA violations. Even though there are some defenses, attorneys must be cautious and consider that courts are unpredictable in imposing liability. Such risks may not substantially affect the performance of attorneys, and the articles reviewed indicate there are several ways to achieve their goals and avoid liability other than obtaining credit report.<sup>491</sup>

### **3.12. Attorney Fees**

The FCRA provides for plaintiff, who brings a successful action, inter alia, with reasonable attorney fees.<sup>492</sup> Courts provided guidelines to determine the reasonableness of the award. This award is contingent on bringing a successful action. Courts differed in awarding attorneys' fees in the case where no damages were awarded which will be presented in the seventh chapter.

Both federal and state statutes provide reasonable attorney fees for a successful action.<sup>493</sup> However, federal statutes provide reasonable attorney fees only for consumers, while state statutes provide reasonable attorney fees for the prevailing party, which may include the defendant.<sup>494</sup> The purpose of imposing such provisions is to encourage lawyers to accept these types of cases even if they have nominal damages or no damages at all.<sup>495</sup> Awarding attorney's fees is a matter of reasonableness, thus, the amount is not limited to the damages awarded.<sup>496</sup>

The authors conclude that all federal consumer protection acts serve the same objectives. Enacting statutes that protect consumers but provide no reasonable attorney fees are only hollow rights.<sup>497</sup> Statutes that provide reasonable attorney fees are more likely to be enforced because lawyers will recognize that they will be compensated for their hard works.<sup>498</sup> Finally, frivolous cases may be deterred as the FCRA provides the defendant with the reasonable attorney's fees.<sup>499</sup>

### **3.13. Successful Action**

As stated earlier, the FCRA and the FDCPA provide for plaintiffs who bring a successful action to receive reasonable attorney fees.<sup>500</sup> Some courts unsuccessfully tried to interpret the clause "successful action" by extending the U.S. Supreme Court interpretation of "prevailing party" term in *Buckhannon Board & Care Home, Inc. v. West Virginia*

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<sup>490</sup> *Id.* at 481.

<sup>491</sup> *Id.* at 482.

<sup>492</sup> 15 U.S.C. § 1681n (a)(1-3); 15 U.S.C. § 1681o(b).

<sup>493</sup> Treena A. Kaye, et al., *A Common Thread of Availability Of Attorneys' Fees Links All Federal and State Consumer Protection Statutes. Otherwise, They Would Provide Hollow Rights*, 63-FEB Fla. B.J. 49, at 49 (1989).

<sup>494</sup> *Id.* at 49.

<sup>495</sup> *Id.* at 52.

<sup>496</sup> *Id.* at 50.

<sup>497</sup> Sean Hannon Williams, *Non-Prevailing Parties Who Bring Successful Actions Under Consumer Protection Statutes*, 71 U. Chi. L. Rev. 311, 315 (2004).

<sup>498</sup> Kaye, *supra* note 493, at 52.

<sup>499</sup> Williams, *supra* note 497, at 315.

<sup>500</sup> 15 U.S.C. § 1681n (a)(1-3); 15 U.S.C. § 1681o (b).

*Department of Health & Human Resources* to “successful action”. A commentator asserts that though the term is ambiguous, it ought not to be interpreted similarly to “prevailing party” due to the difference in the language and legislative history. This issue will be discussed in details in the seventh chapter.

### **3.14. Class Action Statutory Damages**

The FCRA provides for statutory damages in willful non-compliance violations.<sup>501</sup> Those statutory damages are intended as a deterrent to the wrongdoers.<sup>502</sup> Furthermore, statutory damages encourage consumers to act as an attorney general in their private capacities to police the conduct of the wrongdoer.<sup>503</sup> Moreover, statutory damages guarantee a minimum redress if the actual harm is difficult to prove or it does not exist.<sup>504</sup>

In many instances, consumers do not have incentive to bring actions for FCRA violations because they do not know about the violations or because the cost of the action is too high.<sup>505</sup> Lawyers, as the drivers of this type of case,<sup>506</sup> found a new mechanism to enforce the FCRA statutory damages in favor of their clients, and of course for their own benefit as well. A class action mechanism raises a constitutional issue of “excessiveness of statutory damages” that violates due process in many cases.<sup>507</sup> Excessiveness of statutory damages will be discussed in the seventh chapter.

### **3.15. Types of Measureable Damage**

There are different types of credit damage. The author in this article examined three of the common damage: increased out-of-pocket costs, loss of credit expectancy, and loss of credit capacity.<sup>508</sup> Another type of damage is credit reputation damage. A plaintiff can recover damage for injuries that resulted in loss of credit or reputation if he proves it was natural, probable, and foreseeable.<sup>509</sup>

Out-of-pocket costs such as an increase in interest or credit denial are compensable.<sup>510</sup> Damages are determined by the difference between the cost of lending pre and post injury. Recovery is limited to the increase of the payment but not to the benefit of securing a lower interest rate.<sup>511</sup> Some courts may include out-of-pocket costs into the actual damages.

A consumer may lose his credit expectancy in some cases. For instance, when a consumer has different credit cards with an aggregate amount of \$30,000 and low interest rates, he may lose this limit if his credit report contains inaccurate information. He may be eligible for punitive damages. A claim of credit expectancy may be available even if the main case of defamation was preempted.<sup>512</sup>

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<sup>501</sup> 15 U.S.C. § 1681n. (Provides, “(a) In general. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of (1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000”).

<sup>502</sup> Sheila Scheuerman, *Due Process Forgotten the Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 117 (2009).

<sup>503</sup> *Id.* at 111.

<sup>504</sup> *Id.* at 107.

<sup>505</sup> *Id.* at 108.

<sup>506</sup> *Id.* at 114.

<sup>507</sup> *Id.* at 104.

<sup>508</sup> Georg Finder, *Types Of Measurable Credit Damages*, 21 No. 5 Prac. Litigator 51, 51 (2010).

<sup>509</sup> *Id.*

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> *Id.*

Credit capacity is different from the credit expectancy a consumer may recover from such damages. Loss of credit capacity is defined as diminishment in available credit or a rise in the rate of available credit. He may lose the utilization of credit that he was used to do before the injury. The formula for calculating the damages is the ratio of pre-injury debt to post-injury debt and pre-injury cost of credit to post-injury cost of credit.<sup>513</sup> More information will be provided in the fifth chapter.

### **3.16. Preemption**

Federal law preemption of state laws is present in the FCRA too. There are different ways of occurrence of preemption. Courts also took different views in dealing with preemption in regard to the FCRA. The courts follow one of three different approaches in interpreting those sections and the relationship between them: temporal approach, total approach, and statutory approach. Preemption approaches will be discussed in the fourth chapter.

### **3.17. Findings**

After reviewing all of the scholarly published articles, we can reach a conclusion that FCRA needs to be amended. Every law, even a perfect law, needs to be amended regularly to meet the changing circumstances and evolving problems. Legislators will benefit from court decisions in anticipating the problems and ambiguity of any given act.

In sum, I can conclude from the foregoing articles that all the articles at hand, except one, dealt with existing problems in defining, interpreting, or reading the FCRA provisions. They only wrote about court cases in the context of the FCRA. None of the authors was trying to help courts avoid such mistakes or misapplication of the FCRA through writing about the FCRA's provisions and providing reasonable interpretation. We saw that many courts overruled previous decisions based, *inter alia*, on such articles but after many years. This shows that courts welcome such help and support and depends on its merits in favoring one argument over the other. Even these articles are helpful to the courts; however, I believe courts may be more reluctant to accept such advice after reaching their decision. Such acceptance may be interpreted as a sign of weakness. Therefore, a holistic treatment of FCRA is a preferred method to attain the utmost benefits which helping courts is one of them.

I found few articles to be neutral. Most of the articles have taken a side before writing, so the whole article was built on that side. For example, some articles take the position as pro-consumer; therefore, their ideas and contributions were built on pro-consumer ideas. On the other hand, some articles take the stance of pro-CRA and build their arguments based on those agendas. I believe justice requires balancing the interests of all parties, the credit reporting industry, consumers, and credit reporting agencies. Any other way of treating such topics will not be accepted by either party.

It is natural that most of the FCRA provisions have not been discussed or defined. I hope my dissertation will help conduct such discussion. Because of the limited scope of the dissertation, I will only examine the actual cause of action, damage, and measuring remedies, which, I believe are the vital and profound parts. I hope I have paved the road for the reader to understand the succeeding chapters.

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<sup>513</sup> *Id.*

## **Fourth Chapter:** **Credit Reporting Breaches<sup>514</sup>**

The first step to building a credit reporting case is proving a breach of the duties imposed by the FCRA. Each section of this chapter focuses on a particular breach of duty or violation of law and includes a citation to the source of the duty or law. Next, I categorized the acts - that constitute breach of duties - and the actors, based on examples from cases if available. Statutory or punitive damages for some of the violations may be granted, in some cases, without requiring actual or nominal damages, while other violations require proof of actual or nominal damages. In this chapter, my aim is to show the violations that constitute breach, regardless of other required elements that are necessary to recover damages. Courts are split on the availability of a private right of action under some sections of the FCRA.

In this chapter, I argue breaches as an element of liability under the FCRA and the CIL. Therefore, the general language of section 1681n<sup>515</sup> and 1681o<sup>516</sup> supports the actionability of any violation of any section of the FCRA or the CIL unless specific sections are expressly excluded.<sup>517</sup> When the FCRA limits liability explicitly in some sections, I do not consider violations of those sections as recoverable breaches.

### **4.1 Definition of Breach**

Breach is defined generally as “a violation or infraction of a law or an obligation [such as] breach of warranty [or] breach of duty.”<sup>518</sup> Breach of duty is defined the same way as “the violation of a legal or moral obligation; the failure to act as the law obligates one to act ...”<sup>519</sup> Therefore, I can define “breach” in the context of credit reporting as “violation of a legal duty that is imposed by the credit reporting act.” The FCRA and the CIL impose different kinds of duties upon CRAs, furnishers of information, and users of information. It is necessary to know the duties imposed by the FCRA and the CIL, on what authorities such duties are imposed, and what acts may constitute breach of duty under the FCRA and the CIL.

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<sup>514</sup> My usage of “FCRA” covers all subsequent amendments whether amendments are direct, or indirect through enacting new acts that affect the FCRA. Amendment includes Consumer Credit Reporting Reform Act, 1997 and 1999 amendments, USA PATRIOT Act, Fair and Accurate Credit Transactions Act of 2003, Credit and Debit Card Truncation Clarification Act, the Credit CARD Act, and Dodd-Frank Wall Street Reform and Consumer Protection Act, and the like.

<sup>515</sup> 15 U.S.C. § 1681n (Provides, “Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer ...”).

<sup>516</sup> 15 U.S.C. § 1681o (Provides, “Any person who is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer ...”).

<sup>517</sup> 15 U.S.C. § 1681g(e)(6) (Provides, “sections 616 and 617 do not apply to any violation of this subsection”); 15 U.S.C. § 1681g (e)(6) (Provides, “No business entity may be held civilly liable under any provision of Federal, State, or other law for disclosure, made in good faith pursuant to this subsection”).

<sup>518</sup> BLACK’S LAW DICTIONARY, *supra* note 163.

<sup>519</sup> *Id.*

## Sub-chapter A:

### 4.2. Breaches of CRAs

#### 4.2.1 Supplying Credit Information to Users with No Permissible Purposes

The CRA violates the FCRA if it provides credit reports to users who have impermissible purposes.<sup>520</sup> The difference between this breach and breach of acquiring credit information for no permissible purposes is that one concerns users who obtain credit reports for impermissible purposes. Conversely, this breach concerns CRAs who supply credit reports to users without permissible purposes.

The FCRA enumerates the permissible purposes under section 1681b. These are exclusive. The permissible purposes under the FCRA are:

- 1) In response to court order or in connection with proceedings before a Federal grand jury;<sup>521</sup>
- 2) In response to the consumer's instruction;<sup>522</sup>
- 3) In connection with credit extension,<sup>523</sup>
- 4) In connection with account review,<sup>524</sup>
- 5) In connection with collecting credit account;<sup>525</sup>
- 6) In connection with employment;<sup>526</sup>

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<sup>520</sup> 15 U.S.C. § 1681b(a) (Provides, that CRAs “may furnish consumer report under the following circumstances and no other ...”).

<sup>521</sup> 15 U.S.C. § 1681b(a)(1); *Ndiaye v. Foust*, 73 Va. Cir. 408, 409 (2007) (The court held, the FCRA gives a court with proper jurisdiction the power to issue an order for production of a credit report, however, a CRA is still not obligated to produce the credit report.).

<sup>522</sup> 15 U.S.C. § 1681b(a)(2).

<sup>523</sup> 15 U.S.C. § 1681b(a)(3)(A); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 278 The FCRA refers to the ECOA in defining credit as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or service and defer payment therefore.” 15 U.S.C. § 1691a(r)(5) . The benefit of differentiating between a “credit” and “business transaction” becomes clear when the collection of debt is needed. If it is “credit” then a user can obtain a credit report for the purpose of debt collection. However, if it is a “business transaction” then a user cannot obtain a credit report for the collection of debt unless the debt is reduced to a judgment. For example, residential lease status is unclear. If it is “credit” then a landlord may obtain a credit report to determine whether to lease, and collect the debt of the lease. If it is a “business transaction” then a landlord may not obtain a credit report to collect the debt.

It is also unclear whether “credit” must be only for personal, family, or household purposes. The FTC official Staff Commentary states sections of the FCRA should be read together, therefore, “credit” in other contexts of the FCRA should be limited to personal, family, or household purposes. The other view extends “credit” to cover any type of credit transaction even if it is not for personal, family, or household purposes.

<sup>524</sup> 15 U.S.C. § 1681b(a)(3)(A); *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118 , 1112 (2006) (The court held, the FCRA permits obtaining a credit report for account review purpose but it does not cover reviewing a closed or paid account).

<sup>525</sup> 15 U.S.C. § 1681b(a)(3)(A); *Weitz v. Wagner*, 07-CV-1106(KAM), 2009 WL 4280284 at \* 4 (E.D.N.Y. Nov. 24, 2009) (The court held, seeking the credit report to establish how much money defendant was advanced to the plaintiff so she can recover the remaining amount is a permissible purpose).

<sup>526</sup> 15 U.S.C. § 1681b(a)(3)(B); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 284 (Using a credit report in an employment context includes use of a report in connection with a promotion, reassignment, retention or termination. Use of a credit report for employment purposes has increased from 19% in 1996 to 47% in 2009. The supporters of such practice claim that handling credit responsibly is an indicator of a good employee. The opponents of such a conclusion say it is inaccurate because there are different reasons to have bad histories, some of which are beyond employees' control, such as being laid off from a job or suffering a medical problem. In order to obtain a credit report for an employment purpose, an employer must provide certification of the purpose, obtain employee consent, must make a disclosure if an adverse action has been taken, and provide copy of credit report and summary of rights.); Jerry Palmer and Laura Koppes, *Credit*

- 7) In connection with insurance underwriting;<sup>527</sup>
- 8) In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality;<sup>528</sup>
- 9) In connection with evaluating existing credit obligations;<sup>529</sup>
- 10) In connection with a legitimate business need initiated by a consumer;<sup>530</sup>
- 11) In connection with a legitimate business need to review account;<sup>531</sup>
- 12) In response to a request by governmental agencies to establish financial capacity or level of payment of child support;<sup>532</sup>
- 13) In response to a request by governmental agencies to set an initial or modified child support award;<sup>533</sup>
- 14) In response to request by the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Administration (NCUA) as part of its preparation for its appointment or as part of its exercise of powers as a conservator, receiver, or liquidating agent;<sup>534</sup>

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*History not a Good Predictor of Job Performance and Turnover*, Advance for Audiologists magazine, (March, 2004), available at <http://audiology.advanceweb.com/Article/Credit-History-Not-a-Good-Predictor-of-Job-Performance.aspx>. Another study proves that there is no correlation between credit history and job performance.

<sup>527</sup>15 U.S.C. § 1681b(a)(3)(C); FTC Commentary on the Fair Credit Reporting Act, § 604(3)(c)(A)(1) (Insurance underwriting includes issuing, canceling, renewal, determining coverage, rates, duration, or terms of a policy related to personal insurance.).

<sup>528</sup>15 U.S.C. § 1681b(a)(3)(D); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 288 (Benefits and licenses include public assistance, admission to practice of a profession, insurance license and the like. This is a permissible purpose to obtain a credit report only if the law requires assessing a consumer's eligibility before granting such benefits or licenses.).

<sup>529</sup>15 U.S.C. § 1681b(a)(3)(E); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 288 (Current creditors or potential investors may obtain credit reports for the purpose of evaluating existing credit obligations. For instance, a potential investor who is willing to buy existing credit has the right to obtain a credit report on the consumer to evaluate the associated risk before buying such credit. Similarly, insurers or banks may obtain credit reports to assess the existing risk.).

<sup>530</sup>15 U.S.C. § 1681b(a)(3)(F)(i); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 289-92 (Business needs include any type of transaction related to personal, family, or household purposes. Samples of business transactions are: renting an apartment, purchasing goods with a check, legal advice, investment, medical services, and the like. If credit or insurance is involved, then "business need" does not apply because of the specificity of credit and insurance provisions. If both sections are read together, then insurance or credit transactions that are not related to personal, family, or household purposes would be allowed, which will render specificity of the credit and insurance provisions meaningless. A consumer must initiate the transaction in order to fall under the provision. Initiation of a transaction cannot be established by asking about price, comparing price, asking about availability of finance, or even test driving. The consumer must offer to conclude a transaction in order for a merchant to obtain a credit report. In addition, a merchant must have a business need that requires obtaining credit report. Thus, obtaining a credit report in a cash sale is impermissible even though a consumer initiates the transaction.).

<sup>531</sup>15 U.S.C. § 1681b(a)(3)(F)(ii); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 292 (To determine whether a consumer continues to meet the terms of the account or not. This purpose is different from "reviewing account" when a user is a creditor of a consumer. This applies even if the user is not a creditor of the consumer but needs to review a consumer's account. For instance, a user may obtain a credit report on a holder of a deposit, non-credit account such as a checking account or investment accounts to check whether the consumer continues to meet the terms of the account.).

<sup>532</sup>15 U.S.C. § 1681b(a)(4).

<sup>533</sup>15 U.S.C. § 1681b(a)(5).

<sup>534</sup>15 U.S.C. § 1681b(a)(6).

- 15) In response to the FTC request for production of documents;<sup>535</sup>
- 16) In response to the Federal Bureau of Investigation (FBI) requesting identifying information<sup>536</sup> for counterintelligence purposes;<sup>537</sup>
- 17) In response to a governmental entity's request for counterterrorism purposes; and<sup>538</sup>
- 18) In connection with making firm offer of credit or insurance.<sup>539</sup>

Violations of section 1681e can be established if a CRA supplies information for no permissible purpose negligently, willfully,<sup>540</sup> or fails to maintain a reasonable procedure to limit furnishing credit reports for permissible purposes.<sup>541</sup> One may distinguish between “negligence” and “failure to maintain a reasonable procedure” by stating that in negligence, a reasonable procedure existed but in a particular case there was negligence in releasing the credit reports. While failure to maintain a reasonable procedure indicates partial or complete absence of a reasonable procedure to determine permissible purposes in a CRA system.

#### 4.2.1.1. Reasonable Procedure to Limit Supplying Credit Reports only for Permissible Purposes

Section 1681e(a) provides what constitutes a reasonable procedure to limit supplying credit reports only for permissible purposes. First, a CRA must require prospective users to identify themselves.<sup>542</sup> The FCRA does not provide any specific identification form; nonetheless, a proper form of ID such as driver license or State ID of a user, or Power of Attorney on behalf of a user is sufficient to meet the identification requirement. A violation of this requirement may be established when a CRA supplies a credit report without obtaining identification at all or without obtaining a proper identification.

Second, users must certify in writing the purpose for which they request credit reports and that they will not use the information for any other purposes.<sup>543</sup> CRAs usually have blanket certification forms, which users sign before credit reports are supplied to them. A violation of this requirement may be proven when a CRA releases a credit report without a signed certification form. Moreover, even in case of blanket certification which may be sufficient in cases where users always have permissible purposes, blanket certification may not release CRAs from liability if users have mixed purposes (permissible and

<sup>535</sup> 15 U.S.C. § 1681s(a); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 294 (The provision is not explicit in releasing a credit report to the FTC, however, a commentator believes “production of documents” includes production of credit reports to the FTC in case of enforcing the FCRA.).

<sup>536</sup> 16 C.F.R. § 603.2(b) (“Identifying information” has been defined by the FTC regulations as any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any: name, social security number, date of birth, driver’s license, identification number, alien registration number, passport number, employer or taxpayer’s identification numbers, unique biometric data (fingerprint, voice print, retina or iris image, or other physical representations, unique electronic identification number, address, routing code, telecommunications or access device).)

<sup>537</sup> 15 U.S.C. § 1681u.

<sup>538</sup> 15 U.S.C. § 1681v.

<sup>539</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 300 (This purpose does not allow for obtaining a full credit report, only lists of client names and addresses prescreened based on specific criteria. An offeror may obtain a full credit report after an offeree accepts the firm offer. A firm offer is an offer that must be honored if an offeree meets the criteria of the offer. A consumer has a right to opt-out of prescreening.).

<sup>540</sup> 15 U.S.C. § 1681b ;15 U.S.C. § 1681n ; 15 U.S.C. § 1681o.

<sup>541</sup> 15 U.S.C. § 1681e(a).

<sup>542</sup> 15 U.S.C. § 1681e(a).

<sup>543</sup> 15 U.S.C. § 1681e(a).



impermissible) in their practice (such as lawyers, insurance companies, or investigators).<sup>544</sup> Therefore, CRAs must take additional steps to make sure users are not using credit reports for impermissible purposes. For instance, they may ask for individual certification each time or conduct random checks.<sup>545</sup>

If an employee of a CRA supplies a credit report for no permissible purpose to a user without CRA's knowledge, then the consumer has a cause of action against the employee but not against the CRA. Unless the CRA is negligent or has no reasonable procedure to prevent releasing credit reports for impermissible purposes, CRAs are not liable.

Third, identification of users by itself is not sufficient. CRAs must have a system to assure they are dealing with legitimate business entities that have permissible purposes.<sup>546</sup> Failure to have this system may result in liability.<sup>547</sup>

#### 4.2.1.2. A Comparative Assessment

Under the CIL, the requirements seem similar to those of the FCRA. However, difficulties arise when CRAs want to comply with it. Under the CIL, a CRA is not allowed to supply a credit report without verifying the identity and the purpose of the user. The user must make a request for a credit report and certify it will not use the information for purposes other than the disclosed purposes.<sup>548</sup> In addition, approval of the consumer must be obtained.<sup>549</sup> CRAs have to investigate the user's purposes for requesting the credit report.<sup>550</sup> Thus, under the CIL, it will be a violation to supply a credit report to a user without the consumer's approval, without verifying the identity of the user, without verifying the purpose, without certifying the purpose of the users, or without investigating the purposes of requesting the credit reports. However, neither the permissible purposes nor what constitutes reasonable investigation are found in the CIL.

### **4.2.2 Providing Outdated Information**

Generally, the FCRA prohibits CRAs from including outdated information in credit reports. This restriction applies only to adverse information. Favorable information is an advantage for consumers and neutral information does not harm the consumers.<sup>551</sup> Yet, even though the interest of consumers is protected under the FCRA, the societal interest is greater. Therefore, criminal convictions, because of their seriousness, never become obsolete.<sup>552</sup> The

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<sup>544</sup>*Pintos v. Pac. Creditors Ass'n*, 565 F.3d 1106, 1114 (9th Cir. 2009) (The court held, a subscriber's certification cannot absolve the reporting agency of its independent obligation to verify the certification and determine that no reasonable grounds exist for suspecting impermissible use.); FTC Official Staff Commentary 16 C.F.R. § 607 (2)(C).

<sup>545</sup>FTC Official Staff Commentary 16 C.F.R. § 607 (2)(C).

<sup>546</sup>FTC Official Staff Commentary 16 C.F.R. § 607 (2)(G).

<sup>547</sup>*Centuori v. Experian Info. Solutions Inc.*, 431 F. Supp. 2d 1002, 1006 (D. Ariz. 2006) (The court held, that a jury may find the CRA fails to maintain a reasonable procedure to limit furnishing credit reports for impermissible purpose when it employs only two employees to review more than 200 Internet access applications per day without training them in the permissible purposes under the FCRA.).

<sup>548</sup>CIL Implementing Regulation, section 28.

<sup>549</sup>CIL Implementing Regulation, section 29 and 39.

<sup>550</sup>CIL Implementing Regulation, section 25/3.

<sup>551</sup>FTC Official Staff Commentary 16 C.F.R. § 605(2); *Serrano v. Sterling Testing Sys. Inc.*, 557 F. Supp. 2d 688, 692 (E.D. Pa. 2008) (It is worth mentioning that the court relied on FTC Official Commentary that "a credit reporting agency cannot even suggest the existence of obsolete information").

<sup>552</sup> 15 U.S.C. § 1681c(a)(5) (Provides, "no consumer reporting agency may make any consumer report containing any of the following items of information ... Any other adverse item of information, *other than records of convictions of crimes* which antedates the report by more than seven years." [Emphasize added].); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 202 (Records of arrest, unlike criminal convictions, are

time of obsolescence should run from the time of the delinquency not from the time of reporting it to CRAs.<sup>553</sup> There are different time limits after which credit reports may not contain such information, as in the following sections.

#### **4.2.2.1 Outdated Bankruptcy**

Bankruptcies, under any chapter of the United States Bankruptcy Code, older than ten years, should not be included in a credit report.<sup>554</sup> In bankruptcy, the period runs from the date of filing the bankruptcy petition.<sup>555</sup> A CRA is prohibited from including bankruptcy information in a credit report if that information antedates the report by more than 10 years.<sup>556</sup>

#### A Comparative Assessment

The CIL, similarly, requires bankruptcy information to be removed from a credit report if it antedates the report by more than 10 years.<sup>557</sup> The CIL does not provide when the time runs in bankruptcy information. However, when we analogize it to other items that have specific times, one can say that the bankruptcy filing date triggers the starting time.<sup>558</sup> A CRA violates the FCRA and the CIL when it includes bankruptcy information in a credit report if that information antedates the report by more than 10 years.

I believe that removing bankruptcy information because of the passage of time is not a good solution. Lenders have the right to know about their consumers' past and take their action accordingly. Equating consumers who never bankrupted with those who bankrupted is not fair to the lenders or the never bankrupted consumers.

#### **4.2.2.2 Outdated Civil Cases**

Under the FCRA, civil judgments or suits may not be reported after the passage of seven years from the date of entry or until the statute of limitation expires, whichever is longer.<sup>559</sup> The FTC staff Commentary differentiates between paid and unpaid judgments. In the case of a paid judgment, it cannot be reported after seven years, even if the statute of limitations is

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treated as civil suits, therefore, it cannot be reported after seven years starting from the date of arrest or until the governing statute of limitation expires. The issue is that no statute of limitation exists for records of arrest. Other kinds of criminal records are treated as "other adverse information", which are governed by the seven years limit).

<sup>553</sup> FTC Official Staff Commentary 16 C.F.R. § 605 (7); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 196 (Therefore, for example, when a debt is reported after five years of its occurrence, the remaining period to include it in the credit report is only two years. One commentator notes a difference in practice of CRAs. Some of them use date of the last activities, which is different from the date of delinquency. Some of them use the date of removing information from the account, which is unknown to people other than that particular CRA. Finally, some of them use an old version of Metro Format, which has no field for date of delinquency. This difference will certainly lead to errors because it will introduce obsolete information.).

<sup>554</sup> 15 U.S.C. § 1681c(a)(1).

<sup>555</sup> FTC Official Staff Commentary 16 C.F.R. § 605(a)(1)(3).

<sup>556</sup> 15 U.S.C. § 1681c(a)(2).

<sup>557</sup> CIL Implementing Regulation, article 19.

<sup>558</sup> CIL Implementing Regulation, article 19 (Provides that time in civil cases runs from the time of court decision, which is the event that triggers the time.).

<sup>559</sup> FTC Official Staff Commentary 16 C.F.R. § 605(a)(2)(1) (The date of entry is the date of initiating the suit. In judgment, the date of entry is the date that judgment rendered.); *Beaver v. TRW Corp.*, CIV-87-1214E, 1988 WL 123636 (W.D.N.Y. Nov. 17, 1988) (The court held, that it is appropriate to include judgment that is less than five years old.).

longer, because payment eliminates any governing statute of limitation.<sup>560</sup> In the case of an unpaid judgment, the time runs after the statute of limitation expires.

#### A Comparative Assessment

Under the CIL, no civil suits may be reported after the passage of five years. The time runs from the date of the final decision or settlement.<sup>561</sup> A CRA violates the FCRA and the CIL by providing outdated civil cases that antedate the report by more than seven and five years respectively.

In my opinion, removing information related to a paid judgment is acceptable. However, unpaid judgments should stay indefinitely in the consumers' reports.

#### **4.2.2.3 Outdated Tax Liens**

Under the FCRA, a paid tax lien cannot be reported after seven years of payment.<sup>562</sup> Therefore, an unpaid tax lien can be reported indefinitely because section 1681c(a)(3) mentions a paid tax lien only.<sup>563</sup>

#### A Comparative Assessment

Under the CIL, tax lien is not mentioned but rather late tax payment, which should not be reported after ten years.<sup>564</sup> A CRA violates the FCRA and the CIL if it includes information related to a tax lien after passage of seven and ten years respectively.

In my opinion, information related to a tax lien should stay indefinitely in the consumers' report until it is paid. Tax is a source of public funding and everyone in the community has an interest in collecting late taxes. Passage of time is not sufficient to remove unpaid tax unless the consumer is unable.

#### **4.2.2.4 Outdated Accounts for Collection or Charged Off**

Accounts placed for collection or charged off to profit and loss cannot be included in credit reports if they antedate the report by more than seven years.<sup>565</sup> However, the period runs 180 days after the date of the first delinquency.<sup>566</sup> The effect of such a rule is that even with future delinquencies, sale of the debt, or partial payment, no new date can be added. Thus, no re-aging of information is allowed.<sup>567</sup> A CRA violates the FCRA if it includes in a

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<sup>560</sup>FTC Official Staff Commentary 16 C.F.R. § 605(a)(2)(2).

<sup>561</sup>CIL Implementing Regulation, article 19.

<sup>562</sup>15 U.S.C. § 1681c(a)(3).

<sup>563</sup>FTC Official Staff Commentary 16 C.F.R. § 605(a)(3)(1).

<sup>564</sup>CIL Implementing Regulation, article 19.

<sup>565</sup>15 U.S.C. § 1681c(a)(4); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 197-98 (Charge-off occurs when a creditor moves a debt from profit to loss on its balance sheet. An account is placed for collection when notice or collection efforts begin.).

<sup>566</sup>NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 197 (For instance, if a consumer's first delinquency is on July 2010, then the creditor charges the account to profit and loss or places it for collection, the time runs after 180 days, which is January 2011. The time ends on January 2018. Therefore, a CRA cannot include this account after January 2018 in a credit report.

<sup>567</sup>*Gillespie v. Equifax Info. Services, L.L.C.*, 484 F.3d 938, 941,943 (7th Cir. 2007) (The court held, "The recording of multiple dates in the "Date of Last Activity" can cause significant confusion and uncertainty for the consumer ... use of the Date of Last Activity could effectively allow Equifax the opportunity to keep delinquent accounts in the credit file past the seven and one-half year limitation".

credit report accounts charged or placed for collection after the passage of seven years and 180 days from the date of first delinquency.<sup>568</sup>

#### A Comparative Assessment

Under the CIL, adverse information related to accounts placed for collection or charged off to profit or loss is to be in the credit report indefinitely until the dispute between the creditor and the debtor is resolved. If a consumer's bankruptcy or insolvency is declared judicially, then adverse information related to the accounts placed for collection or charged off to profit or loss will be in the credit report for ten years.<sup>569</sup>

I think the CIL approach is better than the FCRA for two reasons. First, it closes the gate against intentional or semi-intentional defaults. If consumers know that debts stay in their credit reports forever unless they pay or declare bankruptcy, it incentivizes them to pay. Second, it takes into consideration the interest of bankrupt consumers by specifying a time limit for removal of their credit reports, and it takes into consideration the interest of creditors to keep the information on consumers who are arguably able but unwilling to pay. Inability to pay can be proven by a judgment of insolvency or bankruptcy, not through mere assertion of inability or passage of time.

#### **4.2.2.5 Outdated Adverse Information in an Investigative Report**

The FCRA adds one more requirement to investigative reports because of their effect on consumers. A CRA must review public records information that is intended to be included in the investigative report thirty days before the date of the report to verify accuracy of the information.<sup>570</sup> A CRA violates the FCRA when it reports information that is a matter of public record in an investigative report without verifying the accuracy of the information within 30 days preceding the release of report.

#### A Comparative Assessment

The CIL does not recognize investigative reports. Therefore, inclusion of outdated information is treated as a regular credit report, thus sections of regular credit report apply.

#### **4.2.2.6 Exemption from Prohibition of Reporting Obsolete Information**

Prohibition of reporting obsolete information as above does not apply if a transaction is for credit,<sup>571</sup> an underwriting of life insurance of \$150,000 or more<sup>572</sup>, or employment of an individual at an annual salary equal to or exceeding \$75,000.<sup>573</sup> This exemption is consistent with my opinion that some obsolete information should be kept indefinitely. Although the

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<sup>568</sup>*Rosenberg v. Cavalry Investments, LLC*, 3:03CV1087(RNC), 2005 WL 2490353 at \* 5 (D. Conn. Sept. 30, 2005) (The court held, in the facts of the case, a charged off debt date was in 1976. When a buyer purchased the debt in 2001, he reported the last activities of the debt as 1997. This shows the grave error that may be committed through re-aging charged off account delinquency date.).

<sup>569</sup>CIL Implementing Regulation, article 19.

<sup>570</sup>15 U.S.C. §1681d(d)(3) (Provides, "consumer reporting agency shall not furnish an investigative consumer report that includes information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished.").

<sup>571</sup>15 U.S.C. §1681c(b)(1).

<sup>572</sup>15 U.S.C. §1681c(b)(2).

<sup>573</sup>15 U.S.C. §1681c(b)(3).

FCRA sets a threshold amount to apply the exemption, it shows the importance of some of obsolete information to lenders.

#### **4.2.3 Failure to Follow Reasonable Procedure to Avoid Inclusion of Outdated Information**

Failure to follow a reasonable procedure to avoid the inclusion of outdated information is evidence of negligence, which gives rise to liability.<sup>574</sup> This cause of action is independent from the inclusion of outdated information itself, thus, following a reasonable procedure to avoid such inclusions is not a defense to inclusion of outdated information.<sup>575</sup>

Reasonableness is not defined in the FCRA. However, case law applies the reasonable person test.<sup>576</sup> Therefore, a CRA must follow a reasonable procedure when collecting information to discover outdated information, and to date information upon receipt.<sup>577</sup> Similarly, if a CRA maintains information on an electronic system, it must ensure outdated information is deleted upon expiration, otherwise its procedure is not reasonable. In addition, a CRA violates the FCRA if it does not follow a reasonable procedure to make sure exemptions of reporting outdated information<sup>578</sup> apply.<sup>579</sup>

#### A Comparative Assessment

No procedure is required under the CIL to avoid inclusion of outdated information. However, inclusion of outdated information is a violation simply because of the inclusion of outdated information in general, not because the CRA fails to follow a reasonable procedure.

In my opinion, I see no fruitful effect in making failure to follow a reasonable procedure to avoid inclusion of outdated information a separate violation. Inclusion of outdated information is actionable even if the CRA follows a reasonable procedure to avoid inclusion of outdated information.

#### **4.2.4 Inclusion of Medical Information or Medical Furnisher**

CRAs cannot disclose medical information<sup>580</sup> for credit or employment purposes without the consumer's written consent. Consent must be specific, and the user must describe the

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<sup>574</sup> 15 U.S.C. §1681e(a) (Provides, "Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c...").

<sup>575</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 205.

<sup>576</sup> *Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 (3d Cir. 1996) (The court defines reasonableness of a CRA following procedure when it mixed a consumer's name with his father's name as a, "... reasonably prudent person would [undertake] under the circumstances ... Judging the reasonableness of a [credit reporting] agency's procedures involves weighing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.").

<sup>577</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 205 (For example, when a furnisher of information does not provide the date of delinquency, a CRA violates the FCRA if it includes such information without requesting the date of delinquency.).

<sup>578</sup> Which is reporting outdated information in case a transaction exceeds certain amount as discussed earlier.

<sup>579</sup> For example, if a CRA reports outdated information to a user without assuring that an exemption applies, it violates the FCRA.; *Serrano*, 557 F. Supp. 2d, at 692 (The court held, reporting outdated information without requesting the salary first is a violation of the FCRA.).

<sup>580</sup> 15 U.S.C. §1681a(i)(1) (The FCRA defines medical information as "means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to A) the past, present, or future physical, mental, or behavioral health or condition of an individual; (B) the provision of health care to an individual; or (C) the payment for the provision of health care to an individual.").

needed usage and relevancy of the information to the process of credit or employment.<sup>581</sup> In the case of insurance, consent of the consumer is the only requirement.<sup>582</sup>

The FCRA provides an exception to this prohibition in the furnishing of information that pertains solely to financial transactions relating to debts arising from receipt of medical services, products, or devices. This information must be furnished by using codes that do not identify, or do not provide information sufficient to infer the identity of the specific provider or the nature of such services, products, or devices.<sup>583</sup> Including the name, address, and telephone number of any medical information furnisher is restricted unless it does not identify the provider or if it is furnished for insurance purposes other than casualty and property insurance.<sup>584</sup>

The purpose of this restriction is to guarantee confidentiality of consumers' health information.<sup>585</sup> It is worth mentioning that restricting information that identifies medical information furnishers is not overridden by the exemption for supplying excluded information if the transaction involves an amount that exceeds a certain threshold.<sup>586</sup> Furthermore, the exclusion of affiliate sharing of information<sup>587</sup> does not apply to medical information.<sup>588</sup>

A CRA violates the FCRA if it reports medical information in the following circumstances:

- 1- If the report that contains medical information is without the consumer's consent or if the consent is general or not written;
- 2- If the use of information is not specified, or if the use is specified but not in clear and conspicuous language;
- 3- If the purpose is for other than credit, employment, or insurance purposes;
- 4- If the information is not relevant to the process of credit or employment; or
- 5- If the information identifies, or provides information sufficient to identify the specific provider or the nature of such services, products, or devices.

#### A Comparative Assessment

The CIL does not mention the medical information of consumers explicitly, but medical information is not part of the contents of a credit report under the CIL.<sup>589</sup> However, if the information is related to debts, it will be included just as any other credit-related information is included in credit reports under the CIL. If the information is not credit-related, then it should not be included in credit reports under the CIL regardless of purpose or usage. Thus, a CRA violates the CIL when it supplies medical non-credit related information. However,

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<sup>581</sup> 15 U.S.C. §1681b(g)(1)(B)(i-ii).

<sup>582</sup> 15 U.S.C. §1681b(g)(1)(A).

<sup>583</sup> 15 U.S.C. §1681b(g)(1)(C).

<sup>584</sup> 15 U.S.C. §1681c(a)(6)(A-B).

<sup>585</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 210; 15 U.S.C. §1681s-2(a)(9) (To ensure such compliance, the FCRA requires furnishers of information to notify CRAs of their status as medical information providers.).

<sup>586</sup> 15 U.S.C. §1681c(a)(6)(B) (Provides, "such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer.").

<sup>587</sup> 15 U.S.C. §1681a(d)(2)(A)(ii-iii).

<sup>588</sup> 15 U.S.C. §1681a(d)(3); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 212-214 (There are other exceptions in which medical information can be used but are not governed by the FCRA. Therefore, I chose not to include them here because of space limitations.).

<sup>589</sup> CIL Implementing Regulation, article 18.

no violation can be established if the medical information is credit-related. I believe that even if the information is credit-related, no clear standard is provided to limit the scope of information. If, for example, a late payment of medical service is credit-related, then supplying information regarding the type of medical service is allowed under the definition even though the type of medical service is not wholly credit-related information. A clear standard is needed to clarify when borders are being crossed.

#### **4.2.5 Failure of Indication of Closure of Account by Consumer**

The FCRA requires furnishers of information to notify CRAs of voluntarily closed accounts by consumers.<sup>590</sup> CRAs must report to users the status of closed accounts and the reason why they were closed – either voluntarily or because the account holder failed to meet the terms. A consumer’s reputation could be damaged if a CRA causes a user to confuse a voluntarily closed account with one closed because of a failure to meet the account terms.<sup>591</sup> Furnishers violate the FCRA when they do not report voluntarily closed accounts by consumers at all or when they report closure incorrectly. Logic requires CRAs to include such notification in consumers’ credit reports; otherwise, the purpose of such a requirement will be frustrated. Nevertheless, no private right of action exists under the FCRA for such a violation.<sup>592</sup>

A private right of action exists when a CRA is notified of the closed account, but fails to indicate such facts in subsequent credit reports that contain the disputed information.<sup>593</sup>

#### A Comparative Assessment

In contrast to the FCRA, the CIL requires furnishers of information to notify CRAs of any voluntarily closed account by consumers and provides a right of action.<sup>594</sup> It is a violation not to report voluntarily closed accounts by consumers or to report it misleadingly.

I believe that imposing liability upon furnishers for failure to report a closed account is the best approach. However, liability should not be imposed for mere failure to report a closed account but rather for failure to indicate that the account was closed voluntarily. The flow of information will not be affected by such an imposition and the interest of consumers is protected by following such an approach.

#### **4.2.6 Failure of Maintenance of Fraud or Active Duty Alerts**

##### *One Call Fraud Alert*

The FCRA requires CRAs that operate on a nationwide basis to include a fraud alert<sup>595</sup> or an active duty alert<sup>596</sup> in the file of a consumer upon the consumer’s request. The CRA

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<sup>590</sup> 15 U.S.C. § 1681s-2(a)(4).

<sup>591</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 247.

<sup>592</sup> 15 U.S.C. § 1681s(a)(3) (Provides, “a court may not impose any civil penalty on a person for a violation of section § 1681s-2 ...”).

<sup>593</sup> 15 U.S.C. § 1681c(f).

<sup>594</sup> CIL Implementing Regulation, article 39.

<sup>595</sup> 15 U.S.C. § 1681a(q)(2)(A)-(B) (A fraud alert is defined as “a statement in the file of a consumer that notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, and is presented in a manner that facilitates a clear and conspicuous view ... by any person requesting such consumer report.”).

<sup>596</sup> 15 U.S.C. § 1681a(q)(2)(A)-(B) (An active duty alert is defined as “a statement in the file of a consumer that notifies all prospective users of a consumer report relating to the consumer that the consumer is an active duty military consumer, and is presented in a manner that facilitates a clear and conspicuous view ... by any person requesting such consumer report.”).

must provide that alert along with any credit score generated in using that file, for a period of not less than 90 days for a fraud alert or 12 months for an active duty alert.<sup>597</sup>

The purpose of such a requirement is to combat identity theft either after suspicion of an occurrence or the existence of possibilities of identity theft. In the fraud alert, a consumer has the right to request the alert be included when the consumer suspects that he or she is about to be a victim or has been a victim of identity theft. In an active duty alert, military consumers move from one place to another, which may lead others to impersonate their identities when they are away performing their duties.

#### *Extended Alert*

Consumers may extend the fraud alert period up to seven years.<sup>598</sup> Consumers in any case must provide official reports filed with law enforcement agencies that subject them to criminal penalties if they are found to be false. In addition, consumers must allege specific incidents of being defrauded or victimized.<sup>599</sup>

Upon the consumer's request, it also mandatory to exclude consumers, with fraud alert or an active duty alert, for a period of five years and two years respectively from any prescreening list, unless the consumer requests that such an exclusion be rescinded before the end of such period.<sup>600</sup> A CRA is also required to refer the information regarding the fraud alert or the active duty alert to each of the other CRAs.<sup>601</sup> A reseller must include in its report any fraud alert or active duty alert placed in the file of a consumer by another CRA.<sup>602</sup> Other CRAs that do not operate on a nationwide basis must provide information to the consumer on how to contact the FTC and other CRAs that operate on nationwide basis to obtain more information regarding placing alerts.<sup>603</sup>

Once identity theft is proven, compliance with the requirement combats identity theft.

A violation of this rule may be established by showing that:

- The CRA that operates on nationwide basis fails to include fraud or active duty alerts upon the request of consumer;
- The CRA that operates on nationwide basis fails to include alerts for the required period;
- The CRA includes consumers with fraud or active duty alerts in prescreening lists before expiration of the required period;
- The CRA that operates on nationwide basis fails to refer the information regarding the fraud alert or the active duty alert to each of the other CRAs; or
- The CRA that is not operating on a nationwide basis fails to provide consumers with information related to how to contact the FTC and other CRAs that operate on a nationwide basis to obtain more information regarding placing alerts after suspicion of identity theft.

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<sup>597</sup> 15 U.S.C. § 1681c-1(a)(1)(A); 15 U.S.C. § 1681c-1(c)(1).

<sup>598</sup> 15 U.S.C. § 1681c-1(b)(1)(A).

<sup>599</sup> 16 C.F.R. § 603.3(a)(1)-(2).

<sup>600</sup> 15 U.S.C. § 1681c-1(b)(1)(B); 15 U.S.C. § 1681c-1(c)(2).

<sup>601</sup> 15 U.S.C. § 1681c-1(b)(1)(C); 15 U.S.C. § 1681c-1(c)(3).

<sup>602</sup> § 1681c-1(f).

<sup>603</sup> § 1681c-1(g).



### A Comparative Assessment

Under the CIL, nothing is mentioned regarding fraud or active duty alerts. Therefore, there is no obligation upon CRAs to place such alerts or to maintain them for a specific time. There is no doubt that the CIL is lacking an important provision. With the technology age, identity theft is growing massively. The CIL should be revised to add such an important requirement. Differentiating between a “one-call alert” and an “extended alert” is reasonable. In the first one, the FCRA assumes the trustworthiness of a consumer by accepting his suspicion of identity theft and placing a fraud alert. When the consumer wants to extend the alert period, he must provide an official proof of identity theft. If no requirement is imposed, the flow of information will be disrupted, especially with the block of information allegedly resulting from identity theft.

#### **4.2.7 Failure to Block Information Resulting from Identity Theft**

CRAs must block reporting any information the consumer identifies that resulted from possible identity theft. Blocking such information must be within four days of receipt of the following: an appropriate proof of the identity of the consumer, a copy of an identity theft report,<sup>604</sup> identification of such information by the consumer, and a statement by the consumer that the information is not information relating to any transaction by the consumer.<sup>605</sup> However, the application of the requirement is at the sound discretion of CRAs. A CRA may decline or rescind<sup>606</sup> the blocked information<sup>607</sup> in one of three situations:

- If the information was blocked in error or a block was requested by the consumer in error;
- If the information was blocked as a result of material misrepresentation of consumer; or
- If the consumer obtained possession of goods, services, or money as a result of the blocked transaction.<sup>608</sup>

In addition, the blocking rule does not apply if:

- The CRA has no file on the consumer;
- The CRA is a reseller of the credit report;
- The CRA is not reselling or producing the blocked information; and
- The CRA informs the consumer that he or she may contact the FTC to obtain more information regarding identity theft.<sup>609</sup>

If the CRA has the file of a consumer, then it must block the information if it is identified by the consumer as a result of identity theft, and the CRA is a reseller of such information.<sup>610</sup>

Thus, a CRA violates the FCRA in one of the following situations:

- If the CRA does not block the information after a consumer’s notification of being or about to be a victim of identity theft;

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<sup>604</sup> 16 C.F.R. § 603.3(a)(1)-(2).

<sup>605</sup> 15 U.S.C. § 1681c-2.

<sup>606</sup> When a CRA rescinds information it means an inclusion of deleted information occurs. Inclusion of deleted information is a separate issue that I will be tackling later.

<sup>607</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 378 (The right to decline or rescind such information is to give CRAs ability to stop consumers’ abuse of blocking right information.).

<sup>608</sup> 15 U.S.C. § 1681c-2(c)(1)(A)-(C).

<sup>609</sup> 15 U.S.C. § 1681c-2(d)(1)(A)-(C).

<sup>610</sup> 15 U.S.C. § 1681c-2(d)(2)(A)-(B); 15 U.S.C. § 1681c-2(e) (Check verification companies have to stop reporting information allegedly resulted from identity theft to CRAs.).

- If the CRA blocks the information but only after the passage of four days; or
- If the CRA declines or rescinds blocked information in cases other than the specific three cases.

Similarly, a reseller of credit reports, or a check verification company violates the FCRA in the following situations:

- If a reseller resells credit reports that contain blocked information;
- If a reseller fails to inform the consumers to contact the FTC to obtain more information;
- If a reseller fails to block the information in the files of consumers in its possession; or
- If a check verification company reports the blocked information to CRAs.

#### A Comparative Assessment

The CIL does not mention blocking information that resulted from alleged identity theft. However, one may consider such information as “inaccurate” and proceed to dispute it accordingly. Detailed sections regarding disputing accuracy will be discussed later in this chapter. Nonetheless, because of the importance of the identity theft, the CIL should be revised to add similar sections. Blocking the information until the verification is completed is easier than requiring consumers to pursue CRAs to correct inaccurate information.

#### **4.2.8 Failure to Provide Free Copies of Credit Report or File as Prescribed**

Under the FCRA, a consumer is entitled to obtain a free copy of his or her file or credit report in the following circumstances upon request of the consumer.

##### Initial or Extended Fraud Alerts

When an initial or extended fraud alert is requested to be included in the consumer’s file, the consumer has the right to obtain a free copy of the credit report in case of an initial fraud alert<sup>611</sup> and two copies in the case of an extended fraud alert.<sup>612</sup> In addition, a CRA has to refer the alerts to other CRAs, and the consumer is entitled to free credit reports from the other CRAs as well in both initial and extended fraud alerts.<sup>613</sup>

A CRA violates the FCRA if it refuses to provide a free credit report to a consumer upon request in initial or extended fraud alerts. It violates the FCRA, too, if it provides a free credit report after the required time passes, or if it provides less than the required number of copies. CRAs other than the one that included the alerts violate the FCRA if they refuse to provide free copies to the consumer.

##### Employment Adverse Action

A consumer has the right to obtain a credit report when an adverse action is about to be taken against him or her based in whole or in part on information contained in the credit report. For instance, before an employer may take an adverse action against a consumer, the employer has to provide the consumer with a copy of the credit report without any change.<sup>614</sup>

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<sup>611</sup> 15 U.S.C. §1681c-1(a)(2).

<sup>612</sup> 15 U.S.C. §1681c-1(b)(2).

<sup>613</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 84.

<sup>614</sup> 15 U.S.C. §1681b(b)(3)(A).

The purpose of such a requirement is to give the consumer the chance to correct his or her credit report if there is any inaccuracy before the adverse action is taken.

An employer violates the FCRA if he takes an adverse action against the consumer before providing the consumer with a copy of his or her credit report. No time limit to supply the free credit report is prescribed, thus, reasonableness of time is a question for the trier of fact to determine.

#### General Adverse Action

A consumer is entitled to a free credit report after an adverse action is taken against him or her based in whole or in part on information contained in the credit report regarding employment, insurance, or credit.<sup>615</sup> This credit report must be requested within sixty days of the adverse action from the CRA, and the credit report should be supplied within three days.<sup>616</sup>

A CRA violates the FCRA if it refuses to provide the consumer with a free credit report after adverse action is taken against him or her in a credit, insurance, or employment transaction, or when it provides the credit report but not according to the required time.

#### Every Twelve Months

A consumer has the right to obtain a credit report free of charge once every twelve months, even for no purpose, from every general or specialty nationwide CRA.<sup>617</sup> This credit report must be provided within fifteen days of the consumer's request starting from the day following the request if the consumer provides proper identification.<sup>618</sup> However, if the request is to a nationwide CRA, the request must be submitted to the centralized source through Internet, phone, or mail.<sup>619</sup>

A nationwide CRA violates the FCRA if it refuses to provide requesting consumers with free copies of a credit report once every twelve months. It also violates the FCRA if it provides the free copy late. Likewise, a CRA violates the FCRA if it refuses to provide consumers, who provide special certification<sup>620</sup> with free copies of their credit reports once every twelve months.

#### Unemployment, Fraud Suspicion, Receipt of Public Welfare

Consumers may obtain a credit report once every twelve months when they, in good faith, certify that they believe their credit contains inaccurate information because of fraud.<sup>621</sup> Similarly, an unemployed consumer who is seeking employment has the right to obtain a free credit report to aid in securing a job after providing certification of such a fact.<sup>622</sup> Likewise, a consumer who is receiving public welfare assistance is entitled to a free credit report after making certification of such a fact.<sup>623</sup> Unlike identity theft situations, a consumer may request a free credit report from any CRA, not only nationwide CRAs if it is believed that the credit report contains inaccurate information because of fraud.<sup>624</sup> It is worth

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<sup>615</sup> 15 U.S.C. §1681j(b).

<sup>616</sup> 15 U.S.C. §1681b(b)(3)(B)(ii).

<sup>617</sup> 15 U.S.C. §1681j(a)(2); 15 U.S.C. §1681j(a)(1)(A).

<sup>618</sup> 15 U.S.C. §1681j(a)(1)(B).

<sup>619</sup> 15 U.S.C. §1681j(a)(1)(B).

<sup>620</sup> 15 U.S.C. §1681j(c)(1)-(3) (A consumer who certifies that he or she is unemployed and seeking employment, recipient of public welfare assistance, or believe that the credit report contains inaccurate information because of fraud is entitled to free credit report once every 12 months.).

<sup>621</sup> 15 U.S.C. §1681j(c)(3).

<sup>622</sup> 15 U.S.C. §1681j(c)(1).

<sup>623</sup> 15 U.S.C. §1681j(c)(2).

<sup>624</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 85.

mentioning that the FCRA does not provide a time limit in which a CRA has to provide the free credit report.

A CRA violates the FCRA if it refuses to provide consumers, who certify as above about their situation, with a free copy of a credit report once every twelve months. It violates the FCRA if it provides the free copy unreasonably late.

#### CRA's Affiliate Debt Collection Agency Adverse Rating

When a debt collection agency as an affiliate of a CRA notifies the CRA that a consumer's rating may be or has been adversely affected, a consumer has the right to obtain a free credit report from the CRA.<sup>625</sup>

A CRA violates the FCRA if it does not provide consumers with free credit reports after receiving notification from an affiliate debt collection agency that a consumer's rating may be or has been adversely affected. In this case, no time limit to supply the free credit report is prescribed, thus, reasonableness of time is a question for the trier of fact to determine.

#### Result of Reinvestigation

When a consumer disputes accuracy or completeness of his credit report, and the CRA reinvestigates the dispute, the consumer is entitled to a free copy of the credit report if the reinvestigation results in revision of the credit file of consumer.<sup>626</sup> This credit report must be provided along with the result of reinvestigation no more than five days after the completion of the reinvestigation.

A CRA violates the FCRA if it does not provide the consumer with a free copy of his credit report after the reinvestigation results in revision of his credit file. It violates the FCRA if it fails to provide it within five days after completion of the reinvestigation.

#### A Comparative Assessment

Under the CIL, a consumer is entitled to a free credit report in the following circumstances.

##### Adverse Action

If an adverse action<sup>627</sup> is taken against the consumer, the consumer may obtain a free credit report.<sup>628</sup>

##### Victim of Fraud

In addition, a consumer is entitled to a free credit report if he or she is a victim of fraud and his or her personal information is used in committing the fraud.<sup>629</sup>

##### Inaccuracy of Credit Report

Similarly, a consumer is entitled to a free credit report if the credit report contains erroneous information.<sup>630</sup>

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<sup>625</sup> 15 U.S.C. §1681j(b).

<sup>626</sup> 15 U.S.C. § 1681i(a)(6)(B)(ii).

<sup>627</sup>CIL Implementing Regulation, article 1, An adverse action is defined under the CIL Implementing Regulation as "adverse action means any of the following but not exclusively: refusal of extending credit, closing consumer's account, adverse change in the account's terms, refusal of increasing credit limit, or refusal of renewal of credit limit."

<sup>628</sup>CIL, article 9(3); CIL Implementing Regulation, article 43(1).

<sup>629</sup>CIL Implementing Regulation, article 43(2).

<sup>630</sup>CIL Implementing Regulation, article 43(3).

### Opening of Consumer's File

A consumer is entitled to a free copy of the credit report after the opening of his or her new file.<sup>631</sup>

### Result of Favorable Reinvestigation

Finally, a consumer is entitled to a free credit when a CRA determines after investigation that a consumer's objection to erroneous information turns to be correct.<sup>632</sup>

A CRA violates the CIL if it refuses to provide a consumer with a free credit report in any of the above-mentioned circumstances.

When comparing the FCRA and the CIL, one can conclude the following. They share the same right to obtain a free credit report in the case of an adverse action. However, the FCRA sets sixty days to request the free credit report, while the CIL does not provide such time. The CIL seems more pro-consumer concerning this issue. The FCRA sets a time limit to provide the free credit report within three days.<sup>633</sup> The CIL does not provide a time limit to provide the free credit report. Thus, the FCRA is more pro-consumer in this issue. Because the scope of permissible purposes of the CIL is not clear, one cannot determine whether the use of credit reports for employment purposes is a permissible purpose. If employment purposes are permissible, then it is included under adverse action notice. However, CRAs should be required to provide a free copy to the consumer before taking adverse action so the consumer may correct errors on which the adverse action may be based.

The CIL, as discussed, does not include any rules regarding identity theft alerts. Although the FCRA excels in providing consumers with free credit reports in the case of fraud alerts, the CIL provides the right of a free credit report in fraud cases, too. The difference is that the CIL requires proof of fraud in all cases, while the FCRA requires official proof only in the case of an extended fraud alert, but not in an initial fraud alert. Similarly, the FCRA provides a free credit report once a year in the case of an honest belief of the existence of inaccurate information because of fraud. The CIL provides the same, but without a time constraint so long as the fraud is proven.

Unlike the FCRA, the CIL does not provide consumers with the right to obtain a credit report free of charge once every twelve months. The CIL should provide such a right as it enables consumers to monitor their credit report and find inaccurate information. The monitoring of inaccurate information by the interested persons is in the interest of the credit reporting industry.

It seems that the FCRA is more pro-consumer when it requires CRAs to provide free credit reports to consumers who are seeking employment or receiving public welfare assistance once a year. The CIL has no similar provision. Again, permissibility of use of a credit report for employment purpose is not clear under the CIL. Therefore, it is logical not to find provisions related to employment purpose. However, the CIL should follow the FCRA approach in providing a free copy to those who are the most likely to be affected by the credit reporting industry, the impoverished consumers. They usually have a poor credit history that may be affected without their knowledge. In addition, they prefer to purchase their essential needs instead of spending money procuring credit reports.

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<sup>631</sup> CIL article 9(4).

<sup>632</sup> CIL Implementing Regulation, article 49(2)(A).

<sup>633</sup> 15 U.S.C. §1681b(b)(3)(B)(ii).

Similar to the FCRA, the CIL provides consumers with a right to free copies of credit reports if the CRA's investigation of the consumers' dispute results in favor of the consumers. Obtaining free copies after the dispute is resolved calms consumers, knowing their new credit reports are free of the inaccurate or erroneous information. Interestingly, the CIL provides consumers with the right to obtain a free copy after opening their file for the first time. I think this approach is preferable as this alerts consumers that their files are open and derogatory information is subject to be posted.

The CIL does not include provisions related to an affiliate debt collection agency's notification of a CRA regarding a consumer's rating. Even though I admire the FCRA approach, since the aim is to protect consumers, I see no point in differentiating between notifications that come from an affiliate or notifications that come from a non-affiliate to CRAs. Both should be treated equally if one takes into consideration the consumer's protection purpose.

#### **4.2.9 Failure to Include a Statement of Dispute**

Under the FCRA, if the CRA's reinvestigation does not result in favor of a consumer, the consumer has the right to file a statement of dispute setting forth the nature of the dispute.<sup>634</sup> This statement must be included in all subsequent credit reports.<sup>635</sup> The CRA may "limit such statements to not more than 100 words if it provides the consumer with assistance in writing a clear summary of the dispute."<sup>636</sup> If the disclosure of the credit report is made over the phone, the CRA has to disclose the statement of the dispute before disclosing the rest of the credit report.<sup>637</sup>

A commentator argues that this statement of dispute is rarely of great consequence. The statement is usually added at the bottom of the credit report, which is difficult to see. Moreover, this statement has no impact on the credit score, which creditors focus on more than the statement of the consumer.<sup>638</sup> In addition, some courts refuse to provide remedies for failure to add a statement of dispute if no actual damages are shown.<sup>639</sup>

The CRA violates the FCRA if does not include the statement of dispute as provided by the consumer or fails to provide an accurate description of the dispute.<sup>640</sup> The CRA violates

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<sup>634</sup> 15 U.S.C. § 1681i(b).

<sup>635</sup> 15 U.S.C. § 1681i(c).

<sup>636</sup> 15 U.S.C. § 1681i(b); *In the Matter of Mib Inc.*, 101 F.T.C. 415 at \* 4 (1983) (If the CRA does not help the consumer in preparing the statement, the CRA cannot limit the statement to 100 words even indirectly. The consent order provides that "Section 611(b) of the Act allows MIB to impose such a limitation only if it provides assistance to the consumer in preparing such a statement. Therefore, MIB has violated and is violating Section 611(b) of the Act.").

<sup>637</sup> *In the Matter of Trans Union Credit Info. Co.*, 102 F.T.C. 1109 at \* 15 (1983) (The consent order provides that "when responding to a telephonic request for information, respondent must read the dispute statement prior to disclosing the challenged information.").

<sup>638</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 190 (The commentator argues that such statement of dispute has no impact on the credit score, however, in another section; the commentator indicates that "disputed items" will not be rated, so it affects the score positively. It may be the commentator means that the "statement" has no effect but the "disputed item" has.).

<sup>639</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 189; *Jianqing Wu v. Trans Union*, CIVA AW-03-1290, 2006 WL 4729755 at \* 10 (D. Md. May 2, 2006) (The court held, "From the record currently before this Court, it appears that Equifax did not make the required disclosures. For civil liability to attach under the FCRA, however, Plaintiff must offer additional proof. To succeed in an action for negligent failure to comply with the FCRA, a consumer must make a showing of actual damages.").

<sup>640</sup> *Alexander v. Moore & Associates Inc.* 553 F. Supp. 948, 954 (D. Haw. 1982) (The court held, "In the instant case, UNI-CHECK did note that the report was disputed by Mr. Okubo. What it did not do was provide either his statement of dispute or a clear and accurate codification or summary thereof. There is therefore a clear violation of § 1681 i(c), and summary judgment on this issue is granted in favor of plaintiff Okubo.").

the FCRA if it limits the length of the statement to 100 words without assistance in writing a clear summary of the dispute. The CRA violates the FCRA if it includes the statement but fails to mention that the information is disputed.<sup>641</sup> Finally, the CRA violates the FCRA if it does not include the statement in “all” of subsequent credit reports.

#### A Comparative Assessment

Under the CIL, if the investigation does not resolve the dispute, upon consumer request, the CRA has to provide a summary of the nature of disputed information as the consumer perceives, and include it in all subsequent reports.<sup>642</sup>

Both acts address the issue similarly. However, the CIL does not give the CRAs the power to determine any dispute to be frivolous or irrelevant. Thus, the statement of dispute should be added in any case. In contrast, the FCRA gives the CRAs the power to determine any dispute to be frivolous or irrelevant. Thus, a statement of dispute, theoretically, does not have to be added. I think the CIL’s approach is more favorable to consumers. Lenders, on the other hand, have the ability to distinguish frivolous or irrelevant disputes from serious ones.

#### **4.2.10 Failure to Maintain a Reasonable Procedure to Assure Maximum Possible Accuracy**

Credit reports are full of errors. This is a matter of fact proven by different studies conducted by different public and private groups.<sup>643</sup> Some types of errors are serious enough to cause denial of credit. For example, a study by the FTC shows that 31% of participants found errors in their credit reports. Consumers who found material errors were 12%.<sup>644</sup> One commentator believes the study does not represent the actual level of error because the samples mostly represent high-scored, high-educated, and high-income participants.<sup>645</sup>

One of the FCRA objectives is to limit the errors in consumer credit reports to the lowest possible rate. According to section 1681e(b), a CRA is required to follow a reasonable procedure to assure maximum possible accuracy of the information.<sup>646</sup> The FCRA does not provide a guide to the kind of procedure that ought to be followed. The interest of a CRA must be balanced against the consumer’s interest when determining the reasonable procedure.<sup>647</sup> Reasonableness of procedure varies according to the circumstances. Relying on reputable sources does not always guarantee that a procedure is reasonable, especially when the consumer disputes such information.<sup>648</sup>

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<sup>641</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 190.

<sup>642</sup> CIL Implementing Regulation, article 50.

<sup>643</sup> *See* for example: U.S. PIRG Jon Golinger, Mistakes Do Happen: Credit Report Errors Means Consumers Lose (Mar. 1998); Consumer Union, What Are They Saying About Me? The Results of a Review of 161 Credit Reports from the Three Major Credit Bureaus (Apr. 29, 1991); Consumer Federation of America and National Credit Report Association, Credit Score Accuracy and Implications for Consumers (Dec. 17, 2002); FTC studies; Federal Reserve Board study; General Accounting Office study; and Consumer Data Industry Association study.

<sup>644</sup> Federal Trade Commission, Report to Congress under Section 319 of the Fair and Accurate Credit Transaction Act of 2003, 2 (Dec. 2008).

<sup>645</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 106.

<sup>646</sup> 15 §1681e(b) (Provides, “Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates”).

<sup>647</sup> Griffith, *supra* note 354, at 62.

<sup>648</sup> Worsley, *supra* note 359, at 70.

#### 4.2.10.1 Definition of Accuracy

The FCRA does not define accuracy, and the courts are split in defining accuracy. This split threatens the rights of consumers and requires congressional intervention.

##### A- Technical Accuracy Approach

A minority of courts allow a CRA to report technically accurate information, even if such information is incomplete or misleading, so long so the information has not misled the users.<sup>649</sup> This approach interprets the “maximum possible accuracy” requirement literally and requires only credit information to be technically accurate. If the information in the credit report is accurate, even if it is misleading or incomplete, the court will find for the CRA without discussing reasonableness.<sup>650</sup> For instance, a court held that reporting debt, without knowledge of obsolescence, is accurate.<sup>651</sup> Courts reasoned such an approach would attain Congress’ goal in balancing the CRA’s interest and consumer’s interest in producing cost-effective credit reporting.<sup>652</sup> Moreover, requiring a CRA to go beyond technical accuracy can put a substantial burden on them, which they are not equipped to meet.<sup>653</sup>

However, some commentators argue the “technical accuracy” approach is against the legislators’ intent. Using the defense that the information was technically accurate was one of the concerns of the legislators when they discussed accuracy. They agreed that an incomplete report was not an accurate.<sup>654</sup>

##### B- Actual Accuracy Approach

A majority of courts held that a CRA did not satisfy the “maximum possible accuracy” requirement if they reported correct, yet misleading, information.<sup>655</sup> This approach interprets the “maximum possible accuracy” requirement in the context of the objectives of the FCRA. Misleading or incomplete credit reports are neither maximally accurate nor fair to consumers.<sup>656</sup> Therefore, it is not sufficient to allow the credit information to be factually correct. It also needs to create the accurate impression. For example, a code “19” in a CRA record has different meanings. It could mean bad debt, placed for collection, a civil suit brought against the debtors, or the debtor cannot be located.<sup>657</sup> Every meaning gives a different impression. Other courts adopting such an approach add a completeness requirement. Therefore, a credit report needs to be factually correct, not misleading, and complete.<sup>658</sup>

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<sup>649</sup> Griffith, *supra* note 354, at 64, Vanderwoude, *supra* note 405, 39.

<sup>650</sup> Griffith, *supra* note 354, at 65 (Some courts differentiate between incompleteness as a fundamental nature, which is a not reasonable and unimportant incompleteness.).

<sup>651</sup> *Spence v. TRW Inc.*, 92 F.3d 380, 383 (6th Cir. 1996) (The court held, “When the \$461 hospital debt was reported to TRW in June of 1990, TRW did not know that the debt had been placed for collection five years earlier. When TRW released its residential mortgage credit report on September 17, 1992, the placement of the debt for collection antedated the report by more than seven years. Again, however, TRW was unaware of this fact.”); and *See Garrett v. Trans Union, L.L.C.*, 2:04-CV-00582, 2006 WL 2850499 at \* 10 (S.D. Ohio, 2006) (The court held, “While the phrases “Profit and loss write off” and “charged as bad debt” are less specific than “Deed received in lieu of foreclosure on a defaulted mortgage,” they are technically accurate Citifinancial, in accepting the deed in lieu of foreclosure, made a profit loss write off and charged off the remaining debt).

<sup>652</sup> O’Brien, *supra* note 406, at 1234.

<sup>653</sup> Vanderwoude, *supra* note 405, at 402.

<sup>654</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 113.

<sup>655</sup> O’Brien, *supra* note 406, at 1219; Vanderwoude, *supra* note 405, at 400.

<sup>656</sup> Vanderwoude, *supra* note 405, at 404.

<sup>657</sup> O’Brien, *supra* note 406, at 1228.

<sup>658</sup> *Id.* at 1229.



### C- Reporting v. Investigation Approach

A third approach distinguishes between “accuracy” and “completeness” as they are not interdependent. A credit report may be accurate but not complete and may be complete but not accurate. It is argued that “accuracy” can be tested by verification, but “completeness” needs exercise of judgment on potentially difficult questions related to the meaning and effect of contextual information.<sup>659</sup> This means the CRA does not have to include all existing information about a consumer.<sup>660</sup>

### D- Completeness v. Accuracy

Two sections of FCRA seem to contradict one another: section 1681i and section 1681e(b). First, section 1681i is titled “Procedure in case of disputed accuracy”,<sup>661</sup> This section mentions “accuracy” and “completeness”, while section 1681e(b) requires only “accuracy”. This means there are two standards to apply, one in preparing the report, which is “accuracy” and one in conducting the investigation, which is “accuracy and completeness”.<sup>662</sup> This contradiction leads to disagreement among courts. Some courts incorporated “completeness” into the “accuracy” requirement and so required a credit report to be accurate and complete in order to satisfy the FCRA. Other courts drew a different conclusion and said that “completeness” is needed only in the case of investigation but not in the preparation of the report, otherwise the duties of the CRA will be expanded unnecessarily.<sup>663</sup>

Some commentators assert, because the FCRA is a federal statute, one standard should be followed to assure the FCRA protects consumers uniformly throughout the country. Courts should not have wide discretion in choosing which application of the law they will follow.<sup>664</sup> The proposal is to revise the FCRA to meet the objective of making the statute consumer friendly. Through incorporating “completeness” into the “maximum possible accuracy” standard, the ambiguity that splits the courts will be removed. Further, it will attain the objectives of the FCRA as a pro-consumer statute.<sup>665</sup>

In contrast, another commentator suggests incorporating “completeness” into the “maximum possible accuracy” standard places a great burden on the CRA to update the information more frequently. This would cause duplication of work and unnecessary extra cost in order to avoid the potential liability. However, amending section 1681i by imposing liability or fines on furnishers would solve many issues in the FCRA as the furnishers are usually the best parties to correct the errors.<sup>666</sup> The author urges Congress to find a solution that allows the dispute to reach a resolution that assures maximum possible accuracy without the need for litigation.<sup>667</sup>

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<sup>659</sup> O’Brien, *supra* note 406, at 1235.

<sup>660</sup> Griffith, *supra* note 354, at 65.

<sup>661</sup> 15 U.S.C. § 1681i (Provides, “if the completeness or accuracy of any item of information contained in a consumer’s file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller”).

<sup>662</sup> O’Brien, *supra* note 406, at 1237.

<sup>663</sup> *Id.* at 1237.

<sup>664</sup> *Id.* at 1241.

<sup>665</sup> O’Brien, *supra* note 406, at 1242; Vanderwoude, *supra* note 405, at 406.

<sup>666</sup> Vanderwoude, *supra* note 405, at 408.

<sup>667</sup> *Id.* at 412.

#### 4.2.10.2. Reasons of Inaccuracy and Incompleteness

There are different reasons for inaccurate or incomplete credit reports. These mistakes can be from the furnishers or from CRAs as follows:

- Data itself is inaccurate or incomplete;<sup>668</sup>
- Failure to assign the information to the correct consumer file through “mixing or merging files”;<sup>669</sup>
- Furnishing correct information about the wrong person;<sup>670</sup>
- Furnishing old information;<sup>671</sup>
- Duplicating information for the same item;<sup>672</sup>
- Furnishers withholding positive information to keep clients with them;<sup>673</sup>
- Furnishing preliminary negative information without reporting the outcome;<sup>674</sup>
- Errors in collection of public records;<sup>675</sup>
- Mixing files because of subscribers’ inquiries; and<sup>676</sup>
- Identity theft problems;<sup>677</sup>

#### 4.2.10.3. Negligent Defamation

Section 1681o provides for plaintiff recovery in the case of negligent noncompliance with FCRA provisions. When a CRA reports false or inaccurate information resulting from non-maintenance of reasonable procedure to ensure maximum possible accuracy, the consumer can bring an action against the CRA. However, when the damage is only to the consumer’s reputation, there is a problem of preemption because damage to reputation is defamation.

Courts split on whether defamation that results in injuries to reputation may be brought under sections 1681o.<sup>678</sup> The first approach is that a defamation action may not be brought under section 1681o unless malice or willfulness is proven because of the immunity section 1681h(e) provides.<sup>679</sup>

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<sup>668</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 114.

<sup>669</sup> *Id.* at 121.

<sup>670</sup> *Id.*

<sup>671</sup> *Id.* at 115.

<sup>672</sup> *Id.*

<sup>673</sup> Comments of the National Consumer Law Center *et al.*, Advanced Notice of Proposed Rulemaking: Furnisher Accuracy Guidelines and Procedures Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act, at 7, available at <http://www.ftc.gov/os/comments/FACTA-furnishers/522110-00067.pdf>. For instance, banks withhold credit limit, which constitutes 30% of the credit score, to depress their clients’ credit score.

<sup>674</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 116 (Such as reporting the debt is unpaid and not reporting the debt when paid later.).

<sup>675</sup> *Id.* at 119.

<sup>676</sup> *Id.* at 123 (When a subscriber requests a credit report about a consumer from CRA electronically, he enters the identifying information such as SSN or the name. If nothing is found, the system of the CRA will try to match the inquiry with a file. If there is no file, a new file will be created with the information provided in the search. When a new search is performed, the information will be added to the file created before and the system starts building the file with inaccurate information that may be added later to another person whose name matches the created file.).

<sup>677</sup> *Id.* at 126.

<sup>678</sup> Maurer, *supra* note 411, at 120.

<sup>679</sup> *Id.* at 121.

The second approach allows defamation to be brought under section 1681o. One court upheld a decision to include damage to reputation under section 1681o even if considered defamation. The court reasoned that, although action “in the nature of defamation” is precluded by section 1681h(e) [but], injuries to reputation are not precluded.<sup>680</sup> Congress meant to exclude presumed damages, except in malice cases, but did not mean to limit actions where the actual damages can be proven. The actual injury under this approach may include impairment of reputation, personal humiliation, and mental anguish and suffering.<sup>681</sup>

For a consumer to succeed, he must prove the CRA did not maintain a reasonable procedure to ensure maximum possible accuracy, and false or inaccurate information was reported.<sup>682</sup>

The standard of conduct is the “reasonable person standard”. This is “assessed by balancing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy”.<sup>683</sup> Unreasonable procedure to ensure maximum possible accuracy encompasses many of the FCRA violations.

- Failure to have procedure at all to ensure maximum possible accuracy;<sup>684</sup>
- Ignoring its defective system after a CRA discovers or has reason to discover it;<sup>685</sup>
- Failure to implement a quick correction system;<sup>686</sup>
- Failure to maintain a system to prevent re-appearance of deleted information;<sup>687</sup>
- Failure to follow reasonable, established procedure;<sup>688</sup>
- Failure to train personnel to follow the procedure;<sup>689</sup>
- Failure to detect obvious contradicting information;<sup>690</sup>

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<sup>680</sup> *Thornton v. Equifax Inc.*, 619 F.2d 700, 703 (8th Cir. 1980) (The court held, “... no defamation or like actions are allowed under the Act unless malice or willful intent is alleged.”); *Rasor v. Retail Credit Co.*, 87 Wash. 2d 516, 526 (1976) (the court cited another case, “... that harm to reputation would be compensable under the Fair Credit Reporting Act in proper circumstances ...”).

<sup>681</sup> Maurer, *supra* note 411, at 122.

<sup>682</sup> *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 (9th Cir. 2008) (The court held, “Dennis has made the prima facie showing of inaccuracy required by sections 1681e and 1681i.”).

<sup>683</sup> *Poore v. Sterling Testing Sys. Inc.*, 410 F. Supp. 2d 557, 571 (E.D. Ky. 2006) (The court held, “The standard of conduct by which the agency's action is to be judged is deeply rooted in the law of negligence: what a reasonably prudent person would do under the circumstances.”); *Jones v. Credit Bureau of Garden City Inc.*, 703 F. Supp. 897, 901 (D. Kan. 1988) (The court held, “The reasonableness of an agency's procedures is assessed by balancing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.”).

<sup>684</sup> *Dennis*, 520 F.3d, at 1071 (The court held, “This case illustrates how important it is for Experian, a company that traffics in the reputations of ordinary people, to train its employees to understand the legal significance of the documents they rely on.”).

<sup>685</sup> FTC Official Staff Commentary 16 C.F.R. § 607 (3)(B).

<sup>686</sup> *Boris v. Choicepoint Serv. Inc.*, 249 F. Supp. 2d 851, 856 (W.D. Ky. 2003) (The court held, “One could infer from the evidence that Choicepoint included incorrect data on Plaintiff's claims report; that Plaintiff complained about this false information; and that after the original mistakes were corrected, more incorrect claims data reappeared on her report and remained well after the suit was filed. Based on this series of events, a jury could certainly conclude that a reasonably prudent company would have prevented a similar outcome.”).

<sup>687</sup> *Molina v. Experian Credit Info. Solutions*, 02 C 5561, 2005 WL 5525336 at \* 9 (N.D. Ill. Jan. 19, 2005) (The court held, “Experian had some duty under § 1681e(b) to assure itself of the accuracy of the information supplied by Providian when it began reporting an account belonging to Molina that had substantially the same balance and the same opened-date as the account Providian told Experian to delete as inaccurate.”).

<sup>688</sup> *Rothery v. Trans Union, LLC*, CV-04-312-ST, 2006 WL 1720498 at \* 5 (D. Or. Apr. 6, 2006) (The court granted summary judgment for the defendant because the plaintiff failed to show unreasonableness of the CRA's procedure).

<sup>689</sup> FTC, Compliance with the Fair Credit Reporting Act, at 26 (1977).

- Reliance on unreliable furnishers without review;<sup>691</sup>
- Failure to have reasonable secured computerized system resistant to alteration or stealing;<sup>692</sup>
- Merging or mixing files because procedural lack of matching tools;<sup>693</sup>
- Keeping more than one file under the same Social Security Number;<sup>694</sup>
- Failure to keep track of the source of consumer address;<sup>695</sup>
- Failure to adopt a reasonable procedure to prevent merged information from reappearing;<sup>696</sup>
- Failure to maintain procedure to ensure incomplete information is not misleading;<sup>697</sup>
- Failure to maintain a reasonable procedure to report current information;<sup>698</sup>
- Failure to maintain a reasonable procedure to report public record information;<sup>699</sup>
- Supplying credit information for no permissible purposes;<sup>700</sup>
- Failure to follow a reasonable procedure to maintain fraud or active duty alerts;<sup>701</sup>
- Failure to follow a reasonable procedure to block information resulting from identity theft;<sup>702</sup> and
- Failure to conduct a reasonable reinvestigation of disputed information;<sup>703</sup>

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<sup>690</sup> *Gohman v. Equifax Info. Services, LLC*, 395 F. Supp. 2d 822, 827 (D. Minn. 2005) (The court held, “By contrast, plaintiff’s deceased status was caused by a standard notation that was plainly inconsistent with other information in her file. Such inconsistencies could lead a jury to infer that Equifax’s failure to detect them was unreasonable.”).

<sup>691</sup> *Breed v. Credit Collection Services Inc.*, CIV A 305CV-547-H, 2006 WL 3524093 at \* 3 (W.D. Ky. Dec. 1, 2006) (The court held, “... it may have liability where the agency previously received notice of prevalent unreliable information from the furnisher which would put the credit reporting agency on notice that systemic problems existed within the furnisher’s system.”).

<sup>692</sup> FTC Official Staff Commentary 16 C.F.R. § 607 (3)(C).

<sup>693</sup> *Jones*, 703 F. Supp., at 902 (Regarding the defendant’s testimony, the court held, “...information is commonly recorded in wrong accounts in instances like the present case where there is a similarity of names ... does not as a matter of law outweigh the harm resulting from the erroneous recording of damaging information.”); *Thompson v. San Antonio Retail Merchants Ass’n*, 682 F.2d 509, 513 (5th Cir. 1982) (The court affirmed the holding that stated SARMA failed to employ reasonable procedures designed to learn the disparity in social security numbers for the two Thompsons when it revised file number 5867114 at Gulf’s request.).

<sup>694</sup> *Rothery*, 2006 WL 1720498 at \* 8 (The court held, “Unlike the facts in *Crabill*, Trans Union maintained two consumer files under the same social security number, one belonging to a Seattle man, the other to a Portland woman, despite knowing that a social security number can belong to only one person.”).

<sup>695</sup> *Graham v. CSC Credit Services Inc.*, 306 F. Supp. 2d 873, 878 (D. Minn. 2004) (The court held, “The reasonableness of CSC’s procedures for tracking the sources of the information that it receives is not “beyond question”). Thus, the Court concludes that a question of material fact remains regarding whether CSC violated section 1681e(b).”).

<sup>696</sup> *Cousin v. Trans Union Corp.*, 246 F.3d 359, 375 (5th Cir. 2001) (The court held, “The lack of permanence with the cloaking procedure [temporary block of information] may evidence the weakness and unreasonableness of the procedure, but no malice can be derived from it.”).

<sup>697</sup> *Koropoulos v. Credit Bureau Inc.*, 734 F.2d 37, 42 (D.C. Cir. 1984) (The court held, “We find there is a genuine issue of fact as to whether the report was sufficiently misleading so as to raise the issue of whether CBI’s procedures for assuring “maximum possible accuracy” were reasonable.”).

<sup>698</sup> FTC Official Staff Commentary 16 C.F.R. § 607 (3)(F)(1).

<sup>699</sup> 15 U.S.C. §1681k (This requirement can be waived if the CRA chooses to notify the consumer upon the release of adverse public record information according to section 15 U.S.C. §1681k(a)(1).).

<sup>700</sup> 15 U.S.C. § 1681e(a).

<sup>701</sup> 15 U.S.C. § 1681a(q)(2)(A)-(B).

<sup>702</sup> 15 U.S.C. §1681c-2.

<sup>703</sup> 15 U.S.C. §1681i(a)(1)(A).

### A Comparative Assessment

Under the CIL, CRAs are required to take different precautions to ensure the accuracy and completeness of information. The following may be considered unreasonable procedure:

- Collection of information without proper standards or in violation of SAMA standards;<sup>704</sup>
- Failure to investigate the users' purpose of requesting credit reports;<sup>705</sup>
- Failure to inform the users of its obligations according to the CIL;<sup>706</sup>
- Failure to implement secure informational system;<sup>707</sup>
- Failure to ensure complete, accurate, and updated information;<sup>708</sup>
- Failure to establish procedure to handle consumers' complaints;<sup>709</sup>
- Failure to establish a department to handle consumers' disputes;<sup>710</sup>
- Failure to provide consumers with reasonable awareness of credit reporting;<sup>711</sup> or
- Failure to maintain reasonable procedure to reinvestigate disputes;<sup>712</sup>

On the previous list, each violation can branch out to many others. However, because most of them are mentioned in detail under other violation headings, and because of limited time and space, the list is sufficient. The reasonableness of any of the CRA is a question for the trier of fact to determine. However, failure to follow the requirements of the CIL is circumstantial evidence of unreasonable procedure.

Both the FCRA and the CIL require reasonableness on the part of CRAs. However, the acts mention only non-exclusive examples of reasonableness. Courts may find other practices of CRAs unreasonable even though they are not mentioned specifically in the acts.

#### **4.2.11 Failure of Disclosure of the Required Information under §1681g**

Every CRA must make certain disclosures in accordance with section 1681g. These disclosures can be categorized into three categories.

##### 4.2.11.1. Disclosure of Credit Report

A CRA should disclose all of the following upon consumer's request:

- All information in the consumer's file at the time of the request,<sup>713</sup> except the credit score is not required to be disclosed free of cost;<sup>714</sup>
- The source of information, except that the sources of information acquired solely for use in preparing an investigative consumer report and for no other purpose;<sup>715</sup>
- The identification of each person who procured a credit report for employment purpose or for other purposes during a two year period<sup>716</sup> or a one-year period<sup>717</sup>

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<sup>704</sup> CIL Implementing Regulation, article 25(2) (However, no SAMA's standard issued yet.).

<sup>705</sup> CIL Implementing Regulation, article 25(3).

<sup>706</sup> CIL Implementing Regulation, article 25(4).

<sup>707</sup> CIL Implementing Regulation, article 26.

<sup>708</sup> CIL Implementing Regulation, article 27(3).

<sup>709</sup> CIL Implementing Regulation, article 33.

<sup>710</sup> CIL Implementing Regulation, article 46.

<sup>711</sup> CIL Implementing Regulation, article 42.

<sup>712</sup> CIL Implementing Regulation, article 48.

<sup>713</sup> 15 U.S.C. §1681g(a)(1).

<sup>714</sup> 15 U.S.C. §1681g(a)(1)(B).

<sup>715</sup> 15 U.S.C. §1681g(a)(2) (Unless under appropriate discovery procedures).

<sup>716</sup> 15 U.S.C. §1681g(a)(3)(A)(i).

<sup>717</sup> 15 U.S.C. §1681g(a)(3)(A)(ii).

respectively<sup>718</sup> including: natural or business name,<sup>719</sup> address and telephone number;<sup>720</sup>

- The dates, original payees, and amounts of checks upon which any adverse characterization of the consumer is based, included in the file at the time of the disclosure;<sup>721</sup>
- A record of all inquiries received by the CRA during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer;<sup>722</sup>
- A statement that the consumer may request and obtain a credit score;<sup>723</sup>
- A summary of rights to obtain and dispute information in consumer reports and to obtain credit scores<sup>724</sup> along with a toll-free number of nationwide CRAs,<sup>725</sup> a list of all Federal agencies (with address and phone number) responsible for enforcing any provision of the FCRA,<sup>726</sup> and a statement that the consumer may have additional rights under State law;<sup>727</sup>
- A statement that a CRA is not required to remove accurate derogatory information from the file of a consumer, unless the information is outdated or cannot be verified;<sup>728</sup> and
- A summary of rights of identity theft victims if they place fraud or active duty alerts.<sup>729</sup>

A CRA violates the FCRA if it does not include any of the foregoing disclosures in the credit report of a consumer. For instance, if the CRA refuses to include the source of information, identification of each person who procured credit reports, and a record of all inquiries or the like, it is a violation.

#### 4.2.11.2. Disclosure of Credit Score

If a consumer requests a credit score, and the CRA is in the business of producing credit scores,<sup>730</sup> such a disclosure should include the following:

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<sup>718</sup> 15 U.S.C. §1681g(a)(3)(A) (This section does not apply if the user is “an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information and the head of the agency or department makes a written finding ... that the consumer report is relevant to a national security investigation of such agency or department, the investigation is within the jurisdiction of such agency or department, there is reason to believe that compliance will endanger the life or physical safety of any person; result in flight from prosecution; result in the destruction of, or tampering with, evidence relevant to the investigation; result in the intimidation of a potential witness relevant to the investigation; result in the compromise of classified information; or otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.”); 15 U.S.C. §1681g(a)(3)(C)(i)-(ii); 15 U.S.C. § 1681b(b)(4)(A).

<sup>719</sup> 15 U.S.C. §1681g(a)(3)(B)(i).

<sup>720</sup> 15 U.S.C. §1681g(a)(3)(B)(ii).

<sup>721</sup> 15 U.S.C. §1681g(a)(4).

<sup>722</sup> 15 U.S.C. §1681g(a)(5).

<sup>723</sup> 15 U.S.C. §1681g(a)(6).

<sup>724</sup> 15 U.S.C. §1681g(c)(2)(A) (This requirement is discussed in details under another violation.).

<sup>725</sup> 15 U.S.C. §1681g(c)(2)(B).

<sup>726</sup> 15 U.S.C. §1681g(c)(2)(C).

<sup>727</sup> 15 U.S.C. §1681g(c)(2)(D).

<sup>728</sup> 15 U.S.C. §1681g(c)(2)(E).

<sup>729</sup> 15 U.S.C. §1681g(d).

<sup>730</sup> 15 U.S.C. §1681g(f)(4) (If the CRA is using credit score developed by another person (without modification or development), the CRA should provide the consumer with the name, address, and website of the developing person.); 15 U.S.C. §1681g(f)(5)(A)(B).

- A statement indicating that the information and credit scoring model may be different than the credit score used by the lender;<sup>731</sup>
- A notice includes: the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the CRA for a purpose related to the extension of credit,<sup>732</sup> the range of possible credit scores under the model used,<sup>733</sup> all of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which should not exceed four,<sup>734</sup> the date on which the credit score was created,<sup>735</sup> and the name of the person or entity that provided the credit score or credit file upon which the credit score was created;<sup>736</sup> and
- The number of enquiries, if this factor is the key factor that adversely affects the credit score.<sup>737</sup>

A CRA violates the FCRA if it does not include any of the foregoing disclosures along with the credit score. For instance, if the CRA omits the inclusion of the fact that the number of enquiries is the factor that adversely affected the credit score, it is a violation. Similarly, it violates the FCRA if it omits inclusion of the required notice.

#### 4.2.11.3. Disclosure of Credit Score by Certain Mortgage Lenders

If the user of a credit score is a person who is engaged in arranging or making loans to consumers in connection with an application initiated or sought by a consumer for an open or closed ended loan,<sup>738</sup> the user has to make the following disclosures:

- A credit score that is obtained from a CRA, or was developed and used by the user of the information;<sup>739</sup>
- A notice to home loan applicants;<sup>740</sup> and
- A credit score generated by use of an automated underwriting system other than the credit score provided by CRAs.<sup>741</sup>

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<sup>731</sup> 15 U.S.C. §1681g(f)(1).

<sup>732</sup> 15 U.S.C. §1681g(f)(1)(A).

<sup>733</sup> 15 U.S.C. §1681g(f)(1)(B).

<sup>734</sup> 15 U.S.C. §1681g(f)(1)(C).

<sup>735</sup> 15 U.S.C. §1681g(f)(1)(D).

<sup>736</sup> 15 U.S.C. §1681g(f)(1)(E).

<sup>737</sup> 15 U.S.C. §1681g(f)(9).

<sup>738</sup> 15 U.S.C. §1681g(g)(1).

<sup>739</sup> 15 U.S.C. §1681g(g)(1)(A)(i).

<sup>740</sup> 15 U.S.C. §1681g(g)(1)(D) (Provides, “In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores. The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change. “Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another. If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application. If you have questions concerning the terms of the loan, contact the lender.”).

A user of credit score violates the FCRA if he does not disclose the credit score used to make a decision. Likewise, the user of an automated underwriting system other than the credit score provided by CRAs must disclose the credit score that is used. The user violates the FCRA, too, if he does not provide the home loan applicants with the required notice.

#### A Comparative Assessment

Under the CIL, disclosure of a credit report should include all information in the files of consumers,<sup>742</sup> which usually contain the followings:

- Consumer's personal information;
- Consumer's financial information;
- Public records information;<sup>743</sup>
- Persons who have requested the credit report during the last two years;
- and any other information may affect the credit capacity or creditworthiness of consumers.<sup>744</sup>

A CRA violates the CIL if it refuses to disclose all or part of the information in the consumer's file.

When comparing the two acts, the CIL does not mention at all most of the required disclosures under the FCRA. Yet, most of the required disclosures under the FCRA are complex and very detailed. I think the CIL drafting in requesting all of the information in the file without singling out every item is less complex. However, at least the following items should be added to the CIL to achieve the goals of credit reporting laws:

- A source of information;
- A summary of rights;
- A summary of rights of identity theft victims; and
- Government agencies contact information that are responsible to enforce the laws.

#### **4.2.12 Failure to Adhere to the Conditions and Forms When Disclosing**

Disclosures, as mentioned above, must be in accordance with the FCRA concerning the conditions and forms. Failure to adhere to the conditions and forms may give rise to liability.

##### A- Requesting Proper Identification

First, the FCRA requires a CRA to request proper identification of consumers before disclosing any information.<sup>745</sup> The purpose is so consumers' personal information is confidential.

##### B- Writing

Second, disclosure generally must be in writing.<sup>746</sup> Nevertheless, a CRA may disclose information in forms other than writing, provided the forms are authorized by the consumer and available from the CRA.<sup>747</sup> The FCRA provides examples of the forms as in-person

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<sup>741</sup> 15 U.S.C. §1681g(g)(1)(B)(i)(ii).

<sup>742</sup> CIL Implementing Regulation, article 43.

<sup>743</sup> CIL Implementing Regulation, article 43.

<sup>744</sup> CIL Implementing Regulation, article 18.

<sup>745</sup> 15 U.S.C. §1681h(a)(1) (And that the consumer may wish to contact a State or local consumer protection agency or a State attorney general (or the equivalent thereof) to learn of those rights.).

<sup>746</sup> 15 U.S.C. §1681h(a)(2).

<sup>747</sup> 15 U.S.C. §1681h(b)(1).



disclosure,<sup>748</sup> by telephone,<sup>749</sup> by electronic means,<sup>750</sup> or by any reasonable means available from the CRA.<sup>751</sup> A CRA may disclose the information in the presence of an accompanying person with proper identification if the consumer requests so.<sup>752</sup>

### C- Personnel Training

Third, a CRA must provide trained personnel to explain to the consumer any information released pursuant to the FCRA.<sup>753</sup>

Thus, a CRA violates the FCRA when it discloses information to a consumer without obtaining proper identification. If the disclosure is made to another person because of failure to request a proper identification, the violation is evident. However, one may argue that a CRA may be violating this rule, too, even if the disclosure is made to the consumer himself but without requesting proper identification to prove his identity. A CRA violates the FCRA if it discloses information to consumers in a form other than writing without consumer's authorization. A CRA violates the FCRA if it refuses to permit an accompanying person with proper identification from being present during disclosure of the consumer's file. A CRA violates the FCRA if it does not provide trained personnel to help consumers understand the disclosed information. Since the qualifications of personnel are not mentioned, the triers of fact must revert to the custom of industry to determine whether a CRA's personnel are qualified. Similarly, a CRA violates the FCRA if it provides personnel without proper training or when personnel number is insufficient to handle the tasks.

### A Comparative Assessment

Similarly, the CIL requires CRAs to affirm the identity of the requesting person.<sup>754</sup> This requirement covers all persons including consumers. A CRA violates the CIL if it discloses information without proper identification. Although the CIL does not require CRAs to request proper identification in other disclosures under the CIL, one should read the articles together to reach this conclusion. Even if one argues that articles should not be read together, consumers may bring actions against the CRAs under the general negligence theory in the case of providing their information without proper identifications.

The CIL is silent about the forms of disclosure, thus, any form of disclosure meets the legal requirements. I suggest that a provision should be added to clarify the form of disclosure should satisfy the disclosure purpose - which is understanding the content of the credit report - or at least the form of disclosure corresponds to the consumer's request. For instance, a written disclosure may not be sufficient for a blind consumer without verbal explanation. Similarly, a verbal disclosure may not be enough for a consumer whose memory is fading. When a consumer requests a specific form of disclosure, the CRA should deliver the disclosure in the requested form, if readily available, after conducting reasonable procedure to ensure the confidentiality of the personal information.

The CIL is silent, too, regarding permissibility of the presence of an accompanying person with proper identification if the consumer requests so. Nevertheless, this should not be an issue. A CRA should protect itself by requesting signed written permission from the consumer to avoid any subsequent allegations by the consumer that his confidential

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<sup>748</sup> 15 U.S.C. §1681h(b)(2)(A).

<sup>749</sup> 15 U.S.C. §1681h(b)(2)(B).

<sup>750</sup> 15 U.S.C. §1681h(b)(2)(C).

<sup>751</sup> 15 U.S.C. §1681h(b)(2)(D).

<sup>752</sup> 15 U.S.C. §1681h(d).

<sup>753</sup> 15 U.S.C. §1681h(c).

<sup>754</sup> CIL Implementing Regulation, article 27.

information has been released in the presence of another person without his approval. The CIL generally requires CRAs to hire qualified personnel regardless of their positions.<sup>755</sup> A CRA violates the CIL by hiring unqualified personnel, however, since the qualifications of personnel is not mentioned, the triers of fact must revert to the custom of industry to determine whether a CRA's personnel are qualified.

#### **4.2.13 CRA's Failure to Conduct Reasonable Reinvestigation of Disputed Information**

CRAs are required to conduct a reasonable reinvestigation<sup>756</sup> of disputed information within thirty days of receipt of a dispute.<sup>757</sup> Although a CRA may not be liable for inaccurate information in the consumer's report after following a reasonable procedure, the CRA may be held liable if it does not reasonably reinvestigate a consumer's dispute.<sup>758</sup>

After receiving the consumer's dispute, the CRA must handle the dispute reasonably. The CRA can avoid the need for reinvestigation by deleting the disputed information.<sup>759</sup> Otherwise, the CRA must conduct a reinvestigation,<sup>760</sup> correct or delete any inaccurate information,<sup>761</sup> and provide notice of the results of the reinvestigation.<sup>762</sup> One of the most important steps involves the furnisher of disputed information.<sup>763</sup> The CRA must contact the furnisher of the information and provide all relevant information regarding the dispute submitted by the consumer.<sup>764</sup> The furnisher of disputed information, in turn, should conduct an investigation of the disputed information and provide the CRA with its determination.<sup>765</sup> Part of the required investigation procedure is to review all relevant information regarding the dispute provided by the consumer through the CRA.<sup>766</sup>

A commentator argues the current practice of CRAs in the U.S. does not meet the legal requirements of the FCRA in providing all relevant information.<sup>767</sup> The CRAs use ACDV<sup>768</sup> through processing disputes using the e-Oscar system<sup>769</sup> electronically.<sup>770</sup> The ACDV transmits the information received from the consumers to furnishers using standardized dispute codes.<sup>771</sup> The information is then reduced to two digit codes in which a 100 pages complaint or one page complaint is the same regardless of different circumstances.<sup>772</sup> Not all documented, relevant information provided by the consumers is forwarded to the furnishers of information.<sup>773</sup> Therefore, the furnishers are likely to review the information in their files, which is different from what the consumers provided, and respond with the same wrong

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<sup>755</sup>CIL Implementing Regulation, article 3.

<sup>756</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 167 ("Courts in juries' instructions treat "reinvestigation" and "investigation" as the same term").

<sup>757</sup> 15 U.S.C. §1681i(a)(1)(A).

<sup>758</sup> *Id.* at 398.

<sup>759</sup> 15 U.S.C. §1681i(a)(1)(A).

<sup>760</sup> 15 U.S.C. §1681i(a)(1)(A).

<sup>761</sup> 15 U.S.C. §1681i(a)(5)(A)(i).

<sup>762</sup> 15 U.S.C. §1681i(a)(6).

<sup>763</sup> 15 U.S.C. §1681i(a)(2)(A).

<sup>764</sup> 15 U.S.C. §1681i(a)(2)(A).

<sup>765</sup> 15 U.S.C. §1681s-2(b)(1).

<sup>766</sup> 15 U.S.C. §1681s-2(b)(1)(B).

<sup>767</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 156.

<sup>768</sup> ACDV stands for Automated Consumer Dispute Verification. A sample can be found in appendix C.

<sup>769</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 179.

<sup>770</sup> *Id.*

<sup>771</sup> *Id.* at 176.

<sup>772</sup> *Id.*

<sup>773</sup> *Id.*

information.<sup>774</sup> The commentator argues this form of reinvestigation is unreasonable and can be actionable, although courts prefer to address the issue on a case-by-case basis.<sup>775</sup> One approach is that not forwarding the documents to the furnishers is not a violation of the FCRA.<sup>776</sup> In contrast, another approach is that not forwarding the documents to the furnishers is a violation of the FCRA.<sup>777</sup> The commentator argues, too, that treating acceptance of this procedure as reasonable helps furnishers escape liability by conducting a superficial investigation. Furnishers in this case are required only to make sure their files have the same information as the first time they reported to the CRAs.<sup>778</sup> Upon receipt of a furnishers' confirmation, the CRAs, in turn, confirm that the information in their files is accurate.<sup>779</sup> This result does not respond to the consumers' goals of initiating disputes.<sup>780</sup>

Thus, a CRA violates the FCRA if it does not handle the consumer's dispute reasonably. The following are examples of unreasonable reinvestigation:

- When the CRA does not have reasonable procedure to conduct reinvestigation;<sup>781</sup>
- When the CRA merely tells the recipients of the credit reports that the information is disputed without further reinvestigation;<sup>782</sup>
- When the CRA does not reinvestigate and ignores the consumer's dispute;
- When the CRA does not contact the furnisher of the disputed information with the disputed information and all relevant information;<sup>783</sup>
- When the CRA does not check the original sources and additional sources to verify the disputed information;<sup>784</sup>
- When the CRA does not contact a third party to verify the information, if the original source is unreliable for any reason;<sup>785</sup>

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<sup>774</sup> *Id.*

<sup>775</sup> *Id.* at 177.

<sup>776</sup> *Karmolinski v. Equifax Info. Services LLC*, CIV.04-1448-AA, 2007 WL 2492383 at \* 4 (D. Or. Aug. 28, 2007) (The judge said, "I find that Trans Union's failure to adopt blanket policies of contacting third parties, such as ERS, and providing creditors with copies of all documents received from consumers cannot be considered willful failure to comply with § 1681e(b)").

<sup>777</sup> *Saenz v. Trans Union, LLC*, 621 F. Supp. 2d 1074, 1083 (D. Or. 2007) (The court agreed with another courts' decisions and said, "exclusive reliance on furnishers of credit information and standardized procedures such as partial matching logic may not be justified once the credit reporting agency receives notice that the consumer disputes information contained in his or her credit report."); *Dixon-Rollins v. Experian Info. Solutions Inc.*, CIV.A. 09-0646, 2010 WL 3749454 at \* 4 (E.D. Pa., 2010) (The court held, "Based upon this undisputed evidence, a reasonable jury could have concluded that the material submitted by Dixon-Rollins was relevant to the status of her debt, and Trans Union negligently and willfully failed to forward it to ACCB for verification.").

<sup>778</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 177.

<sup>779</sup> *Id.*

<sup>780</sup> *Id.* at 176.

<sup>781</sup> *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997) (The court held, "Similarly, the jury could have concluded that seventy-five cents per investigation was too little to spend when weighed against Cushman's damages.")

<sup>782</sup> *In the Matter of Equifax Inc.*, 96 F.T.C. 844 at \* 96 (1980) ("... providing notification to the recipient companies which inaccurately or incompletely set forth the disputes by the consumers").

<sup>783</sup> *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 38 (1st Cir. 2010) (The court held, "If a CRA fails to provide "all relevant information" to a furnisher, then the consumer has a private cause of action against the CRA ...").

<sup>784</sup> *Cushman*, 115 F.3d, at 224-25 (The court held, "We assume for the sake of argument, as the Seventh Circuit concluded, that the costs of requiring consumer reporting agencies to go beyond the original source of information as an initial matter outweigh any potential benefits of such a requirement."); FTC Official Staff Commentary 16 C.F.R. § 611 (2).

- When the CRA does not review the provided documents and all relevant information;<sup>786</sup>
- When the automated system of the CRA does not meet the FCRA's requirements such as not forwarding the all relevant documents provided by the consumer;<sup>787</sup>
- When the CRA does not delete, modify, or correct the incorrect or unverifiable information; or
- When the CRA reinvestigates but after the required time limit.

### A Comparative Assessment

Similarly, under the CIL, consumers have the right to dispute any information in their files concerning how accurate, complete, and updated it is. The CRA has to investigate the disputed information within thirty days of receipt of the dispute.<sup>788</sup> The CRA must notify the furnisher of the disputed information, and provide it with all relevant information and documents within five days.<sup>789</sup> The furnisher has only ten days to respond to the disputed information.<sup>790</sup> If the furnisher does not respond within the time limit, it is presumed the consumer's dispute is correct. Upon the expiration of ten days with no response, or upon receipt of the response within the period, the CRA has to make a decision within seven days.<sup>791</sup> If the result of the investigation favors the consumer in whole or in part, or the information is unverifiable, the CRA has to delete or modify the disputed information within two days.<sup>792</sup> The CRA has to notify the consumer of the investigation procedure within fifteen days from the date of dispute.<sup>793</sup> Finally, once the CRA makes a decision, the consumer needs to be notified of the result of the investigation within five days.<sup>794</sup>

A similar problem arises concerning the reasonableness of the investigation procedure. SIMAH's system in Saudi Arabia was developed by Experian Credit Agency in the U.S.; therefore, SIMAH's practice should be the same as CRAs in the U.S. American CRAs assign codes describing the dispute without forwarding the actual documents provided by the consumer. This practice may be considered unreasonable by the trier of fact.<sup>795</sup>

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<sup>785</sup> *Olwell v. Med. Info. Bureau*, CIV. 01-1481 JRTFLN, 2003 WL 79035 at \* 5 (D. Minn. Jan. 7, 2003) (The court held, "Nonetheless, a reasonable jury could find that the procedures followed by MIB and Lincoln Benefit - specifically, the failure to contact outside sources - were unreasonable."); *Swoager v. Credit Bureau of Greater St. Petersburg, Fla.*, 608 F. Supp. 972, 976 (M.D. Fla. 1985) (The court held, "Therefore, it simply became unreasonable to rely solely upon FMCC's representatives, who obviously had a biased viewpoint, to verify the plaintiff's classification in the repossession category.").

<sup>786</sup> *Saenz*, 621 F. Supp. 2d, at 1082 (The court stated, "An agency conducting a reinvestigation is further required to conduct its own review of the "relevant information" it received from the consumer.").

<sup>787</sup> *Carvalho v. Equifax Info. Servs., L.L.C.*, 588 F. Supp. 2d 1089, 1100 (N.D. Cal. 2008). (The court held, "However, the Court notes that while there is no categorical rule requiring reporting agencies to look beyond the furnishers of credit information in conducting a reinvestigation, the agencies also are not entitled *as a matter of law* to rely on such furnishers using the CDV system.") (Emphasis in original)); *Gorman v. Experian Info. Solutions Inc.*, 07 CV 1846 (RPP), 2008 WL 4934047 at \* 6 (S.D.N.Y. Nov. 19, 2008) (The court held, "Given the standard articulated in *Cushman*, and Experian's claimed sole reliance on the information it received from HSBC, a jury could conclude that Experian did not reinvestigate Plaintiff's dispute in accordance with the requirements of 15 U.S.C. § 1681.") (Emphasis in original); *Carvalho*, 588 F. Supp. 2d, at 1100.

<sup>788</sup> CIL Implementing Regulation, article 47.

<sup>789</sup> CIL Implementing Regulation, article 48(1).

<sup>790</sup> CIL Implementing Regulation, article 48(1).

<sup>791</sup> CIL Implementing Regulation, article 48(2).

<sup>792</sup> CIL Implementing Regulation, article 48(3).

<sup>793</sup> CIL Implementing Regulation, article 49(1).

<sup>794</sup> CIL Implementing Regulation, article 49(2).

<sup>795</sup> I contacted SIMAH regarding this issues but I did not get response.

A CRA violates the CIL in the following cases:

- When the CRA refuses to initiate an investigation;
- When the CRA conducts the investigation but exceeds the time limit;
- When the CRA fails to notify the furnishers of the disputed information;
- When the CRA fails to provide the furnisher with all relevant information;
- When the CRA fails to delete or modify the disputed information that is unverifiable or incorrect; or
- When the CRA fails to notify the consumer of the followed procedure or the result of the investigation in a timely manner.

When one compares the FCRA and the CIL, one can conclude that there is no difference between the two acts in regard to investigation procedure. The similarities between the two acts are as follows:

- Both acts require an investigation to be conducted within thirty days;
- Both acts require following procedure in conducting investigation. However, unlike the FCRA, the CIL does not require the procedure to be reasonable. Nevertheless, reasonableness is an implied requirement in any case if there is no legal standard to be followed. Thus, courts in Saudi Arabia will consider reasonableness when deciding whether or not the CRA is liable because of its procedure;
- Both acts make the CRA liable if it does not contact the furnisher of disputed information with all information relevant to the dispute;
- Both acts make the CRA liable if it does not review the provided documents and all relevant information; and
- Both acts make the CRA liable if it fails to delete or modify the disputed information in case of unverifiability or incorrectness of such information.

On the other hand, the FCRA allows CRAs to avoid investigation by deleting the disputed information upon receipt of a consumer's dispute. However, the CIL does not include such a provision but rather it has the opposite. The CIL prohibits CRAs from deleting negative accurate information from the credit report after the investigation result proves its accuracy.<sup>796</sup> It is not clear whether or not CRAs can delete negative accurate information if there is no dispute at all. The FCRA has no comparable clause prohibiting deleting negative accurate information. The CIL's approach tends to protect the interest of users of credit reports so they become aware of any negative information of the consumers and can consider it when extending credit.

#### **4.2.14 Reinsertion of Deleted Information**

Reinsertion of deleted information in the consumer's file or credit report can be willful or negligent. In a case of willful reinsertion, CRAs usually believe the deleted information is a result of unverifiable information, which then becomes verifiable. In this instance, the furnisher of the deleted information must provide a certification that the information is accurate and complete.<sup>797</sup>

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<sup>796</sup> CIL Implementing Regulation, article 48(4).

<sup>797</sup> 15 U.S.C. §1681i(a)(1).

A commentator notes the form of this certification is not specified. She argues the certification must contain an individualized determination of the reinserted items. She believes blanket forms furnishers provide with their weekly or monthly reports undermine the purpose of requiring certification of completeness and accuracy. When the furnishers provide blanket certifications accompanying hundreds or thousands items, no one can assure the reinserted items are verified as complete and accurate.<sup>798</sup>

Deleted information may be reinserted negligently in the consumers' files or reports. The FCRA requires CRAs to maintain reasonable procedures to prevent deleted items from reappearing in the consumers' files or reports.<sup>799</sup>

One commentator argues the problem of reappearance is attributable to the furnishers and the CRAs. Unless the furnishers of credit information delete unverifiable or incorrect information from their internal files, it is likely the deleted information will appear again. Further, the practice of CRAs in the deletion of items is not reasonable as a means to prevent the reappearance of deleted information. The CRAs perform soft-deletion, which does not erase the information completely from their database.<sup>800</sup> Sometimes the soft-deletion is linked to a time limit, in which the deleted information appears again after expiration of that time.<sup>801</sup> A court held that a CRA's practice of soft-deletion or cloaking, which allows for the reappearance of deleted information after one year, is unreasonable.<sup>802</sup>

Thus, a CRA violates the FCRA if it reinserts deleted information into a consumer's file or report without obtaining a certificate from the furnisher of the information, confirming the accuracy and completeness of the reinserted items. The CRA violates the FCRA if it fails to implement a reasonable procedure to prevent the reappearance of deleted information.

### A Comparative Assessment

Under the CIL, once the information is deleted from the consumer's file, a CRA cannot reinsert the information without a resolution from the Credit Reporting Dispute Resolution Committee (CRDRC).<sup>803</sup>

Because of the short period that furnishers have to provide responses to disputes, information likely is deleted frequently.<sup>804</sup> However, such deletion is not because of inaccuracy of credit information, but because of delayed responses. Thus, most of the deleted information is likely to be reinserted in credit files after verification. When the law requires each reinsertion to be approved by the Committee, it overburdens the Committee with work that can be performed by CRAs. Moreover, it provides to consumers ultra-protection against CRAs. A comparison of the FCRA and CIL reveals the FCRA is better in treating this issue. Complicating the reinsertion process is likely to impede the credit reporting industry as a

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<sup>798</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 187.

<sup>799</sup> 15 U.S.C. §1681i(a)(5)(B)(i).

<sup>800</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 185-86.

<sup>801</sup> *Id.*

<sup>802</sup> *Cousin*, 246 F.3d, at 368 (The court held, "... it is incumbent on the consumer reporting agency to permanently delete and cloak the erroneous information ... Trans Union offers no reason why, as a matter of law, cloaking for only twelve months is a reasonable procedure, especially when it could have easily cloaked any adverse information permanently and when its own witness conceded that in retrospect the twelve month cloaking procedure may have been unreasonable.").

<sup>803</sup> CIL Implementing Regulation, article 52.

<sup>804</sup> The period in the FCRA is 25-30 days depending on when the CRA sends the information to the furnisher (the CRA is required to send the information within five days), and 10 days in the CIL.

whole. The FCRA seems to balance industry's interests in the flow of information, by way of reinsertion, and consumers' interest in requiring the maintenance of reasonable procedures to prevent reappearance.

### 4.3. Sub-Chapter B: Other Breaches

Under this sub-chapter, I will present breaches that may be performed by different violators. This category includes CRAs, furnishers, users, and others.

#### 4.3.1. Acquiring Credit Information for No Permissible Purposes

Acquiring credit information for no permissible purpose is one of the main breaches of the FCRA. If the breach satisfies the elements, a consumer is entitled to compensation. Section 1681n (a)(1)(b) provides “in the case of liability of *a natural person* for obtaining a consumer report *under false pretenses or knowingly without a permissible purpose*, actual damages sustained by the consumer as a result of the failure or \$1,000, whichever is greater.”<sup>805</sup> (Emphasis added). The FCRA enumerates the permissible purposes under section 1681b as discussed earlier.<sup>806</sup>

Section 1681n (a)(1)(b) provides remedies for consumers injured by willful acquiring of a credit report for no permissible purpose. Section 1681n (b) provides additional remedies for CRAs injured by their clients’ acquirement of a credit report for no permissible purpose.<sup>807</sup> One can call this right statutory indemnification. The statute provides CRAs with a right to collect from users of credit reports whatever judgment is entered against CRAs because of users’ acts.

To test whether this duty has been breached, one can look at the purpose for which the report is obtained. Permissible purposes are enumerated; therefore, any other purpose is impermissible. Some examples of impermissible purposes are found in the FTC Commentary, the FTC Staff letters, and courts decisions as in the following sections.

##### 4.3.1.1 Impermissible purposes

###### A. In Connection with Litigation

Obtaining a credit report for litigation purposes, such as assessing consumer’s ability to pay a judgment, outstanding judgments, previous lawsuits, employment records, locating jurors or witnesses, or attacking other parties’ credibility, is impermissible.<sup>808</sup> In addition, the court held an attorney does not have a legitimate business need, within the meaning of the FCRA, to obtain credit reports on opposing parties in litigations to force the opposing party to settle the case.<sup>809</sup>

###### B. In Connection with Investigations

A private investigator has no permissible purpose to obtain a credit report on consumers for issues not related to credit, insurance, or employment purposes.<sup>810</sup> In addition, credit

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<sup>805</sup> 15 U.S.C. § 1681n (a)(1)(b).

<sup>806</sup> See pp. 86-88.

<sup>807</sup> 15 U.S.C. § 1681n(b) (Provides, “Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or \$1,000, whichever is greater.”) (Emphasis added).

<sup>808</sup> Anenson, *supra* note 441, at 441; FTC Official Staff Commentary 16 C.F.R. § 604 (3)(E)(4); *Klapper v. Shapiro*, 154 Misc.2d 459, 465 (N.Y. Sup. Ct. 1992) (The court held that obtaining a credit report to impugn plaintiff’s credibility is an improper purpose).

<sup>809</sup> *Bakker v. McKinnon*, 152 F.3d 1007, 1012 (8th Cir. 1998); *Zeller*, 758 F. Supp., at 781 (One must distinguish this purpose from obtaining a credit report for litigation related to credit reports or for collection purpose, which are permissible. A court held that a creditor’s obtaining of a credit report to verify that information had been correctly recorded is a permissible purpose.).

<sup>810</sup> FTC Official Staff Commentary 16 C.F.R. § 604 (3)(E)(6C).



reports cannot be obtained by non-governmental agencies' for the purpose of locating a suspected criminal.<sup>811</sup>

C. Checking Titleholder

Courts held that user's accessing a credit report of a former client to check the titleholder is not a permissible purpose under the FCRA.<sup>812</sup>

D. Locating Concealed Assets

Obtaining a credit report to find concealed assets is not a permissible purpose.<sup>813</sup> A court held that obtaining the credit report of a husband whose wife is indebted to the defendant is not a permissible purpose.<sup>814</sup>

E. In Connection with Marketing

Courts held that supplying a credit report to those who want to target consumers with their products and services is not a permissible purpose.<sup>815</sup>

F. Collecting a Debt of a Related Person

A debt collection agency has no permissible purpose to obtain a credit report on a spouse to collect debts owed by the other spouse where the spouses are not joint holders of the account.<sup>816</sup>

G. Establishing a Financial Profile on a Defendant as Part of a Criminal Investigation

Obtaining a credit report of a defendant in a criminal case to establish a financial profile as part of an investigation of a wire transfer is impermissible and results in suppression of it.<sup>817</sup>

H. Developing Additional Private Financial Information

Obtaining a credit report by an asset search firm for the purpose of developing additional private financial information about a target group for the firm's clients is not a permissible purpose.<sup>818</sup>

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<sup>811</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (3)(E)(4).

<sup>812</sup>*Goodby v. Wells Fargo Bank, N.A.*, 599 F. Supp. 2d 934, 939 (S.D. Ohio 2008).

<sup>813</sup>*Thibodeaux v. Rupers*, 196 F. Supp. 2d 585, 592 (S.D. Ohio 2001).

<sup>814</sup>*Id.* at 591.

<sup>815</sup>*Trans Union Corp. v. F.T.C.*, 81 F.3d 228, 234 (D.C. Cir.1996) (This purpose should be distinguished from pre-screening practice, which is a permissible purpose, in which the creditors purchase lists of qualified consumers and provide them with firm offer of credit or insurance.); 15 U.S.C. § 1681b(c)(1)(b)(i) (Provides, "consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if ... *the transaction consists of a firm offer of credit or insurance.*" [Emphasis added]. This purpose should be distinguished from pre-screening practice, which is a permissible purpose, in which the creditors purchase lists of qualified consumers and provide them with firm offer of credit or insurance.).

<sup>816</sup>*Cappetta v. GC Servs. L.P.*, 654 F. Supp. 2d 453, 461 (E.D. VA, 2009).

<sup>817</sup>*People v. Warmus*, 561 N.Y.S.2d 111 (1990).

<sup>818</sup>*Commonwealth v. Source One Assocs.*, 436 Mass. 118, 125 (2002).

I. In Connection with Marriage

Obtaining a credit report for marriage-related purposes is not a permissible purpose. A mother obtaining of a credit report of a prospective son-in-law is a violation of the FCRA.<sup>819</sup>

J. In Connection with Divorce Proceeding

A spouse has no permissible purpose to obtain a credit report on the other spouse to determine missing joint marital assets before or during divorce proceedings. A court held that obtaining a credit report for the purpose of determining money and property for divorce proceeding constitutes a violation of the FCRA.<sup>820</sup>

K. Procurement of Credit Report for Third Parties

A person, with no relationship to a consumer, has no permissible purpose to obtain a credit report on the consumer at the request of a third party.<sup>821</sup>

L. Securing Custody or Child Support of Child

A parent's obtaining of the other parent's credit report in order to secure custody of a child is not a permissible purpose.<sup>822</sup>

M. In Connection with Tax Collection

Tax collection agencies, other than Internal Revenue Service (IRS) have no permissible purpose to obtain credit reports because the FCRA sections apply to credit accounts.<sup>823</sup> Yet, they have a permissible purpose after getting a tax lien having the same effects of a judgment or having a judgment because the IRS becomes a creditor in that case.<sup>824</sup>

N. In Connection with Consumer's Relatives of Third Parties

Obtaining a credit report on a consumer's relatives is not a permissible purpose.<sup>825</sup> Nonetheless, when relatives or third parties have a relationship to the transaction such as being liable for the account, then a permissible purpose exists.<sup>826</sup>

O. In Connection with Insurance Claims

Although obtaining credit reports for insurance underwriting is a permissible purpose,<sup>827</sup> obtaining credit reports in connection with insurance claims is not a permissible purpose. Therefore according to the prevailing opinion, no other insurance-related purposes is allowed except insurance underwriting.<sup>828</sup> It cannot be argued that insurance claims may be included

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<sup>819</sup>*Phillips v. Grendahl*, 312 F.3d 357, 363 (8th Cir. 2002).

<sup>820</sup>*Cole v. Am. Family Mut. Ins. Co.*, 410 F. Supp. 2d 1020, 1023 (D. Kan. 2006).

<sup>821</sup>*Scott v. Real Estate Fin. Group*, 956 F. Supp. 375, 383 (E.D.N.Y. 1997).

<sup>822</sup>*Rodgers v. McCullough*, 296 F. Supp. 2d 895, 903 (W.D. Tenn. 2003) (This is different from obtaining credit report for a child support by a governmental agency, which is a permissible purpose.); 15 U.S.C. § 1681b(a)(4); 15 U.S.C. § 1681b(a)(5).

<sup>823</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (1)(2).

<sup>824</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (3)(A)(4).

<sup>825</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (3)(A)(5B).

<sup>826</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (3)(A)(5A).

<sup>827</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (3)(C)(1).

<sup>828</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (3)(C)(2).

under “legitimate business need” because the business need exists to include purposes other than credit, insurance underwriting, or employment purposes.<sup>829</sup>

P. Media Usage

A media reporter has no permissible purpose to obtain a credit report for an investigative magazine article.<sup>830</sup>

Q. Personal Reasons

Obtaining credit report for personal reasons such as to satisfy someone’s curiosity is not a permissible purpose.<sup>831</sup>

R. Employment of a Relative

Obtaining a credit report on a consumer’s relatives to consider the consumer for a promotion is not a permissible purpose as the relative person is not a party to the employment.<sup>832</sup>

A Comparative Assessment

Unlike the FCRA, the CIL does not provide a list of permissible purposes but rather requires consumer’s approval to obtain his or her credit report. No purpose is mentioned in the CIL. The rules of the CIL and its Implementing Regulation are as follows:

- The CIL provides that “A user may obtain a copy of a consumer credit record from companies subject to a written consent of the consumer.”<sup>833</sup>
- The Implementing Regulation of the CIL states, “a credit reporting agency shall verify the identity of a requester of a credit report and the purpose of request.”
- A user “must certify not to use the information for purposes other than the disclosed purposes.”<sup>834</sup>
- The CIL Implementing Regulation states that “credit reporting agency is not allowed to issue a credit report unless ... upon request of the user and approval of the consumer.”<sup>835</sup>
- The CIL bans using credit reports for unlawful purposes or for a purpose other than purposes described in the act.<sup>836</sup>

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<sup>829</sup>FTC Official Staff Commentary 16 C.F.R. § 604 (3)(C)(2).

<sup>830</sup>*W.D.I.A. Corp. v. McGraw-Hill Inc.*, 34 F. Supp. 2d 612, 617 (S.D. Ohio 1998) (The court held, obtaining a credit report to investigate credit reporting industry in an article in a magazine is impermissible purpose under the FCRA.).

<sup>831</sup>*Yohay v. Alexandria Employees Credit Union*, 827 F.2d 967, 974 (4th Cir. 1987) (The court held that obtaining a credit report for personal reasons constitutes a violation of the FCRA. The court did not disclose the nature of the reason in this particular case); FTC Official Staff Commentary 16 C.F.R. § 604 (3)(E)(5) (Obtaining credit reports for impermissible purposes can be either truthful, by stating an impermissible purpose in the certification, or under false pretenses, by stating permissible purpose other than the intended impermissible purpose. In addition to the civil liability, the FCRA imposes criminal liability for obtaining credit report under false pretenses according to section 15 U.S.C. § 1681q.).

<sup>832</sup>*Zamora*, 811 F.2d, at 1370 (The court held, “Nothing in the FCRA indicates that a consumer credit report for “employment purposes” may be obtained on any person other than the actual individual whose employment is being considered.”).

<sup>833</sup> CIL, Article 5.

<sup>834</sup> CIL Implementing Regulation, article 28.

<sup>835</sup> CIL Implementing Regulation, article 29 and 39.

- The CIL places a burden upon CRAs to investigate the purposes of requesting the credit report.<sup>837</sup> Even though CRAs have to investigate the purposes for which a credit report is requested, the CIL is not clear on what constitutes permissible or impermissible purposes that need to be investigated.

From the foregoing, it seems that any business purpose is acceptable in contrast to using the credit report for other purposes such as personal and other non-business purposes. The CIL also prohibits the use of credit reports for non-permissible or non-disclosed purposes.<sup>838</sup> Nevertheless, requiring CRAs to investigate into the purpose is meaningless because the CIL links every obtainment of a credit report to the approval of the consumer. Under the CIL, it is a violation to obtain a credit report of a consumer without his approval, regardless of the purpose of the obtainment even though CRAs need to investigate the purposes. Thus, a user violates the CIL if he uses the credit report for a purpose other than the disclosed purpose. Since no specific purpose is mentioned in the CIL, one can conclude that using a credit report for any purpose is lawful so long as the consumer's approval is obtained and the purpose is disclosed.

Although the CIL sheds no light on the permissible purposes in the first place, the Code of Conduct of SIMAH indicates the purpose must be a relevant purpose to assessing creditworthiness.<sup>839</sup> The practice of SIMAH cannot be taken as an interpretation of the CIL or its Implementing Regulation; however, SIMAH has the heritage of SAMA's registry. It is very close to the decision makers in SAMA, and under its umbrella; therefore, SIMAH's practice is very important in shedding light on the meaning of some terms of the CIL.

The difference between the FCRA and the CIL is evident. Even the FCRA sets out specific permissible purposes.<sup>840</sup> It provides more flexibility by allowing CRAs to supply credit reports in many circumstances without approval of consumers. In addition, the FCRA allows CRAs to issue credit reports in any unspecified circumstances with an approval from the consumer.

In contrast, the CIL seems inflexible in its prohibition of issuance of any credit report without consumer's approval. There are some circumstances in which credit reports are needed, and in which obtaining consumer's approval is impractical. For instance, in the case of national security, proper authorities may need to access credit reports of some suspects. These should be obtained without the suspects' approval or even knowledge. In addition, the CIL is not clear on the purposes under which a credit report may be obtained.

I believe that the FCRA approach is better than the CIL approach. If consumer's approval is required in every situation, then sections in the CIL that govern the purposes are meaningless. Moreover, requiring approval every time may result in a load of needless paperwork and extended procedures, which result in costly wasted time that will be passed on to consumers. Requiring more than what is necessary is impractical and may result in non-compliance or fictitious compliance in some cases. Finally, the CIL should be revised to specify permissible purposes.

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<sup>836</sup> CIL, Article 12.

<sup>837</sup> CIL Implementing Regulation, article 25/3.

<sup>838</sup> CIL Implementing Regulation, article 39.

<sup>839</sup> SIMAH, Code of Conduct, 1(27) (Provides, "(i) the purpose of assessing the creditworthiness of a Consumer in connection with an application for opening an account by such Consumer or a review of the account of the Consumer; (ii) the purpose of assessing the creditworthiness of a Consumer as a Guarantor in connection with an application for opening an account by a Consumer or a review of the account of such Consumer or a review of the creditworthiness of the Consumer; or (iii) Any other purpose(s) permitted by SAMA.").

<sup>840</sup> 15 U.S.C. § 1681b.

### 4.3.2. Failure to Truncate Expiration Date or Credit Card and Debit Card Digits

No person is allowed to print on the receipt of a transaction more than the last five digits of debit or credit cards or the card's expiration date.<sup>841</sup> This restriction applies when the means of printing the receipt is electronic. If the numbers of debit or credit cards or expiration dates are to be printed using non-electronic methods, then no compliance is required.<sup>842</sup> The purpose of this restriction is to limit the chances of identity theft, which is an increasing threat.<sup>843</sup> This violation is one of the most litigated issues under the FCRA.<sup>844</sup> The term "no person" includes individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.<sup>845</sup> Thus, liability arises when a governmental agency, for example, prints a receipt of a transaction for a consumer without truncation of the expiration date or required digits. Similarly, liability arises when an online merchant emails transaction confirmation without truncation of expiration date or required digits.

#### 4.3.2.1. Location of Printing

Defendants use different strategies and arguments to circumvent this rule. For instance, courts are divided on whether this requirement applies to receipts of phone or online transactions. A court rejected the argument that the application of this rule is limited to traditional printed receipts at the point of sale and that it does not apply to over-the-phone transactions where the receipt is mailed but is not received in a physical location.<sup>846</sup> Another court took the opposite position and held that transactions over the phone or online are not protected because receipts are not printed "at the point of the sale or transaction".<sup>847</sup> When taking into consideration the language of the FCRA, one can clearly conclude that transactions, other than on-site, are not within the definition. The main purpose of this requirement is to protect consumers from identity theft. Protection from identity theft purpose will be frustrated if such a conclusion is accepted. The risk of identity theft through phone or online transactions is greater than through on-site transactions.

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<sup>841</sup> 15 U.S.C. §1681c(g)(1) (Provides, "... no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.").

<sup>842</sup> 15 U.S.C. §1681c(g)(2) (Provides, "This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card." For example, printing more than the last five digits or expiration date through handwriting, imprinting, or copying is exempted from this restriction.).

<sup>843</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 380; Federal Trade Commission & Synovate, *Federal Trade Commission Identity Theft Survey Report*, 7 (2003 (Loss of individuals from identity theft in 2003 is \$5 billion, number of victims is 9.9 million persons, loss to business is \$47.6 billion, and victims spent about 297 million hours to resolve their problems.).

<sup>844</sup> *Id.*

<sup>845</sup> 15 U.S.C. §1681a(b).

<sup>846</sup> *Ehrheart v. Bose Corp.*, CIV.A. 07-350, 2008 WL 64491 at \* 4 (W.D. Pa. Jan. 4, 2008) (The defendant printed the expiration date on the receipt and mailed it with the merchandise. The court held that the term [point of sale] has been applied to denote a time or an event, as opposed to a location ... and the purpose of the FCRA is to prohibit the unnecessary inclusion of sensitive credit card information on customer receipts, the relevant factor is not where the receipt is provided to the cardholder, it is that the protected information is wholly unnecessary in the context of providing a customer receipt and its inclusion on such receipt, no matter where the customer receives it, can lead to identity theft.).

<sup>847</sup> *Shlahtichman v. 1-800 Contacts Inc.*, 09 CV 4032, 2009 WL 4506535 at \* 2 (N.D. Ill. Dec. 2, 2009) (The court held, an e-mail order confirmation is not entitled to the protection because it is not provided at the point of the sale or transaction.).

#### 4.3.2.2. Definition of Printing

Courts split on whether Internet transactions are within the definition of “print”. A court held that printing includes “publishing information” by use of any means, which covers Internet transactions.<sup>848</sup> In contrast, another court relied on the plain meaning of the word and limited the application of “printing” to tangible printing, thus excluding emailed receipts from the definition.<sup>849</sup> Although it is difficult to tip the scale toward one approach or the other, remedial statutes are to be construed liberally.<sup>850</sup> Construing “printing” tangibly ignores the current usage of “printing” with intangible printing such as printing from Microsoft Word to PDF files for example. When construing “print” liberally, one may achieve the purpose of the FCRA to protect from identity theft, for which the Internet constitutes the main threat. Finally, if the violation is willful, then the actual damages are presumed upon violation of the statutory duty. Therefore, there is no need to prove actual damages in order to recover statutory damages.<sup>851</sup>

#### A Comparative Assessment

Under the CIL, no rule is mentioned regarding the truncation of expiration dates or digits of debit or credit cards. This may be attributed to the limited usage of credit cards in Saudi Arabia.<sup>852</sup> This limited usage decreases chances of identity theft in Saudi Arabia, therefore, legislators may have thought that adding such details would make the CIL complicated. This excuse seems unpersuasive, considering most Saudi banks are already complying with the requirement to truncate digits. If adding this requirement to the law is troublesome, it could be added to the Code that SAMA is going to issue.

#### **4.3.3. Establishment or Extension of Credit During Alerts Period**

Establishment or extension of credit during initial or extended alert periods without reasonable verification is a violation of the FCRA if no reasonable procedures and policies to affirm the identity of the requester are followed.<sup>853</sup> In the case of extended alerts, a user must

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<sup>848</sup> *Romano v. Active Network Inc.*, 09 C 1905, 2009 WL 2916838 at \* 2 (N.D. Ill. Sept. 3, 2009) (The court held, “it is apparent that the use of the word “print” was merely used to convey the meaning of publishing information rather than imprinting ink on a piece of paper that is generated by a machine or electronic device”).

<sup>849</sup> *Shlahtichman*, 2009 WL 4506535 at \* 3 (The court held, “e-mail confirmations are not printed receipts ... and in the absence of a statutory definition, a court should use a term's plain meaning”).

<sup>850</sup> *Tenney v. Springer*, 121 Mich. App. 47, 53 (1982) (The court held that they reach this conclusion “liberal construction of a term” because the summary proceedings statute is remedial in nature and should be construed liberally.).

<sup>851</sup> *Ramirez v. Midwest Airlines Inc.* 537 F. Supp. 2d 1161, 1168 (D. Kan. 2008) (Defendant failed to trunk the expiration date from the receipt, the court held, that “In sum, the lack of ambiguity in the plain language of the statute as well as the coherency and consistency of the dichotomous statutory scheme reflects that a showing of actual damages is not required to recover the statutory damages permitted under § 1681n(a)(1)(A) in a willful noncompliance case”).

<sup>852</sup> Credit cards in Saudi Arabia are limited for two reasons: first, strict banks’ requirements in issuing credit cards such as employment condition; second, most credit cards are interest-based credit cards, which most people avoid because of its prohibition in Islamic law. Debit cards cannot be used as credit cards in online purchases in Saudi Arabia yet.

<sup>853</sup> 15 U.S.C. § 1681c-1(h)(1)(B)(i); 15 U.S.C. § 1681c-1(h)(2)(B) (both provide, “No prospective user of a consumer report that includes an initial [or extended] fraud alert or an active duty alert ... may establish a new credit plan or extension of credit, other than under an open-end credit plan ... in the name of the consumer, or issue an additional card on an existing credit account requested by a consumer, or grant any increase in credit limit on an existing credit account requested by a consumer, unless the user utilizes reasonable policies and procedures to form a reasonable belief that the user knows the identity of the person making the request”).

contact the consumer in person or through the consumer's designated contact methods to affirm the identity of the consumer.<sup>854</sup>

The FCRA requires CRAs to adopt procedures to affirm the identity of the person who requests establishing or extending credit. Part of the procedure is that users must contact the consumer if he or she provides a telephone number when he or she requests that the alert be placed.<sup>855</sup> If no telephone number is provided, then a reasonable person test is applicable.

Since the aim of the FCRA is to protect consumers, inclusion of alerts without the consumer's request may not violate the FCRA. A CRA's suspicion of identity theft of a consumer is a reasonable justification to place alerts in a consumer's file without her request.<sup>856</sup>

A user of credit reports violates the FCRA if the user does not utilize reasonable procedures to affirm a consumer's identity in initial and active duty alerts. Similarly, it is a violation if the user does not contact the consumer in person or through the consumer's designated contact methods to affirm the identity of the consumer to establish a new credit plan, extend credit, issue additional credit cards on existing credit card accounts, or increase the credit limit of existing credit accounts.

#### A Comparative Assessment

Under the CIL, no such rules exist. I believe that legislators have two options to determine the scope of legislation. The first option is to limit the statute to what the country needs in the short and medium terms without adding details related to issues the country is not facing and is not expected to face in the short or medium term as legislators are able to amend the statute when the need arises. Adding such details may incur expenses the private sector is going to pass on to consumers without current actual need. The second option is to broaden the scope to fit the country's need in the long term even for issues that the country is not facing and not expected to face in the short or medium term. I believe taking one position or the other is inappropriate. Legislators may switch from one position to the other if the public interest ultimately rests on one of them regardless of short or long terms need. Nevertheless, in this situation, since identity theft is an increasing practice worldwide, I believe rules regarding identity theft are necessary in the age of Internet and technology, thus, the CIL should include articles regulating identity theft prevention.

#### **4.3.4. Failure to Provide Investigative Consumer Reports-related Disclosures**

A person<sup>857</sup> is not allowed to procure or cause an investigative report to be procured unless he makes certain disclosures to the consumer beforehand.<sup>858</sup> The person must disclose in writing, no later than three days,<sup>859</sup> to the consumer that an investigative consumer report, including information as to his character, general reputation, personal characteristics, and

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<sup>854</sup> 15 U.S.C. § 1681c-1(h)(2)(B); 15 U.S.C. § 1681c-1(h)(1)(B)(i) (The FCRA exempts open-end credit from this requirement and does not require users to utilize procedures other than its usual procedures to check the identity of the consumer.).

<sup>855</sup> 15 U.S.C. § 1681c-1(h)(1)(B)(ii).

<sup>856</sup> *Baker v. Trans Union LLC*, CV 07-8032-PCT-JAT, 2009 WL 4042909 at \* 4 (D. Ariz. Nov. 19, 2009) (The court granted summary judgment for the defendant and held, that 1681c-1 “[b]y its terms does not regulate a CRA's placement of a fraud alert on a consumer's account without the consumer's permission”).

<sup>857</sup> Includes any person according to the definition of the FCRA, which covers wide variety of people and entities.

<sup>858</sup> 15 U.S.C. § 1681d.

<sup>859</sup> 15 U.S.C. § 1681d(a)(1)(A).

mode of living, whichever are applicable, may be made,<sup>860</sup> and that the consumer has the right to further disclosures.<sup>861</sup>

After procuring an investigative report according to the above procedure, a person must provide, upon a consumer's written request, a complete and accurate disclosure of the nature and scope of the investigation requested.<sup>862</sup> The disclosure must be in writing, no later than five days, from the date of the consumer request or from the date of the report request whichever is later.<sup>863</sup> The nature of the information should be information related to character, general reputation, personal characteristic, and mode of living. The scope of the report should be the type and number of people who are to be interviewed by the collector of the information such as friends, relatives, employers, etc.<sup>864</sup>

Thus, a person violates the FCRA if he or she procures or causes an investigative report to be procured without disclosing the preparation of the report to the consumer. The person does not have to receive the investigative report but a mere request, even if cancelled later, constitutes violation.<sup>865</sup> The person also violates the FCRA if he does not provide the required disclosures in a timely manner. Similarly, he violates the FCRA if he does not provide the disclosure in writing. The person violates the FCRA if he does not disclose the complete and accurate nature and scope of the investigation. Disclosing the information contained in the report, or disclosing the names of interviewees is not required.<sup>866</sup> The only requirement is to disclose the nature and the scope of the questions about the consumers.<sup>867</sup>

However, violation of these rules is not sufficient to establish liability. The person is immune from liability if he proves, by a preponderance of evidence, that he maintains a reasonable procedure to comply with these rules.<sup>868</sup> For example, if a person procured an investigative report but failed to provide the required disclosure within the required time because of labor strike, the trier of fact may find that the employer followed a reasonable procedure to comply with this section.

Employers or other users of investigative reports may require all employees to provide waivers of these rights in order to avoid the FCRA notice requirement. Upon hiring, an employer may request a waiver of the rights of notice in the case of an investigative report, to be used at a later time.<sup>869</sup> However, I agree with the FTC staff that this kind of waiver is invalid because it constitutes unfair practice. In addition, rights that are created by a federal statute cannot be waived unless the statute explicitly provides otherwise.<sup>870</sup>

#### A Comparative Assessment

Under the CIL, an investigative report does not exist. Therefore, no provisions cover the issues related to investigative reports. Information related to character, general reputation, personal characteristic, and mode of living is excluded from the scope of the CIL.<sup>871</sup>

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<sup>860</sup> 15 U.S.C. §1681d(a)(1).

<sup>861</sup> 15 U.S.C. §1681d(a)(1)(B).

<sup>862</sup> 15 U.S.C. §1681d(b).

<sup>863</sup> 15 U.S.C. §1681d(b).

<sup>864</sup> FTC Official Staff Commentary 16 C.F.R. § 606 (6).

<sup>865</sup> *EEOC v. Video Only Inc.*, CIV. 06-1362-KI, 2008 WL 2433841 at \* 9 (D. Or. June 11, 2008) (The court held, "The damage to the privacy right is first inflicted when a person starts gathering data for a consumer report, even if no oral or written report is ever delivered to the requester").

<sup>866</sup> 15 U.S.C. §1681g(a)(2) (It is not required to disclose the name of interviewees if the investigative report information is obtained solely for the purpose of an investigative report and used for that purpose.).

<sup>867</sup> 15 U.S.C. §1681g(a)(2).

<sup>868</sup> 15 U.S.C. §1681d(c).

<sup>869</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 552.

<sup>870</sup> Carson, FCT Staff Opinions (June 3, 1971).

<sup>871</sup> CIL Implementing Regulation, article 18.



### 4.3.5. Failure of Disclosure or Providing Consumer's Summary of Rights

The FCRA requires different persons to disclose or provide consumers a summary of their rights in different circumstances under the Act. Failure to disclose or provide a summary of rights may give rise to liability. FCRA regulations create two models of a summary of consumer's rights. One is regarding general summary rights and the other is regarding identity theft. Use or distribution of these models constitutes compliance with the FCRA requirements.<sup>872</sup>

#### 4.3.5.1. General Consumer's Rights Summary

General consumer's rights summary includes the following:

- Consumer has the right to know if information in his file has been used against him;
- Consumer has the right to know what is in his file;
- Consumer has the right to ask for a credit score;
- Consumer has the right to dispute incomplete or inaccurate information;
- CRAs must correct or delete inaccurate, incomplete, or unverifiable information;
- CRAs may not report outdated negative information;
- Access to consumer's file is limited;
- Consumer must give consent for reports to be provided to employers;
- Consumer may limit prescreened offers of credit and insurance;
- Consumer may seek damages from violators;
- Identity theft victims and active duty military personnel have additional rights;<sup>873</sup>
- Consumer may have additional rights under states laws;<sup>874</sup> and
- The method by which a consumer can contact, and obtain a consumer report.<sup>875</sup>

A summary of consumers' rights should be provided or disclosed in the following circumstances:

- Upon a consumer's request of file disclosure;<sup>876</sup>
- To users of a credit report for an employment purpose;<sup>877</sup>
- Before taking an adverse action in an employment context, the user must provide to the consumer a summary of consumer rights;<sup>878</sup>
- After taking an adverse action in an employment context, the user must provide to the consumer a summary of consumer rights within three business days of consumer request;<sup>879</sup>
- Before starting procurement, a person who procures or causes procurement of an investigative report must provide to the consumer a summary of rights;<sup>880</sup>

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<sup>872</sup> 16 C.F.R. § 698.2 (a).

<sup>873</sup> Full details of the model of summary of consumer's rights available at: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf>

<sup>874</sup> 15 U.S.C. §1681g(c)(2)(D).

<sup>875</sup> 15 U.S.C. §1681g(c)(1)(B)(v)-(vi).

<sup>876</sup> 15 U.S.C. §1681g(a).

<sup>877</sup> 15 U.S.C. §1681b(b)(1)(B).

<sup>878</sup> 15 U.S.C. §1681b(b)(2)(B)(i).

<sup>879</sup> 15 U.S.C. §1681b(b)(3)(B)(ii).

<sup>880</sup> 15 U.S.C. §1681d(b)(a)(1)(B).

- After an adverse action is taken against the consumer;<sup>881</sup>
- Once every twelve months;<sup>882</sup>
- Every twelve months, an additional report must be provided if the consumer is unemployed,<sup>883</sup> receives public welfare assistance,<sup>884</sup> or has reason to believe that his file contains inaccurate information due to fraud;<sup>885</sup>
- After notification of a debt collection agency affiliated with a CRA that a consumer's rating may be or has been adversely affected;<sup>886</sup>
- In the case of disclosure of a credit score;<sup>887</sup>

#### 4.3.5.2. Identity Theft Victims' Rights Summary

Similarly, FCRA regulations require that a summary of rights be provided to a victim of identity theft.

- A consumer has the right to ask a nationwide CRA to place fraud alerts in his file;
- A consumer has the right to free copies of the information in his file
- A consumer has the right to obtain documents relating to fraudulent transactions made or accounts opened using his personal information;
- A consumer has the right to obtain information from a debt collector;
- If a consumer believes information in his file results from identity theft, he has the right to ask that a CRA blocks that information from his file; and
- A consumer also may prevent businesses from reporting information about him to CRAs if he believes the information is a result of identity theft.<sup>888</sup>

This summary of rights should be supplied to the consumer when he contacts a CRA expressing the belief that he is a victim of identity theft.<sup>889</sup>

Accordingly, the FCRA is violated in the following circumstances:

- A CRA does not provide a summary of rights upon consumer's request of file disclosure;
- A CRA does not provide a summary of rights to a requesting user of a credit report for an employment purpose;
- A user of a credit report for an employment purpose does not provide to an applicant a summary of rights within three days before taking adverse action;
- A user of a credit report for an employment purpose does not provide to an applicant a summary of rights after adverse action is taken. The user violates the FCRA if he does not provide it within three business days of a consumer's request;
- A person does not provide to a consumer a summary of rights within three days before procuring an investigative report;

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<sup>881</sup> 15 U.S.C. §1681j(b).

<sup>882</sup> 15 U.S.C. §1681j(a)(1)(A).

<sup>883</sup> 15 U.S.C. §1681j(c)(1).

<sup>884</sup> 15 U.S.C. §1681j(c)(2).

<sup>885</sup> 15 U.S.C. §1681j(c)(3).

<sup>886</sup> 15 U.S.C. §1681j(b).

<sup>887</sup> 15 U.S.C. §1681g(f).

<sup>888</sup> Full details of the summary of the model of consumer's rights are *available at* <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/rights.html> as 03/20/2011.

<sup>889</sup> 15 U.S.C. §1681g(d)(2).

- A person does not provide to a consumer a summary of rights within three days after taking an adverse action;
- A CRA does not provide to a consumer a summary of rights within three days after notification of a debt collection agency affiliated with a CRA that a consumer's rating may be or has been adversely affected;
- A CRA does not provide a summary of rights with the annual disclosure within fifteen days;
- A CRA does not provide a summary of rights with the additional report once every twelve months if the consumer is unemployed, receives public welfare assistance, or has reason to believe the file at the agency contains inaccurate information due to fraud;
- A CRA does not provide a summary of rights with disclosure of a credit score;
- A CRA does not provide to a consumer a summary of rights, within three days, after an alert is placed.

#### A Comparative Assessment

Providing a summary of rights of consumers under the CIL is only required when a consumer disputes information. If the investigation shows the consumer's dispute is not correct, the CRA is required to provide a summary of consumer rights, along with the result of the investigation of inaccurate information, no more than five days from the conclusion of the investigation.<sup>890</sup> The wide range of circumstances in which a summary of rights is given under the FCRA shows the deficiency of the CIL.

My suggestion is even beyond the scope of the FCRA. I suggest requiring CRAs and users to provide a summary of rights to a consumer whenever a consumer contacts them for any cause. For the sake of efficiency, the form of delivery does not have to be always written, but can be written, verbal, or an electronic, depending on the seriousness of the issue. However, CRAs and users should be exempted from this requirement if the summary has been given to the consumer before in response to the same concern.<sup>891</sup>

#### **4.3.6. Furnishing False Information with Malice or Willful Intent**

The FCRA preempts state laws to the extent that those laws are inconsistent with the FCRA. Preemption affects laws relating to the responsibilities of persons who furnish information to CRAs.<sup>892</sup> On the other hand, the FCRA allows claims in "the nature of" defamation,<sup>893</sup> invasion of privacy,<sup>894</sup> or negligence<sup>895</sup> if malice or willfulness is proven.<sup>896</sup>

<sup>890</sup> CIL Implementing Regulation, article 49(2)(B).

<sup>891</sup> For instance, when a consumer contacts a CRA asking for reinvestigation of a dispute, a summary of rights should be given to the consumer. Nevertheless, when the consumer follows up with the CRA regarding the same dispute later, the CRA does not have to provide him again with this summary of rights.

<sup>892</sup> 15 U.S.C. § 1681t(b)(1)(F).

<sup>893</sup> BLACK'S LAW DICTIONARY, *supra* note 163 (Defamation is, "The act of harming the reputation of another by making a false statement to a third person.").

<sup>894</sup> BLACK'S LAW DICTIONARY, *supra* note 163 (Invasion of privacy is, "An unjustified exploitation of one's personality or intrusion into one's personal activities, actionable under tort law and sometimes under constitutional law").

<sup>895</sup> BLACK'S LAW DICTIONARY, *supra* note 163 (Negligence is, "The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregards of others' rights.").

<sup>896</sup> 15 U.S.C. § 1681h (e); McClure, *supra* note 408, at 273.

For those claims to be preempted, they must be based on information disclosed pursuant to the FCRA requirements.<sup>897</sup> This preemption provides qualified immunity for CRAs, users, and furnishers of information in exchange for disclosing information pursuant to the FCRA's provisions.<sup>898</sup> This qualified immunity is not applicable when false information is furnished with malice or willful intent.<sup>899</sup> Courts view these seemingly contradictory sections in the FCRA differently.

#### 4.3.6.1. Preemption

Preemption can occur in one of three ways. Explicit preemption occurs when Congress clearly states federal law preempts state law. Field preemption occurs when federal law is enacted in an area of law and leaves no room for state law. Conflict preemption occurs when federal and state laws are in conflict and cannot be reconciled.<sup>900</sup>

Before the 1996 amendment of the FCRA, the issue of preemption was clear in the eyes of courts.<sup>901</sup> The FCRA provided for preemption of state law that allowed claims for defamation, invasion of privacy, or negligence based on information disclosed pursuant to the provisions of the act.<sup>902</sup>

However, in the 1996 amendment, the FCRA added a new limitation on furnisher liability, which led to a split of the courts.<sup>903</sup> Section 1681t(b) provides, "No requirement or prohibition may be imposed under the laws of any State".<sup>904</sup> It further states the FCRA "does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State ... except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency".<sup>905</sup> Most important is the part that relates to furnisher liability in section 1681t(b)(1)(f).<sup>906</sup>

The courts follow one of three approaches in interpreting those sections and the relationship between them.

##### A- Temporal Approach

The "temporal approach"<sup>907</sup> applies the sections in different time periods to avoid the apparent conflict. Under this approach, section 1681t(b)(1)(f) applies to claims after consumers notify the CRA of the inaccuracy. Section 1681h(e) applies before serving the

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<sup>897</sup> 15 U.S.C. § 1681h (e).

<sup>898</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 405.

<sup>899</sup> 15 U.S.C. § 1681h (e).

<sup>900</sup> Jill A. Conrad, *Preemption Under The Fair Credit Reporting Act*, 25 Ann. Rev. Banking & Fin. L. 579, 587 (2006).

<sup>901</sup> Mark H. Tyson, *State Law Furnisher Liability Claims and The FCRA: The State of Confusion*, 63 Consumer Fin. L. Q. Rep. 19, 20 (2009).

<sup>902</sup> 15 U.S.C. §1681h(e) (Provides, "Limitation of liability: Except as provided in sections §§1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section §§ 1681g, 1681h, or 1681m of this title or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report, except as to false information furnished with malice or willful intent to injure such consumer.").

<sup>903</sup> Conrad, *supra* note 900, at 581.

<sup>904</sup> 15 U.S.C. §1681t(b).

<sup>905</sup> 15 U.S.C. §1681t(a).

<sup>906</sup> 15 U.S.C. §1681t(b)(1)(f) (Provides, "No requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under ... section 623 [§ 1681s-2], relating to the responsibilities of persons who furnish information to consumer reporting agencies...").

<sup>907</sup> Tyson, *supra* note 901, at 20.

notice.<sup>908</sup> Therefore, if a consumer wants to bring an action under state law after discovering the inaccuracy but before notifying the CRA, his claim is preempted by the FCRA unless he proves malice or willfulness. However, if he brings an action after notifying the CRA, section 1681t(b)(1)(f) applies and the court must consider the consistency of state law and the FCRA in order to decide to enforce the state law or preempt it.<sup>909</sup> One court stated the FCRA preempts state law claims when the furnishers knew or should have known of the inaccuracy of the information.<sup>910</sup> In other words, state law cannot regulate issues regarding furnisher duties after a receipt of notice of inaccuracy, but it can regulate regarding duties that precede its knowledge.<sup>911</sup>

Courts that follow this approach are split in regard to the notice element. Some courts held the notice of dispute to furnishers can be from anyone.<sup>912</sup> Other courts held the notice should be served to furnishers only through CRAs.<sup>913</sup>

One commentator criticized this approach, pointing out two flaws. First, section 1681h(e) applies only when the disclosed information is pursuant to section 1681g,<sup>914</sup> section 1681h, or section 1681m<sup>915</sup> of the FCRA. Therefore, if the disclosed information is not related to the those sections, section 1681h(e) does not apply and there is no conflict. Second, section 1681s(2)(b)<sup>916</sup> regulates the “duty of furnishers of information to provide accurate information”, and preempts state law. Even so, the “temporal approach” failed to provide the same preemption but limits the preemption of section 1681t(b)(1)(f) to section 1681s(2)(b) and not to section 1681(s)(2) as a whole.<sup>917</sup>

#### B- Total Preemption Approach

The “*total preemption approach*” found those sections irreconcilable. Thus, section 1681h(e) is completely preempted by section 1681t(b)(1)(f). Under this approach, all state law claims are preempted by the FCRA. Furthermore, under this approach, preemption applies only to furnishers of information but not to the CRA.<sup>918</sup> This approach concludes the enactment of section 1681t(b)(1)(f) implies revocation of section 1681h(e). Because they are conflicting, the latter revokes the earlier.<sup>919</sup> Courts assume the FCRA does not preempt state laws as section 1681t(a) provides, but section 1681t(b) provides exceptions to the assumption. The courts conclude that specific provisions override general provisions,

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<sup>908</sup> Tyson, *supra* note 901, at 20; Conrad, *supra* note 900, at 590.

<sup>909</sup> *Ryder v. Wash. Mut. Bank, FA*, 371 F. Supp. 2d 152, 154 (D. Conn., 2005) (The court held, state law claims based on actions of a furnisher of information after the furnisher has received notice of inaccuracies are held preempted by § 1681t(b)(1)(F), while actions taken before notice has been received may not be preempted.)

<sup>910</sup> Conrad, *supra* note 900, at 590.

<sup>911</sup> *Id.*

<sup>912</sup> *Ryder*, 371 F. Supp. 2d, at 154 (The court held, “It is important to note that the notice referred to here need not be from a credit reporting agency, as is required to sustain a private cause of action under § 1681s-2(b) of FCRA; notice may be received from the ... credit reporting agency or from the consumer himself.”).

<sup>913</sup> *Harrison v. Ford Motor Credit Co.* 2005 WL 15452 at \* 1 (D. Conn. Jan. 3, 2005) (The court held, “Under this approach, plaintiff’s state law claims are not preempted insofar as they are based on Navy’s conduct before it was notified of the existence of a dispute by a CRA.”).

<sup>914</sup> 15 U.S.C. §1681g (Provides, “Every consumer reporting agency shall, upon request, and subject to §1681h, clearly and accurately disclose to the consumer: (1) All information in the consumer’s file at the time of the request ...”).

<sup>915</sup> 15 U.S.C. §1681m.

<sup>916</sup> 15 U.S.C. §1681s (2)(b).

<sup>917</sup> Tyson, *supra* note 901, at 20.

<sup>918</sup> *Id.*; Conrad, *supra* note 900, at 589.

<sup>919</sup> Tyson, *supra* note 901, at 21.

therefore, section 1681t(b) impliedly revokes section 1681h(e).<sup>920</sup> One court held all state law claims are preempted by the FCRA because the Congress intended so.<sup>921</sup>

Another commentator finds this approach to be flawed. Different sections or statutes should be read to be both effective and valid. Accordingly, reading the FCRA's sections to imply revocation of one section by another section is disfavored. There is no legislative history to support such revocation, therefore, we should not go this far.<sup>922</sup> In addition, he finds the opposite of what they suggest when Congress left section 1681h(e) unamended while other sections were amended.<sup>923</sup>

Implied repeal can be found when a new statute or amendment covers the entire subject matter of the older statute or creates irreconcilable conflict. None of these exists. Section 1681t(b)(1)(f) and section 1681h(e) cover different subject matters. Section 1681h(e) covers the conditions and form of disclosure to consumers while section 1681t(b)(1)(f) covers the relation to state laws.<sup>924</sup> The sections are reconcilable. Section 1681h(e) can be read to preempt state laws that are not based on furnishing false information with malice or willfulness. Section 1681t(b)(1)(f) can be read to allow state laws to regulate consistent laws regarding gathering, distributing, or using consumer information. Both sections regulate state law claims but do not preempt all state law claims.<sup>925</sup>

### C- Statutory Approach

The third approach is called the “statutory approach”. Under this approach, the best solution for reconciliation between the sections is to apply each section to a different set of claims. Section 1681h(e) applies only to state common law claims, while section 1681t(b)(1)(f) applies to state statutory claims. Therefore, there is no preemption against state law claims but the furnisher may rely on section 1681h(e) to prove that his conduct is not willful or malicious to avoid liability.<sup>926</sup> To prove this approach, some courts looked into the effectiveness dates provided in the FCRA to conclude that it does not include common law claims, as common law does not have dates for their effectiveness.<sup>927</sup> Other courts saw the language of section 1681t(b)(1)(f) as dealing only with responsibilities of furnishers, which is too specific to preempt all state common law claims.<sup>928</sup>

A commentator criticized this approach based on the plain language of the FCRA. Under section 1681t(b)(1)(f), no requirement or prohibition may be imposed under state law. Thus, allowing imposition of any kind of liability under a state common law claim is considered to be against the plain language of section 1681t(b)(1)(f).<sup>929</sup> The author asserts the U.S. Supreme Court held the “requirement or prohibition” includes state statutes and common

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<sup>920</sup> Conrad, *supra* note 900, at 588.

<sup>921</sup> *Campbell v. Chase Manhattan Bank, USA, N.A.* 2005 WL 1514221 at \* 16 (D.N.J., 2005) (The court held, “Congress wanted to eliminate all state causes of action relating to the responsibilities of persons who furnish information to consumer reporting agencies.”); *Purcell v. Universal Bank, N.A.* 2003 WL 1962376 at \* 5 (E.D. Pa., 2003) (The court held, “We likewise find that any state law claims based upon reports to credit agencies are preempted in light of precedent as well as the plain language of § 1681t(b)(1)(F).”).

<sup>922</sup> Tyson, *supra* note 901, at 21.

<sup>923</sup> Conrad, *supra* note 900, at 602.

<sup>924</sup> *Id.*

<sup>925</sup> *Id.* at 603.

<sup>926</sup> Tyson, *supra* note 901, at 21; *DiPrinzio v. MBNA America Bank, N.A.* 2005 WL 2039175 at \* 6 (E.D. Pa., 2005) (The court held, “That Congress so deliberately specified the *type* of state law claims prohibited under this section suggests they did not want to prohibit *all* state law claims.” [Emphasis in original]).

<sup>927</sup> Conrad, *supra* note 900, at 593; *Jeffery v. Trans Union, LLC*, 273 F. Supp. 2d 725, 728 (E.D. Va., 2003).

<sup>928</sup> *Id.* at 594.

<sup>929</sup> Tyson, *supra* note 901, at 21.

law. Therefore, a distinction between statutes and common law concerning FCRA sections is not acceptable.<sup>930</sup>

Not all courts followed the three approaches described above. Some courts held the FCRA does not preempt all state claims but ignored the apparent conflict of those sections.<sup>931</sup> Other courts held the FCRA does not preempt any state claim based on either statute or common law as long as plaintiff alleges malice or willfulness.<sup>932</sup>

#### D- Chosen approach

After appraising those approaches, the author offered a solution to resolve the conflict. To determine the applicability of section 1681h(e), we must take the limitation on the scope of liability into consideration. This section applies only when the consumer obtained the information by users or a CRA, pursuant to sections 1681g, 1681h, or 1681m of the FCRA. If the information is obtained pursuant to these sections, the FCRA preempts state common law claims unless malice or willfulness involved.<sup>933</sup> However, if the consumer obtained the information through other means, this section does not apply.<sup>934</sup>

Pursuant to sections 1681g, 1681h, or 1681m of the FCRA, the duty of disclosure is imposed only upon users and CRAs. Consequently, disclosure of information by furnishers according to any section has no effect concerning preemption.<sup>935</sup>

Section 1681h(e) provides qualified immunity for furnishers of information for state common law claims, but does not preempt the claims. Qualified immunity is a *quid pro quo*<sup>936</sup> of requiring disclosure and can be overcome by proving malice or willfulness, as section 1681h(e) provides.<sup>937</sup> On the other hand, section 1681(s)(2) provides preemption for all state common law claims related to furnishers' obligations. Therefore, when a state law claim is preempted by the FCRA, qualified immunity is not present, thus there is no conflict.<sup>938</sup> Another commentator adds that section 1681h(e) can be read to preempt only those state law claims similar to those enumerated: invasion of privacy, defamation, and negligence.<sup>939</sup> Also, section 1681t(b)(1)(f) means that state laws cannot impose more duties on furnishers of information, but does not mean that state laws cannot regulate other issues.<sup>940</sup>

This is the preferred approach, because this reading of the FCRA:

- Applies both sections of the FCRA without rendering one of them meaningless;
- Limits the preemption to the necessary scope; and
- Achieves the goal of the FCRA in enforcing statutes and common law claims to protect consumers.

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<sup>930</sup> *Id.* at 22.

<sup>931</sup> Conrad, *supra* note 900, at 599.

<sup>932</sup> *Id.*

<sup>933</sup> *Id.* at 583.

<sup>934</sup> Tyson, *supra* note 901, at 22.

<sup>935</sup> *Id.*

<sup>936</sup> BLACK'S LAW DICTIONARY, *supra* note 163. (Defines it as "Latin: something for something. An action or thing that is exchanged for another action or thing of more or less equal value; a substitute <the discount was given as a quid pro quo for the extra business>").

<sup>937</sup> Tyson, *supra* note 901, at 22.

<sup>938</sup> *Id.*

<sup>939</sup> Conrad, *supra* note 900, at 604.

<sup>940</sup> *Id.* at 606.

#### 4.3.6.2. Standard of Malice

Although Section 1681h(e) provides that the qualified privilege is not available to those who furnish false information with “malice or willful intent,” the section does not define these states of mind. As a consequence, the term “malice” is not consistently interpreted. As one court has observed: “Courts are split on whether state or federal law governs the meaning of ‘malice’ in § 1681h(e),”<sup>941</sup> Courts that look to federal law rather than state law “have suggested the actual malice standard...as an appropriate definition.”<sup>942</sup>

In *New York Times Co. v. Sullivan*, the U.S. Supreme Court defined actual malice as publication of a statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>943</sup> Overcoming the qualified privilege in 1681h(e) by proving actual malice is difficult. Proving negligence would be comparatively simple.<sup>944</sup> Depending on whether a court is guided by state or federal law, a consumer may need to prove ill will, bad faith, or a conscious disregard for the truth or the rights of the others.<sup>945</sup> Courts in some cases have tried to lower the standard from malice to negligence. Their focus has been on the reasonableness of the conduct of the CRA and not the state of mind.<sup>946</sup> One court held the qualified privilege is overcome if the CRA fails to investigate whether information is false.<sup>947</sup> Another court shifted the burden to the CRA to show the CRA had reasonable grounds to believe in the truth of a false credit report in order to benefit from the qualified privilege.<sup>948</sup>

#### A- Examples of Acts Support Finding of Malice

Courts consider the following acts as support for finding of malice or the equivalent of malice:

- Reliance on a biased source of information with knowledge;<sup>949</sup>
- Publication of material without a reasonable basis for belief in its truth;<sup>950</sup>
- Refusal to retract a false report or to issue a corrected report,<sup>951</sup> or
- Not waiting for clarification when it is needed.<sup>952</sup>

#### B- Standard of Malice in Defamation

In general, a common law defamation claim is in the plaintiff’s favor. The falsity of the statement and the harm to the reputation are a rebuttable presumption.<sup>953</sup>

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<sup>941</sup> *Ross v. F.D.I.C.*, 625 F.3d 808, 815 (4<sup>th</sup> Cir. 2010).

<sup>942</sup> *Id.*

<sup>943</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

<sup>944</sup> Maurer, *supra* note 411, at 103.

<sup>945</sup> *Id.*

<sup>946</sup> *Id.* at 104.

<sup>947</sup> *Id.*

<sup>948</sup> *Id.*

<sup>949</sup> *Roemer v. Retail Credit Co.* 44 Cal. App. 3d 926, 937 (1975) (The court held, “Thus, defendant does not contest the fact that Mr. Kett, admittedly biased against Mr. Roemer, was the primary source of the information contained in the defamatory reports.”).

<sup>950</sup> *Bloomfield v. Retail Credit Co.* 14 Ill. App. 3d 158, 172 (1973) (The court held, “This is not the negligence standard which we agreed would not support a finding of malice, but, rather, one which suggests a reckless disregard for the truth or falsity of the published material.”).

<sup>951</sup> *Morgan v. Dun & Bradstreet Inc.*, 421 F.2d 1241, 1243. (5<sup>th</sup> Cir. 1970) (The court held, “Cumulatively, the refusal of the defendant to retract or to issue a corrected report on request is likewise evidence of malice.”).

<sup>952</sup> *Dun & Bradstreet Inc. v. Robinson*, 233 Ark. 168, 178 (1961) (“We hold there was substantial evidence to the effect that Mrs. Lawrence and Dun & Bradstreet acted with conscious indifference and reckless disregard of the rights of Robinson in publishing the report of March 3rd ...”).



a- New York Times Standard: Proof of Actual Malice is Required to Recover

Another issue that has affected the common law defamation claim is the freedom of speech.<sup>954</sup> The U.S. Supreme Court held in *New York Times v. Sullivan*<sup>955</sup> that First Amendment protects a publisher from strict liability for defaming public officials who were acting in their official capacities.<sup>956</sup> Publisher is liable only if the public official shows publication was done with actual malice.<sup>957</sup> In *Curtis Publishing Co. v. Butts*<sup>958</sup> the U.S. Supreme Court found that public figure status had been attained by a well-known collegiate athletic director<sup>959</sup> and a former military officer of “some political prominence”.<sup>960</sup> The U.S. Supreme Court said the athletic director “may have attained that status by position alone” and the military officer “by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements”.<sup>961</sup> Through its decision in *Curtis Publishing Co. v. Butts*, the U.S. Supreme Court broadened the class of plaintiffs who are subject to the standard of *New York Times*.<sup>962</sup>

b- Application of New York Times to Private Citizens: Negligence v. Knowing or Reckless Disregard:

Other courts extended the application of *New York Times* to cases where a private citizen has been defamed in discussion related to public concern.<sup>963</sup> In *Gertz v. Robert Welch, Inc.*,<sup>964</sup> the U.S. Supreme Court distinguished between public figures and private citizens. The court held that a private citizen may be compensated for a defamation if he proves only negligence, as non-public figures have no access to the media to rebut the defamatory statement.<sup>965</sup> However, a private plaintiff who successfully sues for defamation under the negligence standard cannot recover presumed or punitive damages unless he also proves actual malice—either in the form of knowingly or recklessly disregarding the truth.<sup>966</sup>

Therefore, if *Gertz* is the standard, the private plaintiff cannot recover punitive damages merely by showing common law malice. The plaintiff must meet the *New York Times* standard and show there is actual malice in order to obtain punitive damages.<sup>967</sup>

One commentator’s view is that the U.S. Supreme Court has not addressed the defamation by non-media defendants yet.<sup>968</sup> The author asserts that the Court almost held that CRAs are

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<sup>953</sup> Katz, *supra* note 407, at 789-90

<sup>954</sup> Maurer, *supra* note 399, at 105.

<sup>955</sup> *N.Y. Times Co.*, 376 U.S., 283.

<sup>956</sup> Maurer, *supra* note 399, at 105

<sup>957</sup> Katz, *supra* note 407, at 791.

<sup>958</sup> *Curtis Publ'g v. Butts*, 388 U.S. 130, 155 (1967).

<sup>959</sup> *Id.* at 135-136.

<sup>960</sup> *Id.* at 140.

<sup>961</sup> *Id.* at 155.

<sup>962</sup> Katz, *supra* note 407, at 791.

<sup>963</sup> Maurer, *supra* note 399, at 106.

<sup>964</sup> *Gertz v. Robert Welch Inc.* 418 U.S. 323, 348 (1974).

<sup>965</sup> Katz, *supra* note 407, at 795.

<sup>966</sup> Maurer, *supra* note 399, at 105; Katz, *supra* note 407, at 795.

<sup>967</sup> *Id.* at 107.

<sup>968</sup> The U.S. Supreme Court addressed the issue later in *Dun & Bradstreet Inc., v. Greenmoss Builders Inc.*, although the U.S. Supreme Court did not address it from non-media defendant perspective but as a matter of public concern.

not protected by the First Amendment. Most of the Court's reasoning is that CRA activities are pure commercial activities that are outside of First Amendment.<sup>969</sup>

c- Dun & Bradstreet Standard: Recovery of Presumed and Punitive Damage without Malice is concern Allowed if the Defamation is Not a Matter of Public Concern

The U.S. Supreme Court sharply changed its position of requiring proof of malice in order to recover presumed and punitive damages in *Dun & Bradstreet, Inc., v. Greenmoss Builders Inc.*,<sup>970</sup> The decision in this case allowed a private plaintiff to recover presumed and punitive damages in a defamation case although no actual malice was shown, because the defamatory statement was not a matter of public concern.<sup>971</sup> The U.S. Supreme Court focused on the content of the defamation rather than the plaintiff's or defendant's standing. If the defamation is a matter of public concern, First Amendment protection will be recognized, and proof of actual malice is required to overcome such protection. In this case, the U.S. Supreme Court justices split, writing four different opinions.<sup>972</sup> However, commercial speech may be granted First Amendment protection if it meets a four-part test.<sup>973</sup>

One commentator believes courts should not engage in assessing whether the issue is a matter of public matter concern, as this will add a burden on the already overloaded judicial system.<sup>974</sup> He notes court engagement on the issue of a public matter on an *ad hoc* basis would lead to uncertainty among CRAs as to what constitutes "a matter of public concern". This would have a chilling effect on the advancement of the industry.<sup>975</sup>

#### 4.3.6.3. Willfulness Standard

Defining willfulness is an important issue because some of the FCRA violations require willfulness to be established. In two recent U.S. Supreme Court decisions, *Safeco Insurance Co of America v. Burr*<sup>976</sup> and *Edo v. GEICO Casualty Co.*,<sup>977</sup> the U.S. Supreme Court provided more guidance to the meaning of "willfulness".<sup>978</sup> The U.S. Supreme Court decided in favor of consumers and agreed with their interpretation of the FCRA that conscious disregard of the law constitutes willfulness because of the way the term is used in other

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<sup>969</sup> *Id.* at 109.

<sup>970</sup> *Dun & Bradstreet Inc.*, 472 U.S., at 786.

<sup>971</sup> Katz, *supra* note 407, at 786.

<sup>972</sup> *Id.* at 796-97 (In the majority opinion, the U.S. Supreme Court found First Amendment protection in cases involving public matters such as *Gertz*. In addition, in *Dun & Bradstreet*, when the issue is purely a private matter, the defendant is not entitled to protection. A concurring opinion said the case concerned a private matter, thus it was different from *Gertz*, which dealt with public matters. Although the concurring opinion agreed with the majority decision, justices believed that *Gertz* should be overruled. In a separate concurring opinion, justices criticized the U.S. Supreme Court's involvement in a defamation case. They believed that this led to two problems: a false statement about a public figure is difficult to rebut given the high standard of showing actual malice, and this requirement of proving actual malice will lead to the destruction of the public figure's reputation. They agreed that *Gertz* should be overruled. Dissenters, after analyzing and criticizing the other opinions, believed that *Gertz* should apply in this case.).

<sup>973</sup> Maurer, *supra* note 399, at 110 (Four-part test: first, it must concern a lawful activity and not be misleading. Second, then it must be determined whether the governmental interest is substantial. If both are positive, third part then the court must determine whether the regulation directly advances the governmental interest. Finally, it must be determined whether it is not more extensive than is necessary to serve that interest.).

<sup>974</sup> Katz, *supra* note 407, at 805-06.

<sup>975</sup> *Id.* at 806.

<sup>976</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S.

<sup>977</sup> *Edo v. Geico Cas. Co.*, 426 F.3d 1020, 1040 (2005).

<sup>978</sup> McClure, *supra* note 408, at 278.

statutory contexts.<sup>979</sup> The U.S. Supreme Court rejected the insurance companies' argument that willfulness is different from recklessness and that construing willfulness to encompass recklessness places an excessive burden on providers and users of credit information. The U.S. Supreme Court defined recklessness as "a risk of violating the law substantially greater than the risk associated with a reading that was merely careless".<sup>980</sup>

One commentator asserts that because the U.S. Supreme lowered the standard and made it easier for consumers to allege a violation of the FCRA, this will lead to an increase of litigation. The decision in *Safeco Insurance Co of America v. Burr* is both helpful and harmful to the insurance companies. It is helpful in defining the standard of willfulness to include recklessness because the standard is objectively assessed.<sup>981</sup> The decision is also harmful because it is ambiguous.<sup>982</sup>

#### 4.3.6.4. Tort Claims

##### A. Defamation, Invasion of Privacy, and Negligence Claims

According to the chosen approach, liability for defamation, invasion of privacy, or negligence under section 1681h(e) is not preempted and can be established in any one of three ways.

###### a) When Tort Claims are not Based on the Required Disclosure of Sections 1681g, 1681h, or 1681m

Qualified immunity applies if the disclosure is required by the FCRA, such as disclosures pursuant to sections 1681g, 1681h, or 1681m. However, when a consumer obtained the information in a way other than the required disclosure, he may bring an action against any person if the information is false.<sup>983</sup> In one case, a court held that a negligence claim is not preempted, even if no malice or willfulness is proven.<sup>984</sup>

###### b) When Malice or Willfulness is Proven

Qualified immunity can be overcome by proof of malice or willfulness. A court held that a defamation claim is not preempted by section 1681h(e) if malice or willfulness is proven.<sup>985</sup> Another court held that defamation or invasion of privacy is not preempted if

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<sup>979</sup> *Id.* at 281.

<sup>980</sup> *Id.* at 288.

<sup>981</sup> *Id.* at 294.

<sup>982</sup> McClure, *supra* note 408, at 295; Travis S. Souza, *Safeco Insurance Co. Of America v. Burr: Defining Notification Requirements and Willfulness Under the Fair Credit Reporting Act*, 3 Duke J. Const. L. & Pol'y Sidebar 29, 34 (2007).

<sup>983</sup> *Whitesides v. Equifax Credit Information Services Inc.*, 125 F. Supp. 2d 807, 811 (W.D. La. 2000) (The court held that a consumer might bring an action in defamation against a bank who reported false information to CRA even without proof of willfulness or malice even the disclosure was pursuant to sections 1681g because section 1681g is related to CRA but not creditors. The court said, "... the acts of BOL, particularly the reporting of the Whitesides account to consumer reporting agencies, do not fall within the ambit of disclosures considered by 1681h(e). Therefore, the necessity of malice or willful intent is obviated. Accordingly, 1681h(e) does not preclude any of Whitesides's claims.").

<sup>984</sup> *Edmonds v. Beneficial Miss Inc.*, 2005 WL 2361913, at \* 2 (S.D. Miss. 2005) (The court held, "The purported negligence in that respect is clearly not preempted by the FCRA. Accordingly, summary judgment must be denied on Edmonds' negligence claim.").

<sup>985</sup> *Carlson v. Trans Union, LLC*, 259 F. Supp. 2d 517, 522 (N.D. Tex. 2003) (The court denied defendant's motion to dismiss the claim and held, "Under the requirements of § 1681h(e), plaintiff would be required to show actual malice or willful intent in this case.").

malice or willfulness is proven.<sup>986</sup> In addition, another court held that a negligence claim is not preempted if malice or willfulness is proven.<sup>987</sup>

c) When the Information is Reported to Non-CRAs

The qualified immunity under section 1681h(e) can be overcome if the person reports the information to a party other than a CRA. For instance, when a creditor reports inaccurate information about the consumer to another creditor, the furnisher is not entitled to the qualified immunity under section 1681h(e) because the immunity applies only when the furnishing is to a CRA.<sup>988</sup>

B. Other Tort Claims

Some courts limit the qualified immunity of section 1681h(e) to torts in the nature of defamation, invasion of privacy, or negligence. “In the nature of”, refers to a prohibition of any actions similar to these actions.<sup>989</sup> For example, slander is similar in its nature to defamation as both claims protect the reputation. Other tort claims are not preempted by this section such as:

- Intentional infliction of emotional distress;<sup>990</sup>
- Breach of contract; and<sup>991</sup>
- Breach of fiduciary duty.<sup>992</sup>

A Comparative Assessment

Under the CIL, furnishers of information are not allowed to report information they know to be inaccurate, or have a sufficient belief that it may contain inaccurate data.<sup>993</sup> Therefore, knowledge of inaccuracy of information or sufficient belief that the information may contain inaccurate data suffices. Thus, no proof of malice is required. In addition, knowledge of inaccuracy is equivalent to the willfulness requirement. Once the consumer proves that the furnisher knows about the inaccuracy, it is considered a willful violation of the CIL if he reports such information. Similarly, the furnisher has violated the CIL if the

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<sup>986</sup> *Dornhecker*, 99 F. Supp. 2d, at 931 (The court held, “Dornhecker and Sanchez may only bring the common law actions alleged here by sufficiently pleading that Ameritech furnished false information to a consumer reporting agency with malice or willful intent to injure them.”)

<sup>987</sup> *Thomas v. CitiMortgage Inc.*, 2004 WL 1630779, at \* 2 (N.D. Ill. 2004) (The court held, “Thus, common law claims will not be pre-empted by the FCRA if the plaintiff sufficiently pleads that the alleged false information was communicated with malice or willful intent to injure the plaintiff.”).

<sup>988</sup> *Poore*, 410 F. Supp. 2d, at 573-74 (The court held, “Here, Poore's defamation claim is based on information provided by a CRA to a prospective employer. It is not based on the disclosures to consumers required under section 1681g, 1681h and section 1681m. Nor is it based on information disclosed by a user of a consumer report. Accordingly, Poore's state law defamation claim is not prohibited under section 1681h(e).”).

<sup>989</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 409.

<sup>990</sup> *Whitesides*, 125 F. Supp. 2d, at 811 (The court held, “... the acts of BOL, particularly the reporting of the Whitesides account to consumer reporting agencies, do not fall within the ambit of disclosures considered by 1681h(e). Therefore, the necessity of malice or willful intent is obviated. Accordingly, 1681h(e) does not preclude any of Whitesides's claims.”).

<sup>991</sup> *Larobina v. First Union Nat. Bank*, 2004 WL 1664230, at \* 4 (Conn. Super. Ct. 2004) (The court held, “Moreover, the language of § 1681h(e) does not apply to preempt common-law claims alleging a breach of contract and is, consequently, inapplicable ...”).

<sup>992</sup> *Sloan v. Green Tree Servicing LLC*, 2005 WL 2428161, at \* 3 (S.D. W.Va. 2005) “The court held, “there is nothing in the FCRA or its legislative history to suggest that Congress intended these state law causes of action [fiduciary duty breach] to be removable ...”).

<sup>993</sup> CIL Implementing Regulation, article 39(2).

consumer proves the furnisher reported the information even though he had a sufficient belief that the information might contain inaccurate data. Proof of knowledge is an easy standard. When the consumer notifies the furnisher and provides proof of the inaccuracy of an item, the knowledge is established. Proving sufficient belief is also straightforward. When the consumer disputes an item, or provides insufficient proof of inaccuracy of information, the furnisher should review his record, and form sufficient belief of accuracy or inaccuracy. If the furnisher ignores such procedure and does not review the dispute, it would be treated as equivalent to forming sufficient belief of inaccuracy.

#### **4.3.7. Furnishers' Failure to Conduct Reasonable Investigation of Disputed Information**

Furnishers of information must be involved in the reinvestigation process with CRAs.<sup>994</sup> Consumers cannot bring an action against furnishers unless notice of the dispute is provided to the furnishers through the CRAs.<sup>995</sup> One commentator notes that an unreasonable procedure of reinvestigation conducted by CRAs through their e-OSCAR system results in ineffective reinvestigation by furnishers. Because not all documented relevant information that is provided by the consumers is forwarded to the furnishers,<sup>996</sup> furnishers are likely to review the information in their files, and respond with the same wrong information.<sup>997</sup> Subsequently, CRAs upon receipt of furnishers' confirmation, confirm the information in their files is accurate.<sup>998</sup> CRA's unreasonable procedure does not absolve furnishers from liability if the furnisher knows more information about the dispute from other sources such as the consumer himself, which requires the furnisher to conduct a thorough investigation.<sup>999</sup> Furnishers of information violate the FCRA if they fail to conduct a reasonable investigation.<sup>1000</sup> Unreasonable procedure includes the following:

- Failure to conduct an investigation at all;
- Checking the verification box in the special form provided by CRAs without reviewing the underlying dispute;<sup>1001</sup>
- Failure to review readily available information provided by the consumers or from previous complaints;<sup>1002</sup>
- Failure to report the result of investigation to all nationwide CRAs;<sup>1003</sup>
- Failure to go beyond the furnisher's own records when circumstances require;<sup>1004</sup>

<sup>994</sup> 15 U.S.C. §1681s-2(b)(1).

<sup>995</sup> *Chiang*, 595 F.3d, at 36 (The court held, "The statute, in our view, creates a private right of action in § 1681s-2(b).").

<sup>996</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 176.

<sup>997</sup> *Id.*

<sup>998</sup> *Id.*

<sup>999</sup> *Alabran v. Capital One Bank*, CIV.A. 3:04CV935, 2005 WL 3338663 at \* 7 (E.D. Va. Dec. 8, 2005) (The court held, "... Capital usurped any obligation to conduct a reasonable investigation upon receipt of the CRA notices because it had at least clarifying information available.").

<sup>1000</sup> The FCRA mentions "reinvestigation" with CRAs and "investigation" with furnishers of information. Courts, as discussed earlier, treat both terms the same in juries' instructions.

<sup>1001</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 258.

<sup>1002</sup> *Alabran*, 2005 WL 3338663 at \* 7.

<sup>1003</sup> *Evantash v. G.E. Capital Mortg. Services Inc.*, CIV.A. 02-CV-1188, 2003 WL 22844198 at \* 6-7 (E.D. Pa. Nov. 25, 2003) (The court held, "FCRA requires the furnisher to conduct an investigation regarding the dispute and to report its findings accordingly ... Accordingly, we conclude that Plaintiff has a private cause of action against G.E. Capital."); *Saunders v. Branch Banking And Trust Co. Of VA*, 526 F.3d 142, 150 (4th Cir. 2008) (The court held, "In sum, given the evidence before it, the jury could reasonably conclude that BB & T's decision to report the debt without *any* mention of a dispute was "misleading in such a way and to such an extent that it can be expected to have an adverse effect." [Emphasis in original]).

- Failure to allocate reasonable time or personnel to investigate the dispute;<sup>1005</sup>
- Mere review of computer data without reviewing the original documents;<sup>1006</sup>
- Failure to delete, modify, or block inaccurate information;<sup>1007</sup>
- Failure to conduct the investigation within the time limit;<sup>1008</sup>

### A Comparative Assessment

Under the CIL, furnishers must be involved in the reinvestigation process with the CRAs, too.<sup>1009</sup> Upon receipt of dispute notice from the consumer, the CRA has to notify the furnisher of the disputed information within five days<sup>1010</sup> of the following:

- The information is disputed by the consumer;
- Detailed information about the dispute; and
- All information and documents relevant to the disputed information.<sup>1011</sup>

Upon the furnisher's receipt of the notice, the furnisher has only ten days to respond to the disputed information.<sup>1012</sup> If the furnisher does not respond within the time limit, then there is a presumption that the consumer's dispute is correct.<sup>1013</sup> If the investigation results in favor of the consumer in whole or in part, or the information is unverifiable, the CRA has to

<sup>1004</sup> *Watson v. Citi Corp.*, 2:07-CV-0777, 2009 WL 161222 at \* 9 (S.D. Ohio Jan. 22, 2009) (The court held, "The fact that Citibank did not contact ARS, but merely relied on its own incomplete records, leads this Court to conclude that Citibank failed to comply with its duty to conduct a reasonable investigation after receiving the ACDV from Experian.").

<sup>1005</sup> *Fisher v. Wells Fargo Bank*, E043771, 2009 WL 2772887 at \* 7 (Cal. Ct. App. Sept. 2, 2009) (The court held that requiring employees to finish 85 disputes per day may be found unreasonable and "a jury could find based on the above quoted evidence [the number of disputes need to be finished daily] that defendant's failure to conduct the requisite careful investigation was willful in that each time plaintiffs complained that the inaccurate delinquent mortgage payment information continued to appear ...").

<sup>1006</sup> *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004) (The court held, "The MBNA agents also testified that, in investigating consumer disputes generally, they do not look beyond the information contained in the CIS [Customer Information System] and never consult underlying documents such as account applications. Based on this evidence, a jury could reasonably conclude that MBNA acted unreasonably in failing to verify the accuracy of the information contained in the CIS.").

<sup>1007</sup> *Shames-Yeakel v. Citizens Fin. Bank*, 677 F. Supp. 2d 994, 1006 (N.D. Ill. 2009) (The court held, "The genuine FCRA issue lies not in the reasonableness of Citizens' factual investigation but rather in the reasonableness of its ultimate decision to report Plaintiffs' credit account as delinquent without acknowledging the disputed nature of their debt.").

<sup>1008</sup> *Trikas v. Universal Card Servs. Corp.*, 351 F. Supp. 2d 37, 44 (E.D.N.Y. 2005) (The court held, "Although the Bank may have started its investigation of the CDV on August 24 or shortly thereafter, § 1681s-2(b)(2) is clear that "[a] person shall *complete* all investigations, reviews, and reports" by the end of the thirty day period (emphasis added). The Bank, therefore, did not comply with its duties as a furnisher of information under this section) [Emphasis in original]; 15 U.S.C. § 1681i(a)(1); 15 U.S.C. § 1681j(a)(3). The 30 days can be extended to 45 days if the CRA receives new information from the consumer during the reinvestigation period or if the dispute is a result of discovery of errors after obtaining the free annual credit report").

<sup>1009</sup> CIL Implementing Regulation, article 48(1).

<sup>1010</sup> The time limit in the CIL is confusing. The investigation needs to be conducted in no more than 30 days. This means the CRA is allowed not to reply until the end of 30 days. However, the CRA has to notify the furnisher within 5 days. Then the furnisher needs to reply within 10 days. The CRA has to take a decision in no more than 7 days after the expiration of the 10 days (22 days), and finally, the CRA has to delete or modify the inaccurate information within 2 days (24 days). Then the CRA has to notify the consumer of the result of the investigation within no more than 5 days of the decision. The compulsory time limit becomes 29 days and not 30 days as the CIL allows.

<sup>1011</sup> CIL Implementing Regulation, article 48(1).

<sup>1012</sup> CIL Implementing Regulation, article 48(1).

<sup>1013</sup> CIL Implementing Regulation, article 48(1).

delete or modify the disputed information within two days.<sup>1014</sup> Nevertheless, there is no duty upon the CRA to notify the furnisher of the disputed information of the modification or deletion of inaccurate information. This is a loophole in the CIL that needs to be closed. If the source of the disputed information is not notified of the modification or deletion of the disputed information, it is likely that the same inaccurate information is going to be reported to the CRA. Although furnishers of information have a duty not to report disputed or known inaccurate information, there is a possibility that furnishers report inaccurate information without knowledge of its inaccuracy and without receiving an inaccuracy notice from the consumer. The furnishers of disputed information are required to delete or modify inaccurate information.<sup>1015</sup> Nevertheless, the CIL does not state how the furnisher may know of the inaccurate information. Is it through a consumer's dispute? Is it through a CRA's notice? Is it through a review of its own record? A clear explanation should be added to clarify how the furnisher is supposed to know about inaccurate information as well as a time limit to delete or modify the information within.

A similar problem arises concerning the reasonableness of the procedure. SIMAH's system in Saudi Arabia is developed by Experian Credit Agency in the U.S.; therefore, SIMAH's practice is the same as American CRAs that assign codes describing the dispute without forwarding the actual documents provided by the consumer. This may result in a furnisher's inability to investigate efficiently the disputed information.

Unlike under the FCRA, consumers can bring actions against furnishers if a notice of dispute is provided, so long as the information is inaccurate.<sup>1016</sup> In addition, furnishers cannot provide disputed information to CRAs without notifying CRAs that the information is disputed.<sup>1017</sup> The CIL does not mention the reasonableness of procedure. However, when the issue is before a court, the court will consider reasonableness of procedure as an essential element.

Furnishers violate the CIL in the following situations:

- Failure to conduct an investigation at all;
- Failure to conduct the investigation within the time limit;
- Failure to maintain reasonable procedure to conduct the investigation;
- Verification of the information without reviewing the underlying dispute;
- Failure to report the result of the investigation to CRAs;
- Mere review of computer data without reviewing the original documents;
- Failure to delete or modify inaccurate information;
- Reporting inaccurate information after consumer's notice of dispute;
- Reporting inaccurate information with knowledge or reasonable belief of its inaccuracy; or
- Reporting disputed information without notifying CRAs of the dispute status.

#### **4.3.8. Failure to Provide Required Notices and Notifications Under the Act**

Under the FCRA and the CIL, CRAs, users, and furnishers of information must provide certain notices and notifications in particular circumstances. The main purpose, *inter alia*, of these notices and notifications is to restrict the flow of erroneous or inaccurate information,

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<sup>1014</sup> CIL Implementing Regulation, article 48(3).

<sup>1015</sup> CIL Implementing Regulation, article 39(11).

<sup>1016</sup> CIL Implementing Regulation, article 39(3).

<sup>1017</sup> CIL Implementing Regulation, article 39(10).

which deprives consumers of their chances of obtaining credit, insurance, or employment.<sup>1018</sup> Some notices or notifications prescribed by the FCRA and the CIL are addressed under other violations in this chapter because of their special importance;<sup>1019</sup> therefore, I will not analyze those violations in this section. The FCRA differentiates between notices and notifications. I will address them as they mentioned in the FCRA.

#### **4.3.8.1. First: Notices**

##### **A. Notice of Discrepancy of Address**

Under the FCRA, CRAs must provide to users of credit reports a notice of a discrepancy in the address of the consumer in the credit report request.<sup>1020</sup> For instance, a consumer applies for credit and provides an address to the user. Then the user requests a credit report on the consumer from a CRA. When the CRA notices the new address is substantially different from the addresses in its record, the CRA must provide the user with a notice of the discrepancy of address as a sign of possible identity theft. This notice requirement is triggered only when the CRA provides a credit report to the user.<sup>1021</sup> No timeframe is provided under the FCRA to provide the notice. However, a commentator suggests the notice should be given with the credit report in order for the notice to function.<sup>1022</sup>

A CRA violates the FCRA if it fails to provide notice to a user in a discrepancy of address. It violates the FCRA, too, if the notice is provided within an unreasonable time. I believe that in order to combat the identity theft, a CRA should be required to provide the notice of discrepancy of address to the user regardless of whether the CRA provides a credit report.

##### A Comparative Assessment

Under the CIL, no such rule is prescribed. I think discrepancy in an address is a clear sign of the possibility of identity theft; therefore, a notice requirement should be added to the CIL.

##### **B. Notice of Reinsertion of Deleted Information**

Reinsertion of deleted information is an abusive practice of CRAs and one of the most frustrating acts to consumers.<sup>1023</sup> Under the FCRA, a CRA must provide a consumer with notice indicating deleted information was reinserted into the consumer's file.<sup>1024</sup> This notice should be provided to the consumer no later than five days from the reinsertion date, in writing or through any mean authorized by the consumer.<sup>1025</sup> Another notice should be provided, no later than five days from the reinsertion day, in writing, independently or with the previous notice, containing the following:

- A statement that the disputed information has been reinserted;<sup>1026</sup>
- The business name, telephone number, and address of any furnisher of information contacted, if reasonably available, or of any furnisher of information that contacted the CRA, in connection with the reinsertion of such information; and<sup>1027</sup>

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<sup>1018</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 321.

<sup>1019</sup> Such as summary rights notice, identity theft summary rights notice, credit score notice, and the like.

<sup>1020</sup> 15 U.S.C. § 1681c(h)(1).

<sup>1021</sup> 15 U.S.C. § 1681c(h)(1).

<sup>1022</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 369.

<sup>1023</sup> *Id.* at 353.

<sup>1024</sup> 15 U.S.C. § 1681i(a)(5)(B)(ii).

<sup>1025</sup> 15 U.S.C. § 1681i(a)(5)(B)(ii).

<sup>1026</sup> 15 U.S.C. § 1681i(a)(5)(B)(iii)(I).



- Notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.<sup>1028</sup>

Thus, a CRA violates the FCRA if it does not provide to consumers the required notice, provides incomplete notice, provides a late notice, does not provide notice in writing, or uses means not authorized by the consumer.

#### A Comparative Assessment

Under the CIL, the requirement is stricter. Once the information is deleted from the consumer's file, a CRA cannot reinsert the information without a resolution of the Credit Reporting Dispute Resolution Committee.<sup>1029</sup> However, even after obtaining the resolution from the committee, there is no notice requirement.

### **C. Notice of Dispute to Furnishers**

Any consumer may dispute the completeness or accuracy of information in his file with a CRA. Upon a request of reinvestigation, the CRA must provide prompt notice to the furnisher of the disputed information before the expiration of five business days beginning from the day of the consumer's request of reinvestigation.<sup>1030</sup> This notice must include all relevant information regarding the dispute.<sup>1031</sup> Along with the notice, a CRA may be obligated to provide any documents the consumer provided, if they are relevant to the dispute, such as proof of payment.<sup>1032</sup>

A CRA violates the FCRA if it does not provide notice to the furnishers the information that is disputed by the consumer. The CRA violates the FCRA if it provides late notice. It violates the FCRA if it does not include all relevant information<sup>1033</sup> the consumer provided.

#### A Comparative Assessment

Under the CIL, the CRA is required to notify the furnisher of disputed information within five business days of the dispute.<sup>1034</sup> The CRA must provide to the furnisher all relevant information and documents provided by the consumer.<sup>1035</sup>

The CRA violates the CIL if it fails to notify the furnisher of disputed information about the dispute. It violates the CIL if it provides late notice, or if it provides the notice without the supporting information or documents.

### **D. Notice of Frivolous or Irrelevant Information**

A frivolous or irrelevant dispute gives the CRA the right to terminate reinvestigation of disputed information.<sup>1036</sup> The FCRA does not define frivolous or irrelevant.

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<sup>1027</sup> 15 U.S.C. § 1681i(a)(5)(B)(iii)(II).

<sup>1028</sup> 15 U.S.C. § 1681i(a)(5)(B)(iii)(III).

<sup>1029</sup> CIL Implementing Regulation, article 52.

<sup>1030</sup> 15 U.S.C. § 1681i(a)(2)(A).

<sup>1031</sup> 15 U.S.C. § 1681i(a)(2)(B).

<sup>1032</sup> *Dixon-Rollins*, 2010 WL 3749454 at \* 4 (The court held, "based upon this undisputed evidence, a reasonable jury could have concluded that the material submitted by the plaintiff was relevant to the status of her debt, and ... [the CRA] negligently and willfully failed to forward it to the furnisher of information for verification.").

<sup>1033</sup> See p 144 for further information about the investigation of the dispute procedure compliance.

<sup>1034</sup> CIL Implementing Regulation, article 49.

<sup>1035</sup> CIL Implementing Regulation, article 49.

<sup>1036</sup> 15 U.S.C. § 1681i(a)(3)(A).

a- Frivolousness

The regulations provide examples of what constitutes a frivolous dispute. For instance, disputing all information in the file without specifying items, or disputing the same information the CRA already has reinvestigated without providing additional information is considered frivolous or irrelevant.<sup>1037</sup> Failure by a consumer to provide sufficient information to investigate the disputed information is considered evidence of a frivolous dispute.<sup>1038</sup> The FTC also provides that repetition of the same dispute, raising the dispute for the purpose of harassment, filling a dispute in bad faith, or beyond credulity is evidence of a frivolous dispute.<sup>1039</sup>

b- Relevancy

The FTC decided the disputed information must be adverse information to be relevant. If the disputed information is not adverse, then a CRA may conclude that the disputed information is irrelevant.<sup>1040</sup> For example, a wrong address or phone number is not considered adverse information. The determination of frivolousness or irrelevancy must be reasonable.

However, the “frivolous or irrelevant exception should also be construed sufficiently narrowly that doubts are resolved in favor of reinvestigation.”<sup>1041</sup>

A CRA must provide to a consumer notice upon determining the dispute is frivolous or irrelevant.<sup>1042</sup> This notice must be provided by mail, or any other way available to the agency and authorized by the consumer, no later than five business days after making the determination.<sup>1043</sup> The notice must contain the reason for reaching that determination and an identification of any information required to investigate the disputed information.<sup>1044</sup>

There is no clear answer whether another notice, “notice of result of investigation”, is required along with the notice of frivolous or irrelevant information. If one considers the determination as a “result of investigation”, then another notice is required.<sup>1045</sup> If the notice of frivolousness or irrelevance is not considered a result of the investigation, then no other notice is required.

A Comparative Assessment

No provision exists under the CIL regarding frivolous or irrelevant disputes. Therefore, any dispute regardless of its apparent frivolousness or irrelevance must be investigated without limitations.

I believe the FCRA’s approach in providing this tool is better than the CIL’s approach. The dispute process may be abused either by the consumers or by CRAs. Under the CIL’s approach, consumers may abuse the tool by disputing their information whenever they want without limitations. However, no cure is available to treat this issue such as penalizing this

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<sup>1037</sup> FTC Official Staff Commentary 16 C.F.R. § 611(11).

<sup>1038</sup> 15 U.S.C. § 1681i(a)(3)(A).

<sup>1039</sup> *In the Matter of Equifax Inc.*, 96 F.T.C. 844 at \* 159.

<sup>1040</sup> *Id.* (“A dispute over information which might reasonably be expected to harm a consumer simply cannot be ‘irrelevant’”).

<sup>1041</sup> *Id.* at \* 160.

<sup>1042</sup> 15 U.S.C. § 1681i(a)(3)(B).

<sup>1043</sup> 15 U.S.C. § 1681i(a)(3)(B).

<sup>1044</sup> 15 U.S.C. § 1681i(a)(3)(C)(i) and (ii).

<sup>1045</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 352 (The author tends to treat frivolous or irrelevant notice as a result of investigation and requires another notice.).

practice or giving the CRA the right to refuse to conduct an investigation. Under the FCRA's approach, the CRAs may abuse the tool by determining frivolousness or irrelevance of the dispute. However, this determination must be reasonable and can be cured by litigation if the CRAs abuse it. Moreover, investigation consumes time and effort. Thus, if no limit is provided, valuable time may be wasted.

#### **E. Notice of Results of Reinvestigation**

Under the FCRA, a CRA must provide a consumer with notice of the result of reinvestigation of the disputed information no later than five days after completion.<sup>1046</sup> This notice can be delivered by mail or any way authorized by the consumer<sup>1047</sup> and should contain the following:

- The result of reinvestigation;<sup>1048</sup>
- A statement that the reinvestigation is complete;<sup>1049</sup>
- A copy of the credit report after the revision;<sup>1050</sup>
- A description of the procedure used to determine accuracy and notice that assurance of the completeness of the information can be requested by consumer.<sup>1051</sup> If the consumer requests a description, it must be provided no later than fifteen days;<sup>1052</sup>
- A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information;<sup>1053</sup> and
- A notice that the consumer has the right to request that the CRA furnish updated credit reports to whoever received the report containing the erroneous information within a specific period.<sup>1054</sup>

If the notice of the dispute comes to the CRA through a reseller,<sup>1055</sup> the CRA has to provide the result of the reinvestigation to the reseller,<sup>1056</sup> who in turn must provide the notice to the consumer.<sup>1057</sup>

A CRA violates the FCRA if it does not provide to a consumer notice as prescribed. Similarly, the CRA violates the FCRA if it does not provide it within the required period. The same is true when the CRA provides incomplete notice, missing some of the required elements.

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<sup>1046</sup> 15 U.S.C. § 1681i(a)(6)(A).

<sup>1047</sup> 15 U.S.C. § 1681i(a)(6)(A).

<sup>1048</sup> 15 U.S.C. § 1681i(a)(6)(A).

<sup>1049</sup> 15 U.S.C. § 1681i(a)(6)(B)(i).

<sup>1050</sup> 15 U.S.C. § 1681i(a)(6)(B)(ii) (Although the FCRA is clear in providing this right, one court held that a CRA is required only to provide the corrected portion of the credit report but not the whole credit report; *Nunnally v. Equifax Info. Servs.*, 451 F.3d 768, 776 (11th Cir. 2006) (The court stated, "Congress has determined that a "consumer report based on the file as that file is revised," ... satisfies the purposes of the Act.").

<sup>1051</sup> 15 U.S.C. § 1681i(a)(6)(B)(iii).

<sup>1052</sup> 15 U.S.C. § 1681i(a)(7).

<sup>1053</sup> 15 U.S.C. § 1681i(a)(6)(B)(iv).

<sup>1054</sup> 15 U.S.C. § 1681i(a)(6)(B)(v); 15 U.S.C. § 1681i(d); *Jianqing Wu*, 2006 WL 4729755 at \* 10 (Although the CRA did not provide some of the required notices, the court held, "From the record currently before this Court, it appears that Equifax did not make the required disclosures. For civil liability to attach under the FCRA, however, Plaintiff must offer additional proof. To succeed in an action for negligent failure to comply with the FCRA, a consumer must make a showing of actual damages.").

<sup>1055</sup> 15 U.S.C. § 1681i(f)(2).

<sup>1056</sup> 15 U.S.C. § 1681i(f)(3)(A).

<sup>1057</sup> 15 U.S.C. § 1681i(f)(3)(B).

### A Comparative Assessment

Under the CIL, a CRA is required to provide to the consumer two separate notices containing the following:

- The first notice is the result, within no more than five days after the completion of the investigation. A copy of the credit report must be provided if the investigation is in the consumer's favor. A summary of the consumer's rights must be provided if the dispute turns out to be incorrect.<sup>1058</sup>
- The second notice is about the procedures used to investigate the dispute within no more than fifteen days from the request of the consumer.<sup>1059</sup>

The CRA is required, upon the consumer's request, to notify, in addition to all CRAs, any entity that obtained the credit report, within time limit, with the deleted or revised items in the credit report.<sup>1060</sup>

The FCRA and the CIL have the same requirements concerning this notice except that the consumer's right to add a statement is not required to be added to this notice, although this right is reserved under other articles of the CIL.<sup>1061</sup>

### **F. Notice of an Adverse Action Either Information is from CRAs or Third Parties**

An adverse action notice plays an important role in the credit reporting cycle. This notice gives the consumer an opportunity to improve his credit history, gives warning to correct the errors in his credit report, and makes the consumer aware of all of his credit information. In addition, this notice saves the consumer time in finding the source of information by requiring disclosure of the CRA's name and address.<sup>1062</sup> Under the FCRA, a user of a credit report must provide to a consumer a specific notice if an adverse action is taken against the consumer. The user of credit report who takes the adverse action may be one person or may be different persons or entities. However, courts held that all persons or entities who shared in making the decision must give notice.<sup>1063</sup> Similarly, both the consumer and cosigner should receive the adverse action notice.<sup>1064</sup> Therefore, failure to provide notice of an adverse action leads to liability of the user.

#### a- Definition of Adverse Action

Adverse action is defined by the FCRA, and by referring to the ECOA. The adverse action includes the following categories:

##### 1- Credit

- Denial or cancellation of credit;
- Change in the terms of an existing credit arrangement; or

<sup>1058</sup> CIL Implementing Regulation, article 49(2).

<sup>1059</sup> CIL Implementing Regulation, article 49(1).

<sup>1060</sup> CIL Implementing Regulation, article 50 and 51.

<sup>1061</sup> CIL Implementing Regulation, article 50.

<sup>1062</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 326.

<sup>1063</sup> *Reynolds*, 435 F.3d, at 1094-95 (The court stated, "we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and *identify the party or parties taking the action.*") [Emphasize added].

<sup>1064</sup> Spritz, FTC Informal Staff Opinion Letter (Nov. 5, 1998) Available at <http://www.ftc.gov/os/statutes/fcra/spritz.shtm> .

- Refusal to grant credit for the amount or on the terms requested.<sup>1065</sup>

2- Insurance

- Denial or cancellation of coverage;
- An increase in any charge;
- Reduction of coverage; or
- Other adverse or unfavorable changes in the terms of coverage or amount.<sup>1066</sup>

3- Employment

- Denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.<sup>1067</sup>

4- License and Benefits

- Denial or cancellation of license or benefit;
- An increase in any charge; or
- Any other adverse or unfavorable change in the terms of any license or benefit.<sup>1068</sup>

5- Catch-all Adverse Action Provision

- This is in connection with any transaction initiated by the consumer or review of the account that affects the consumer adversely.<sup>1069</sup> This provision covers a wide variety of transactions that have adverse effects on consumers, such as denial of a lease, check refusal, etc., so long so the denial is because of credit reports.<sup>1070</sup>

b- Definition of “Denial”

Denial does not have to be a complete denial. Denial occurs in any of the following circumstances:

- Where less credit is provided;<sup>1071</sup>
- Where an increase in the amount of credit is denied;<sup>1072</sup>
- Change of terms;<sup>1073</sup>
- New conditions are imposed such as requiring a down payment, shorter maturity, cosigner, guarantor, or additional collateral.<sup>1074</sup>

<sup>1065</sup> 15 U.S.C. § 1691(d)(6); 15 U.S.C. § 1681a(k)(1)(A).

<sup>1066</sup> 15 U.S.C. § 1681a(k)(1)(B)(i).

<sup>1067</sup> 15 U.S.C. § 1681a(k)(1)(B)(ii).

<sup>1068</sup> 15 U.S.C. § 1681a(k)(1)(B)(iii).

<sup>1069</sup> 15 U.S.C. § 1681a(k)(1)(B)(iv).

<sup>1070</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 338.

<sup>1071</sup> *Id.* at 332.

<sup>1072</sup> FTC Official Staff Commentary 16 C.F.R. § 615 (9).

<sup>1073</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 332.

<sup>1074</sup> *Id.*; *Rodriguez v. Lynch Ford Inc.*, 03 C 7727, 2004 WL 2958772 at \* 7 (N.D. Ill. Nov. 18, 2004) (The court stated, “In this case, Lynch Ford told Lopez that Lynch Ford had been unable to finance her purchase of the Jetta and that, if she wished to keep the car, she would have to provide a co-signer. Under the definition of “adverse action” set forth in § 1681, Lynch Ford’s obligations to notify Lopez under § 1681m were triggered when it denied credit to Lopez.”).

If a user counteroffers the consumer's offer and the consumer refuses to accept the offer, there is no doubt an adverse action has taken place, according to the definition. However, some courts held that a counteroffer less favorable to consumer that is accepted by the consumer is not an instance of an adverse action; thus, no notice is required.<sup>1075</sup> The courts argument is not a persuasive one even though the FCRA regulations support such a finding.<sup>1076</sup> When less credit is provided, an adverse action against the consumer is taken, according to the FCRA definition, regardless of the acceptance of the counteroffer. Therefore, an adverse action notice is required. The addition of the FCRA regulation should interpret the FCRA, but does not have the right to add provisions that contradict the original rules. Moreover, the plain language of the FCRA adds a catch-all section, which covers every situation not mentioned by reason of being adverse to the interest of the consumer.<sup>1077</sup>

c- Definition of "increase" and "baseline rate"

"Increase in charge" as part of the definition of an adverse action was disputed among litigants. On the one hand, insurance companies define "increase" narrowly and exclude increases in initial rates for new policies from being an adverse action. Thus, no notice should be served to the consumer. On the other hand, consumers argue the initial rate is an increase in comparison to the market in general, therefore, it constitutes an adverse action, which a consumer needs to be notified about.<sup>1078</sup>

Another issue related to the increase concerns which baseline rate one may rely upon to determine if initial rates for new policies are increasing or not. Insurance companies argue the baseline should be the rate given had the insurance company not looked at the consumer credit report. Contrariwise, consumers believe the baseline should be the rate given had the insurance company looked at the best possible score of the consumer's credit report.<sup>1079</sup> The final issue in regard to "increase" is whether the same baseline will apply in the case of quoting the same rate for all renewing consumers, or it is an adverse action requiring notice.<sup>1080</sup>

In two recent U.S. Supreme Court decisions, *Safeco Insurance Co of America v. Burr*<sup>1081</sup> and *Edo v. GEICO Casualty Co.*,<sup>1082</sup> the Court provided more guidance as to the meaning of adverse action in regard to "increase" and "baseline rate."

The U.S. Supreme Court held the "increase" that constitutes adverse action notice can be found in an initial rate, thus, an increase does not require prior dealing.<sup>1083</sup> The baseline for the increase is determined by applying the "neutral rate test",<sup>1084</sup> which means the rate given had the insurance company not looked at the consumer credit report.<sup>1085</sup> The court, too, held that insurance companies do not need to serve adverse action notice to existing consumers as

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<sup>1075</sup> *Lopez v. Platinum Home Mortg. Corp.*, 1:05-CV-408, 2006 WL 2269154 at \* 4 (W.D. Mich. Aug. 8, 2006) (The court held, "... accepted counteroffer is not an instance of "adverse action" requiring FCRA notification.").

<sup>1076</sup> 12 C.F.R. § 202.2(c)(1)(i) (Provides, "unless the creditor makes a counteroffer and the applicant uses or expressly accepts the credit offered." Thus, an acceptance of counteroffer extinguishes the right of consumer to receive an adverse action notice).

<sup>1077</sup> 15 U.S.C. § 1681a(k)(1)(B)(iv).

<sup>1078</sup> McClure, *supra* note 408, at 278-79.

<sup>1079</sup> *Id.*

<sup>1080</sup> *Id.*

<sup>1081</sup> *Safeco Ins. Co. of Am*, 551 U.S.

<sup>1082</sup> *Edo*, 512 F.3d.

<sup>1083</sup> Souza, *supra* note 982, at 32.

<sup>1084</sup> *Id.* at 33.

<sup>1085</sup> McClure, *supra* note 408, at 286.

long as the price is not higher than the previous one as prior dealing replaces the “neutral rate test.”<sup>1086</sup>

One commentator asserts this holding favors insurance companies, as they will be required to send fewer adverse action notices.<sup>1087</sup> Moreover, he states the “median consumer credit score” should apply instead of the neutral rate. The court’s holding allows insurance companies to decide the neutral rate themselves, which will be less than the median consumer score, and then increase it, so consumers will usually rate less than the neutral rate in order to avoid serving notices.<sup>1088</sup> I believe the U.S. Supreme Court’s holding is correct. However, the baseline should not be left to users themselves to decide, but the fair market value of similar service to similar consumers should govern.

d- Use of Credit Report in “Whole or in Part”

Insurance companies argue in order to make a decision, a credit report must be taken into consideration as an important factor before taking an adverse action. Consumers argue simply consulting a credit report or putting it in the rate-setting process is sufficient.<sup>1089</sup> The Supreme Court held consideration of a credit report is a necessary condition for the increased rate.<sup>1090</sup> Therefore, mere consultation of a credit report does not give rise to the adverse action notice requirement.<sup>1091</sup>

I believe that the U.S. Supreme Court holding in this matter is not convincing. I agree “mere consultation of a credit report” is not enough to require an adverse action notice. Nevertheless, holding “mere consultation is not enough” places the burden upon consumers to prove that the user does not “merely consult” the report but actually relied in whole or in part on the credit report. Such a burden of proof is almost impossible. The presumption should be that the user relies on the credit report in whole or in part, unless the user proves that he does not. This presumption is based on the fact that a user’s request of a credit report is not without purpose, but is only consultation. If the user does not need the credit report at all to rely on it in whole or in part, he does not have to wait until he obtains it and makes the adverse action later on. This fact supports the presumption that a credit report is relied upon more than mere consultation as credit report plays an important role in the action, either adverse or not.

One commentator states insurance companies will circumvent such a requirement by adopting a multi-factor test of which a credit report will be one. For instance, if an insurance company raises the rate of a consumer because of his poor driving history, the company is not required to serve notice, as driving history is not relevant to creditworthiness.<sup>1092</sup>

One can see clearly the scope of an adverse action is a broad one. A consumer need not be denied credit altogether in order for notice to be served. A change in the terms of credit or decreasing the credit limit is considered adverse action. Notice of adverse action can be oral, written, or electronic. Adverse action is required in three circumstances.

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<sup>1086</sup> *Id.* at 287.

<sup>1087</sup> *Id.* at 290.

<sup>1088</sup> *Id.* at 291.

<sup>1089</sup> *Id.* at 280.

<sup>1090</sup> Souza, *supra* note 982, at 32.

<sup>1091</sup> McClure, *supra* note 408, at 288.

<sup>1092</sup> *Id.* at 292-93.

e- Adverse Action in Employment Context

If the adverse action is based in whole or in part on credit information that is procured from a CRA, then a user of the credit report who takes an adverse action against the applicant must provide a notice containing the following:

- That adverse action has been taken based in whole or in part on a consumer report received from a CRA;<sup>1093</sup>
- The name, address and telephone number of the CRA that furnished the consumer report including a toll-free telephone number of a nationwide CRA;<sup>1094</sup>
- The CRA did not make the decision to take the adverse action and is unable to provide to the consumer specific reasons why the adverse action was taken;<sup>1095</sup>
- The consumer may, upon providing proper identification, request a free copy of a report and may dispute the accuracy or completeness of any information in a report; and<sup>1096</sup>
- Credit score that played part in the decision.<sup>1097</sup>

f- Adverse Action in Non-Employment Context

If the adverse action is based in whole or in part on credit information that is procured from a CRA, then a user of credit report who takes an adverse action against the applicant must provide notice containing the following:

- The name, address and telephone number of the CRA that furnished the consumer report including a toll-free telephone number of a nationwide CRA;<sup>1098</sup>
- A statement the CRA did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken;<sup>1099</sup>
- The consumer's rights to dispute the accuracy or completeness of the report; and
- Credit score that played part in the decision.<sup>1100</sup>

g- Adverse Action Based on Information from Affiliates

If the adverse action is based in whole or in part on credit information procured from an affiliate, then the user must notify the consumer of the action, and disclose the nature of the information upon which the action is based, no later than thirty days after receipt of the request.<sup>1101</sup>

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<sup>1093</sup> 15 U.S.C. § 1681b(b)(3)(B)(i)(I).

<sup>1094</sup> 15 U.S.C. § 1681b(b)(3)(B)(i)(II).

<sup>1095</sup> 15 U.S.C. § 1681b(b)(3)(B)(i)(III).

<sup>1096</sup> 15 U.S.C. § 1681b(b)(3)(B)(i)(IV).

<sup>1097</sup> 15 U.S.C. § 1681m(a)(2)(A).

<sup>1098</sup> 15 U.S.C. § 1681m(a)(3)(A); *Morrissey v. TRW Credit Data*, 434 F. Supp. 1107, 1108 (E.D.N.Y. 1977) (Courts differ in requiring disclosure of intermediaries CRAs if the credit report comes from a reseller. A court held that the user complied by disclosing only the ultimate CRA that the credit report came from originally without disclosing the intermediaries CRAs. The court held, "Exxon's action fulfilled the purposes of the Act, for plaintiff was immediately able to learn from TRW the basis of the allegedly false credit information. While plaintiff is understandably frustrated with Exxon's inability to list the intermediate reporting agencies, he cannot hold Exxon liable on that account.").

<sup>1099</sup> 15 U.S.C. § 1681m(a)(3)(B).

<sup>1100</sup> Pub. L. No. 111-203 § 1100F (July 21, 2010).

<sup>1101</sup> 15 U.S.C. § 1681m(b)(2)(A)(i)-(ii).



However, the user who does not comply with this notice requirement may be released from liability if he shows, by a preponderance of the evidence, that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the adverse action notice provisions.<sup>1102</sup>

#### h- Adverse Action Based on Information from Third Parties

If the adverse action is based in whole or in part on credit information obtained from a third party, the user must provide an adverse action notice, if the transaction is related to credit.<sup>1103</sup> The user must provide notice within a reasonable time which is not specified under the FCRA.<sup>1104</sup>

#### i- Existence of Private Right of Action

Existence of a private right of action because of non-compliance with an adverse action notice before FACTA of 2003 was not an issue.<sup>1105</sup> However, after the FACTA amendment, a new section was added to be read as “Sections 616 and 617 shall not apply to any failure by any person to comply with this section”.<sup>1106</sup> This addition causes confusion among courts.

#### 1- No liability under 1681m Approach

The first approach argues “this section” refers to “section 1681m” as a whole, which includes, *inter alia*, adverse action notice. Therefore, no civil action can be brought under section 1681m.<sup>1107</sup>

#### 2- No Liability Only under 1681m(h) Approach

The other approach argues “this section” refers only to section 1681m(h), which does not deal with adverse action.<sup>1108</sup> Commentators who favor this approach support it by stating the uncodified version<sup>1109</sup> of 1681m(h) reads as “nothing in this section ... shall be construed

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<sup>1102</sup> 15 U.S.C. § 1681m(c).

<sup>1103</sup> 15 U.S.C. § 1681m(b).

<sup>1104</sup> 15 U.S.C. § 1681m(b).

<sup>1105</sup> *Austin v. J.C. Penney Co. Inc.*, 162 F. Supp. 2d 495, 497 (E.D. Va. 2001) (The court stated, “A private right of enforcement exists for willful or negligent violations of 15 U.S.C. § 1681m(a).”).

<sup>1106</sup> 15 U.S.C. § 1681m(h)(8)(A).

<sup>1107</sup> *Perry v. First Nat. Bank*, 459 F.3d 816, 820 (7th Cir. 2006) (The court stated, “We cannot accept Perry's interpretation. Instead, we find that the phrase “this section” unambiguously refers to section 1681m as a whole.”).

<sup>1108</sup> *Barnette v. Brook Rd. Inc.*, 429 F. Supp. 2d 741, 748-749 (E.D. Va. 2006) (The court held, “construing § 1681m(h)(8) to eliminate a private right of action for § 1681m renders superfluous a different provision of the very same FACTA amendment, § 312(e), codified at 15 U.S.C. § 1681s-2(c)(3). Section 1681s-2(c) states that, “sections 1681n and 1681o of this title do not apply to any violation of ... subsection (e) of section 1681m of this title.” 15 U.S.C. § 1681s-2(c)(3). If § 1681m(h)(8) eliminated the private right of action for all of § 1681m, including subsection (e), then § 1681s-2(c)(3) merely reiterates § 1681m(h)(8) as to a particular subsection, rendering it superfluous ... the Court must conclude that the use of “section” instead of “subsection” in § 1681m(h)(8) was a drafting error. However, the standard to correct a scrivener's error is high: a court must be convinced that the existing statutory language was enacted by mistake and contravenes the law's true object and design.”).

<sup>1109</sup> *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am. Inc.*, 508 U.S. 439, 448 (1993) (The U.S. Supreme Court ruled that an uncodified version should have the force of law. “Though the appearance of a provision in the current edition of the United States Code is “prima facie” evidence that the provision has the force of law ... it is the Statutes at Large that provides the “legal evidence of laws, ... and despite its omission from the Code section 92 remains on the books if the Statutes at Large so dictates.”).

to affect any liability under section 616 or 617 of the FCRA that existed on the day before the date of enactment of this Act.”<sup>1110</sup> This section clearly provides the private rights, including adverse action notice liability, under the FCRA before the amendments, are not affected by the amendments. In addition, these amendments, before they were added to the FCRA, were enacted independently as public laws. So it is logical to understand “this section” means only the new added section, not 1681m as a whole.

I believe that the second approach, which upholds a private right of action, is stronger than the other approach for the reasons they stated. Thus, a user violates the FCRA if he does not provide notice after taking an adverse action against a consumer based in whole or in part on the credit report. For instance, if the user decreases the credit limit because of credit information, then the user must provide notice to the consumer of that adverse action.

#### A Comparative Assessment

The CIL implementing regulation defines adverse action including, but not limited to following:

- Refusal of extending credit;
- Closing the consumer’s account;
- Adverse change in the account’s terms;
- Refusal to increase credit limit; or
- Refusal to renew the credit limit.<sup>1111</sup>

If a user relies on the credit report in whole or in part in making the decision, then the CIL requires the user, within seven days from the day of decision, to provide the consumer with the following:

- The nature of adverse action taken;
- Reasons for the adverse action taken; and
- The name, phone number, and address of the CRA that supplied the credit report.<sup>1112</sup>

The CIL recognizes neither an adverse action in employment context, nor obtaining credit information from third parties or affiliates; therefore, as long the action is classified as an adverse action, the notice requirement applies. A user of credit report violates the CIL if he does not provide the consumer with an adverse action notice, or if he provides him with the notice but not within the required time period.

I prefer the CIL approach with the broad “adverse action” definition, and by requiring users to provide notice of adverse action in any case without complicating the Act by branching out the cases in which adverse action notice is required.

#### **G. Notice to Consumer of Furnishing Negative Information**

The FCRA requires only financial institutions to provide notice to a consumer either before or after furnishing the negative information to a CRA.<sup>1113</sup> However, the negative

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<sup>1110</sup> Pub. L. No. 108-159, Title III, § 312(f), 117 Stat 1993 (Dec. 4, 2003).

<sup>1111</sup> CIL Implementing Regulation, article 1.

<sup>1112</sup> CIL Implementing Regulation, article 45.

<sup>1113</sup> 15 U.S.C. § 1681s-2(a)(7) (Provides, “If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 603(p) furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.”)

information does not need to be reported even if notice is sent.<sup>1114</sup> This notice is required just for the first time furnishing of information.<sup>1115</sup> This notice must be within thirty days of furnishing the negative information.<sup>1116</sup> Moreover, this notice may be included on or with any notice of default, any billing statement, or any other materials provided to the customer and must be clear and conspicuous.<sup>1117</sup> No private right exists under this requirement, therefore, a consumer cannot bring an action against a furnisher because of the failure to provide notice upon furnishing negative information.<sup>1118</sup>

### A Comparative Assessment

Under the CIL, a furnisher must provide notice to the consumer within thirty days of recording negative information, and before furnishing the negative information to the CRAs.<sup>1119</sup> Requiring the furnisher to provide the same notice again after the actual furnishing of the negative information is not clear. The CIL Implementing Regulation provides a model of the notice before and after furnishing the information, however, the plain language seems to require notice only before the furnishing of information.

The CIL seems more pro-consumer than the FCRA in providing consumers with a private right of action under this section. However, I believe the issue is not a matter of pro-consumer or pro-furnishers. I believe the FCRA strikes a balance between the interest of the industry at large in the flow of information without fear of liability, and the interest of consumers. The interest of consumers may not be affected by failure to provide such notice if the negative information is eventually going to appear in the credit report anyway. On the other hand, furnishers may withhold negative information of consumers fearing the liability, and such withholding may affect the industry. I believe the resolution of this issue should be based on comprehensive surveys and studies not mere speculations.

### **H. Notice of Prescreening**

A user of a prescreening list has to provide to consumers notice concerning the use of their credit report and the choice to opt-out of the list in a clear and conspicuous manner.<sup>1120</sup> The notice must contain the followings:

- Information contained in the consumer's report was used in connection with the transaction;<sup>1121</sup>

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<sup>1114</sup> 15 U.S.C. § 1681s-2(a)(7)(E); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 351. A commentator believe that permitting providing the notice without obligating the furnisher to furnish the negative information is an unusual mean of providing notice. She believes that notice to be inaccurate.

<sup>1115</sup> 15 U.S.C. § 1681s-2(a)(7)(B)(ii). (Provides “After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 603(p) with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.”)

<sup>1116</sup> 15 U.S.C. § 1681s-2(a)(7)(B)(i).

<sup>1117</sup> 15 U.S.C. § 1681s-2(a)(7)(C)(i)-(ii).

<sup>1118</sup> 15 U.S.C. § 1681s-2(c)(1) (Provides, “sections 616 and 617 do not apply to any violation of subsection (a) of this section, including any regulations issued thereunder”).

<sup>1119</sup> CIL Implementing Regulation, article 40.

<sup>1120</sup> 15 U.S.C. § 1681m(d) (Provides, “Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section § 1681b, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement ...”).

<sup>1121</sup> 15 U.S.C. § 1681m(d)(1)(A).

- The consumer received the offer of credit or insurance because the consumer satisfied the criteria for creditworthiness or insurability under which the consumer was selected for the offer;<sup>1122</sup>
- If applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on creditworthiness or insurability or does not furnish any required collateral;<sup>1123</sup>
- The consumer has a right to prohibit information contained in the consumer's file with any CRA from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and<sup>1124</sup>
- The consumer may exercise the right of opt-out by notifying the notification system of CRAs.<sup>1125</sup>

Clarity and conspicuousness are not defined in the FCRA, thus they are a matter of law that is left to the court to determine. For instance, a court held a statement containing the foregoing information in the back of the solicitation was clear and conspicuous because it was the only text on the back.<sup>1126</sup> In contrast, another court held a notice in a small size font that cannot be read with naked eyes and is mixed with other statements that were not clear and conspicuous.<sup>1127</sup> The FCRA regulations provide guidance as to what constitutes clear and conspicuous.<sup>1128</sup>

The enforcement of a private right has the same issues that all provisions of section 1681m have. Therefore, the possibility of recovery depends on the court's interpretation of 1681m(h)(8)(A).<sup>1129</sup>

However, choosing the interpretation of 1681m(h)(8)(A) that limiting liability refers only to the section 1681m(h), means that failure to provide notice of prescreening or failure to provide it in a clear and conspicuous manner gives rise to liability.

After the consumer receives notice, the consumer may choose to opt-out of the prescreening list. The consumer may choose to opt-out even without receiving such notice. If

<sup>1122</sup> 15 U.S.C. § 1681m(d)(1)(B).

<sup>1123</sup> 15 U.S.C. § 1681m(d)(1)(C).

<sup>1124</sup> 15 U.S.C. § 1681m(d)(1)(D).

<sup>1125</sup> 15 U.S.C. § 1681m(d)(1)(E).

<sup>1126</sup> *Schwartz v. Goal Fin. LLC*, 485 F. Supp. 2d 170, 179 (E.D.N.Y. 2007) (The court held, "The text of the disclosure statement, while smaller than that used on the front-side of the solicitation, is not disproportionately small compared to the surrounding text because it is the only text found on that page. Moreover, the text on the front-side, which signals to the reader that the disclosure statement is on the reverse side, is set-off in one of the three boxes on the page, uses the same size font as that found on the rest of the page, and capitalizes the words "prescreen" and "opt-out notice.").

<sup>1127</sup> *Cole v. U.S. Capital*, 389 F.3d 719, 731 (7th Cir. 2004) (The court held, "The notice does nothing to draw the reader's attention to this material to the contrary, the flyer appears to be designed to ensure minimal attention by the reader. Consequently, we must conclude that the district court erred in holding that the defendants' disclosures were clear and conspicuous as a matter of law; indeed, the opposite appears to be the case.").

<sup>1128</sup> 16 C.F.R. § 642.2(a). The notice should use: plain language, clear and concise, short sentence, definite concrete everyday words, avoidance of multiple negatives, avoidance of legal and business terms, avoidance of explanations that are subject to different interpretations, and avoidance of misleading language. 16 C.F.R. § 642.3(a)(2)(i) In addition, the regulations specify the font size to be larger than the other statement but no smaller than 12 points. 16 C.F.R. § 642.3(b)(2)(ii) The type style must be distinct from other styles such as bolding, coloring, underlining, or italicizing. 16 C.F.R. § 642.3(b)(2)(iii) The notice must be located to be the first thing seen by the consumer such as the cover letter. 16 C.F.R. § 642.3(b)(2)(v) The notice must be set apart from other text. 16 C.F.R. § 642.3(b)(2)(iii) The notice must start with heading "PRESCREEN & OPT-OUT NOTICE".

<sup>1129</sup> See pp. 147-153 for the adverse action notice.

the consumer chooses to opt-out, the CRA must provide to the consumer written notice to complete the opt-out process. This notice should be provided no later than five business days after receipt of the notification.<sup>1130</sup> A CRA violates the FCRA if it does not provide the notice at all, or if it provides late notice.

#### A Comparative Assessment

Under the CIL, the prescreening list is not recognized. In addition, no credit report can be procured without the consumer's consent. If the consumer consents, there is no need to provide the consumer with a notice to opt-out. Nevertheless, I believe that prescreening practice is mostly in the interest of consumers. Consumers sometimes underestimate their creditworthiness, therefore, when they are included in a prescreening list, they become aware that they have the potential to obtain credit. A prescreening purpose should be added to the CIL along with a notice requirement.

### **I. Notice of Affiliate Sharing for Marketing**

An affiliate that received information about consumer from a user cannot use the information for marketing and solicitation purposes unless the user<sup>1131</sup> who supplies the information provides notice to the consumer. The FCRA excludes groups of users from this notice requirement as follows:

- Using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship;<sup>1132</sup>
- Using information to facilitate communications to an individual for whose benefit the person provides employee benefits or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;<sup>1133</sup>
- Using information to perform services on behalf of another person related by common ownership or affiliated by corporate control;<sup>1134</sup>
- Using information in response to a communication initiated by the consumer;<sup>1135</sup>
- Using information in response to solicitations authorized or requested by the consumer;<sup>1136</sup> or
- If compliance with this section by that person would prevent compliance by that person with any provision of State insurance laws pertaining to unfair discrimination in any State in which the person is lawfully doing business.<sup>1137</sup>

The notice<sup>1138</sup> must be clear and conspicuous, disclosing to the consumer the information may be communicated among such persons for purposes of making such

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<sup>1130</sup> 15 U.S.C. § 1681b(e)(3)(B).

<sup>1131</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 360. A commentator names it "donor affiliate".

<sup>1132</sup> 15 U.S.C. § 1681s-3(a)(4)(A). Preexisting relationship is defined to include: financial contract, purchase, rental, or lease during the 18 months period preceding the date of solicitation. It covers too any inquiry or application made by the consumer regarding product or service during the 3 months period preceding the date of solicitation. 15 U.S.C. § 1681s-3(d)(1).

<sup>1133</sup> 15 U.S.C. § 1681s-3(a)(4)(B).

<sup>1134</sup> 15 U.S.C. § 1681s-3(a)(4)(D).

<sup>1135</sup> 15 U.S.C. § 1681s-3(a)(4)(E).

<sup>1136</sup> 15 U.S.C. § 1681s-3(a)(4)(F).

<sup>1137</sup> 15 U.S.C. § 1681s-3(a)(4).

<sup>1138</sup> The notice must disclose the following: the name of affiliate, affiliates eligible to receive information, type of information may be used, a statement that the consumer may choose to opt-out, and a statement disclosing that the opt-out period is five years subject to renewal. 16 C.F.R. § 680.23(a)(1)(i)-(v).

solicitations to the consumer.<sup>1139</sup> An opportunity and a simple method to prohibit the solicitations are provided to the consumer.<sup>1140</sup> Opting-out is valid for five years only<sup>1141</sup> and upon the expiration of the period, the affiliate cannot use the information for marketing purpose unless it sends the same notice again.<sup>1142</sup> Delivery of the notice can be through any reasonable means because the FCRA does not specify any particular means.

An affiliate violates the FCRA when it uses information that is provided by another affiliate without providing to the consumer the required notice. The affiliate violates the FCRA when the notice is provided to the consumer in an unreasonable manner. For instance, publishing the notice in a newspaper or posting it in the affiliate website is unreasonable.<sup>1143</sup> Moreover, the affiliate violates the FCRA if the notice is provided, but the method to opt-out is unreasonable. For example, requiring the consumer to write his own letter requesting opt-out or requiring him to call to obtain a form to opt-out is unreasonable.<sup>1144</sup>

#### A Comparative Assessment

Under the CIL, affiliate sharing is not recognized at all. I believe affiliate provisions in general should be added to the CIL. Specifically, affiliate sharing for marketing purposes should be governed by the CIL, as a flourishing practice.

#### **J. Notice of Governmental Agencies' Request**

Obtaining a credit report for child support purposes by certain governmental agencies is a permissible one.<sup>1145</sup> Nevertheless, the official agency must provide to the consumer, by certified or registered mail, notice at least ten days prior to the request of the credit report from a CRA.<sup>1146</sup>

An official agency violates the FCRA if it does not provide a consumer with the required notice or when it provides the notice within a period shorter than the required time.

#### A Comparative Assessment

Under the CIL, any governmental agency, including child support agencies, is not entitled to request a credit report on a consumer unless the governmental agency is a user of the information, which must be through a contract with a CRA.<sup>1147</sup> Thus, a governmental agency violates the CIL if it requests a credit report about a consumer without being a user as the CIL defines. If the governmental agency is a user, no credit report can be obtained without the consumer's approval.<sup>1148</sup>

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<sup>1139</sup> 15 U.S.C. § 1681s-3(a)(1)(A).

<sup>1140</sup> 15 U.S.C. § 1681s-3(a)(1)(B).

<sup>1141</sup> 15 U.S.C. § 1681s-3(a)(3)(A).

<sup>1142</sup> 15 U.S.C. § 1681s-3(a)(3)(B).

<sup>1143</sup> 16 C.F.R. § 680.26(c)(1) and (3).

<sup>1144</sup> 16 C.F.R. § 680.25(b)(2)(i) and (ii).

<sup>1145</sup> 15 U.S.C. § 1681b(a)(4).

<sup>1146</sup> 15 U.S.C. § 1681b(a)(4)(C).

<sup>1147</sup> CIL Implementing Regulation, article 27 and 28.

<sup>1148</sup> CIL Implementing Regulation, article 28.

## **Second: Notifications**

### **A- Notification of Consumer Dispute in Subsequent Consumer Reports**

When a consumer files a statement of dispute, the CRA has to note clearly in any subsequent consumer report that the consumer is disputing the information, and provide either the consumer's statement or an accurate description of the dispute.<sup>1149</sup>

This notification is not required if the CRA believes reasonably the dispute is frivolous or irrelevant.<sup>1150</sup> One commentator believes the drafting of this section and related sections is confusing. A CRA is not required to reinvestigate the dispute if it has reasonable grounds to believe the dispute is frivolous or irrelevant.<sup>1151</sup> Yet, a CRA still has to add the consumer's statement to the file disputing the accuracy or completeness of the information. This suggests that reinvestigation is a prerequisite of adding the statement. That said, in fact there will be no frivolous or irrelevant dispute, because the statement of the dispute will be added to the file after the CRA conducts the reinvestigation.<sup>1152</sup>

A CRA violates the FCRA if it does not include the fact that consumer disputes the information in all subsequent reports.

### A Comparative Assessment

The CIL has the same notification requirement. If the CRA does not resolve the dispute, upon the consumer's request, the CRA has to notify all credit report users in all subsequent reports the information is disputed.<sup>1153</sup> Moreover, the CRA has to notify all previous users of credit reports within the preceding year if the disputed information was part of the provided report.<sup>1154</sup>

The CRA violates the CIL if it does not notify all credit report users in all subsequent reports the information is disputed. The CRA violates the FCRA if it does not notify all previous users of credit reports within the preceding year if the disputed information was part of the provided report.

### **B- Notification of Deletion or Modification of Disputed Information**

Under the FCRA, if the CRA's reinvestigation results in unverifiable or inaccurate information, the CRA must delete such information.<sup>1155</sup> In addition, the CRA must notify the furnishers the information has been deleted or modified.<sup>1156</sup> Moreover, upon a consumer's request, the CRA has to notify any user of about the deletion or the modification.<sup>1157</sup> No timeframe or manner of providing the notification is given under the FCRA. Therefore, reasonableness governs the time and the manner of delivering the notification to the furnishers of information.<sup>1158</sup>

A CRA violates the FCRA if it provides no notification of deleted or modified information to the furnishers of information. A CRA violates the FCRA if does not notify

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<sup>1149</sup> 15 U.S.C. § 1681i(c).

<sup>1150</sup> 15 U.S.C. § 1681i(c).

<sup>1151</sup> 15 U.S.C. § 1681i(3).

<sup>1152</sup> Ullmant, *supra*, note 340, at 65.

<sup>1153</sup> CIL Implementing Regulation, article 50.

<sup>1154</sup> CIL Implementing Regulation, article 50.

<sup>1155</sup> 15 U.S.C. § 1681i(a)(5)(A)(i).

<sup>1156</sup> 15 U.S.C. § 1681i(a)(5)(A)(ii).

<sup>1157</sup> 15 U.S.C. § 1681i(d).

<sup>1158</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 369.

designated users of the deleted or modified information. Similarly, the CRA violates the FCRA if it does not provide the required notifications in a reasonable time or manner.

#### A Comparative Assessment

Under the CIL, the CRA is required to provide notification of deleted or modified information to any entity the consumer chooses, provided the entity has received the consumer's credit report in the preceding year. The CRA is required to provide the same notification to all other CRAs that have agreements to exchange information.<sup>1159</sup> Similar to the FCRA no time or manner of delivery of the notification is provided. Therefore, reasonableness governs the time and the manner of delivering the notification.

A CRA violates the CIL if it does not provide notification of deleted or modified information at all. The CRA violates the CIL if it delivers the notification in an unreasonable time or manner.

The CIL requirements of the notification are the same as the FCRA. Nevertheless, requiring the CRA to provide notification to other CRAs is better in saving the correction time of the information with other CRAs. Requiring the notification to be provided to the furnishers of information under the FCRA solves the problem. By notifying the source of the disputed information, that the information is no longer available and needs to be verified, solves the problem at the root. Adding to the CIL this feature of the FCRA of requiring notification to furnishers, and adding the feature of the CIL to the FCRA of requiring the notification to be provided to other CRAs is recommended.

#### **C- Notification of Public Record Information Provided to Users**

A CRA must notify a consumer when the CRA provides, likely adverse, public record information regarding the consumer to a user for employment purposes along with the name and address of the user.<sup>1160</sup> Adverse information includes arrests, indictments, convictions, suits, tax liens, and outstanding judgments.<sup>1161</sup> The time limit within which the notification is to be provided is not clear. One may conclude from the language used "at the time such public record information is reported" that it must be provided simultaneously with the credit report.<sup>1162</sup> It is worth mentioning a CRA may comply with this requirement or alternatively maintain a strict procedure to ensure public record information is complete and up to date.<sup>1163</sup>

A CRA violates the FCRA if it does not notify the consumer of public record information, which is likely to have an adverse effect, being reported to a user for employment purposes, and does not maintain a strict procedure to ensure public record information is complete and up to date.

#### A Comparative Assessment

Under the CIL, whether employment purposes are permissible is not clear. Moreover, no provision in the CIL treats the issue of reporting adverse public record information for employment purposes. Thus, if one considers employment purposes permissible, no violation can be established if a CRA fails to provide notification to the consumer. If

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<sup>1159</sup> CIL Implementing Regulation, article 51.

<sup>1160</sup> 15 U.S.C. § 1681k(a)(1).

<sup>1161</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 358.

<sup>1162</sup> *Id.*

<sup>1163</sup> 15 U.S.C. § 1681k(a)(2).



employment purposes are impermissible, the CRA violates the CIL by supplying credit information for no permissible purpose.

#### **D- Notification of Identity Theft-related Information**

If a CRA blocks information that is allegedly a result of identity theft, the CRA has to notify the furnisher of this information.<sup>1164</sup>

- That the information may be a result of identity theft;
- That an identity theft report has been filed;
- That a block has been requested; and
- The effective dates of the block.<sup>1165</sup>

No timeframe or manner is provided in the FCRA except this notification should be done promptly.

The CRA violates the FCRA if it does not provide notification to the furnisher of the disputed information. It also violates the FCRA if it provides late notification.

#### A Comparative Assessment

Under the CIL, there is no rule governing notification to furnishers for information believed to be a result of identity theft. Therefore, a CRA is not required to notify furnishers. However, under the general negligence theory, a CRA may be held liable if it knows or had reason to know the information is a result of identity theft and continues to report the information without notifying the furnisher of the status of such information.

#### **E- Notification of Block Information's Decline or Rescind**

When a CRA exercises its discretion by declining to block information that is allegedly a result of identity theft, or when a CRA blocks the information and chooses to rescind the block, a CRA must notify the consumer that the block is declined or rescinded.<sup>1166</sup> The FCRA refers to the manner and time of this notice for the reinsertion of deleted information notice. Therefore, under the FCRA, a CRA must provide a consumer with notice indicating the blocked information is declined or rescinded.<sup>1167</sup> This notice should be provided to the consumer no later than five days from the decision, in writing or using any mean authorized by the consumer.<sup>1168</sup> Another notice should be provided, no later than five days from the decline or rescinding day in writing, independently or with the previous notice, containing the following:

- A statement the block is declined or rescinded;<sup>1169</sup>
- The business name, telephone number, and address of any furnisher of information contacted, if reasonably available, or of any furnisher of information that contacted the CRA, in connection with the block of such information; and<sup>1170</sup>
- A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.<sup>1171</sup>

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<sup>1164</sup> 15 U.S.C. § 1681c-2(c)(2).

<sup>1165</sup> 15 U.S.C. § 1681c-2(b).

<sup>1166</sup> 15 U.S.C. § 1681k(a)(1).

<sup>1167</sup> 15 U.S.C. § 1681i(a)(5)(B)(ii).

<sup>1168</sup> 15 U.S.C. § 1681i(a)(5)(B)(ii).

<sup>1169</sup> 15 U.S.C. § 1681i(a)(5)(B)(iii)(I).

<sup>1170</sup> 15 U.S.C. § 1681i(a)(5)(B)(iii)(II).

Thus, a CRA violates the FCRA if it does not provide to consumers the required notice, provides incomplete notice, provides late notice, does not provide the notice in writing, or providing notice with means not authorized by the consumer.

#### A Comparative Assessment

The CIL does not mention blocking information that resulted from alleged identity theft; therefore, no notice is required. However, one may consider such information “inaccurate” and proceed to dispute it accordingly.

#### **F- Notification of Inactive Account Reactivation**

A financial institution or a creditor has to provide notification to a consumer when a transaction occurs in an inactive account that has been so for more than two years.<sup>1172</sup> The purpose of this notification is to alert the consumer of the possibility of identity theft action. No manner or timing of the notification is provided; therefore, the reasonable person test applies. The same debate over liability for violations of section 1681m. However, as I believe violations of that section give rise to liability, violation of the required notification of inactive account transactions gives rise to liability.

When a creditor or financial institution notes a transaction occurred in an inactive account, they have to provide notification to the consumer of such transaction in a reasonable time and manner. Failure to provide the notification altogether, or failure to provide it in a reasonable time or manner constitutes violation of the FCRA.

#### A Comparative Assessment

The CIL does not recognize notification of inactive account transaction; therefore, no notification is required. In addition to the suggestions that I made in regard to identity theft protection provisions, this notification is one of the examples that needs to be added to the CIL.

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<sup>1171</sup> 15 U.S.C. § 1681i(a)(5)(B)(iii)(III).

<sup>1172</sup> 15 U.S.C. § 1681m(e)(2).

#### 4.4. Sub-chapter C: Credit Reporting Breaches under Islamic Law

Credit reporting breaches under Islamic law can be classified into three categories as follows.

##### 4.4.1. Permanent Prohibited Breaches

Under this category, there are permanently prohibited breaches regardless of whether the FCRA or the CIL prohibits them. In other words, these breaches are prohibited even if the law does not prohibit them. Examples of these breaches are the following:

##### **A- Acquiring credit information for no Permissible Purposes by Misleading the CRA**

If the user misled the CRA and did not inform it of the real purpose, the actions are unlawful because they are dishonest. Allah said, “*O you who believe! Be afraid of Allah, and be with those who are true.*”<sup>1173</sup> Providing false information to obtain a credit report is a clear contradiction to the divine command. Moreover, the Prophet said, “*Truthfulness leads to righteousness, and righteousness leads to Paradise. And a man keeps on telling the truth until he becomes a truthful person. Falsehood leads to wickedness and wickedness leads to the Hell Fire, and a man may keep on telling lies till he is written before Allah, a liar.*”<sup>1174</sup>

##### **B- Inclusion of Medical Information**

Under Islamic law, prohibition of the release of confidential medical information serves an interest of consumers. The CRA’s Inclusion of sensitive medical information in the credit report subjects consumers to unnecessary embarrassment. The International Fiqh Academy states:

*“Secrecy is even more of a duty for individuals working in professions which are adversely affected by indiscretion such as medical ones. Such individuals are resorted to for the sake of advice and assistance by people who open up to them and set them know all that may help them fulfill their vital tasks properly. This may include information which one keeps from all others, including one’s own kin”*<sup>1175</sup>

Therefore, abiding by the authorities’ prohibition of the inclusion of medical information is lawful, and violations constitute an unlawful act under Islamic law.

##### **C- Notification of Inactive Account Reactivation**

A financial institution or a creditor has to provide notification to a consumer when a transaction occurs in an inactive account that has been so for more than two years.<sup>1176</sup> Under Islamic law, this notification is encouraged because it is cooperative. Allah says, “*Help you one another in virtue, righteousness and piety; but do not help one another in sin and*

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<sup>1173</sup>*Holy Quran* 9:119.

<sup>1174</sup> AL-BUKHARI, *supra* note 3, Volume 8, 73/116; MUSLIM BIN AL-HAJJAJ, *supra* note 3, 32/6307.

<sup>1175</sup>The International Fiqh Academy is an academy in which Islamic legal issues are discussed. The academy consists of legal scholars, medical doctors, and other fields related to Islamic law. Members represent more than 43 countries. Resolution No. 79 (8/10), Eighth Session 21-27/6/1993. Reprinted in Magazine of International Fiqh Academy 8 vo. 3 at 15. The resolution provides exceptions to this decision in the case of necessity or balancing the harms of individuals in comparison to other individuals or society.

<sup>1176</sup>15 U.S.C. § 1681m(e)(2).

*transgression. And fear Allah. Verily, Allah is Severe in punishment.*”<sup>1177</sup> Once the Islamic authorities enact such a rule, obedience becomes obligatory and violations are unlawful.

#### 4.4.2. Interest-Based Prohibited Breaches

Interest-Based means that such breaches are not originally prohibited under Islamic law; however, legislators are allowed to prohibit such acts in the interest of consumers and industry. This prohibition is recognized under Islamic law because unrestricted interest “*Masalih Al-Mursalah*” is considered a source of law according to the most respected scholarly opinion.<sup>1178</sup> For unrestricted interest to be a source of Islamic law, scholars require that four conditions be met. First, the interest must be certain or highly assumed. If the interest is neither certain nor highly assumed, then such interest cannot be a source of Islamic law.<sup>1179</sup> Second, the interest must not contradict established Islamic rules from the *Holy Quran, Sunnah*, or consensus.<sup>1180</sup> Third, the interest cannot be considered if it contradicts another interest that is equal or greater.<sup>1181</sup> Fourth, the interest must be for a group of people, not tailored for private individuals.<sup>1182</sup> For example, enacting regulations to protect wealthy investors is not an interest that should be honored because it is not serving the people as a whole. Examples of the breaches are as follows.

##### **A- Acquiring Credit Information for no Permissible Purpose**

If the user told the CRA of his impermissible purpose, then his action is unlawful because his obtainment of the credit report is in contradiction to the law that has been enacted by the authority. Obedience to the commands or laws of the authority is an obligation for all Muslims, as long as the command or the law of the authority is in the best interests of the community and not in contradiction to Islamic law. Nothing in this requirement contradicts Islamic law and it is clearly for the benefit of the community. Allah says,

*“O you who believe! Obey Allah and obey the Messenger”<sup>1183</sup>, and those of you who are in authority, and if you differ in anything amongst yourselves, refer it to Allah and His Messenger, if you believe in Allah and in the Last Day. That is better and more suitable for final determination.”<sup>1184</sup>*

##### **B- Supplying Credit Information to Users with no Permissible Purpose**

Under Islamic law, prohibiting the release of credit reports for impermissible purposes is in the interest of the people. This interest does not contradict Islamic law; therefore, such interest is entitled to be honored under Islamic law. Since the interest is lawful and Islamic authority enacts such laws to secure it, Muslims must obey the authority’s commands. Supplying a credit report for no permissible purpose is disobedience of authority, which is unlawful under Islamic law.

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<sup>1177</sup> *Holy Quran* 5:2.

<sup>1178</sup> See page 37 for discussion of probity of unrestricted interest.

<sup>1179</sup> ALSULAMI, *supra*, note 78, at 209.

<sup>1180</sup> *Id.*

<sup>1181</sup> *Id.* at 209. Such interest may be honored if the result of balancing between equal interests is in favor of it.

<sup>1182</sup> ATWAH, *supra* note 132, at 149-150.

<sup>1183</sup> Means Prophet Muhammad (pbuh).

<sup>1184</sup> *Holy Quran* 4:59. It is interesting to note the verb “obey” is linked directly to Allah and the Messenger but does not link directly to the authority in order to bring attention to the fact that absolute obedience is only to Allah and his messenger while obedience to the authority depends on its conformity with the commands of Allah and his Messenger.

### **C- Failure to Truncate the Expiration Date or Credit and Debit Card Digits**

Under Islamic law, truncation helps prevent financial crimes. The main objectives of Islamic law are the protection of religion, life, intellect, chastity, and property.<sup>1185</sup> Thus, protection of property by requiring truncation of the expiration date or digits of debit or credit cards is in line with Islamic law objectives. In regard to arguments made in favor of exempting online transactions, it is in contradiction to the rule of construction in Islamic law. One rule is that acts similar to the prohibited one in its consequences and that share the same operative cause<sup>1186</sup> should be treated the same. For example, if saying disrespectful words to parents is prohibited,<sup>1187</sup> then, beating them, even if not mentioned, should be prohibited analogically because “saying disrespectful words” and “beating” share a similar characteristic, which is to be hurtful. Thus, printing a receipt online without truncation has the same operative cause as in store transactions, which undermines consumers’ privacy and subjects them to identity theft. Moreover, printing a receipt online without truncation has the same, if not greater, consequences of identity theft.

### **D- Failure to Disclose Information Required under §1681g**

Under Islamic law, disclosure of the above-mentioned information serves the interest of consumers. Additionally, this interest does not contradict an equal or greater interest, and does not contradict established Islamic rules. Therefore, requiring disclosure is lawful. Consequently, non-compliance constitutes a violation of Islamic law, because obedience of authority in this case is obligatory.

### **E- Failure to Adhere to the Conditions and Forms when Disclosing**

Under Islamic law, the forms and conditions of the disclosure requirements imposed by the FCRA are in the interests of consumers. Moreover, the interest preserved is for the public and does not contradict a greater or equal interest. Finally, the interest does not contradict established Islamic rules. Therefore, requiring disclosure to be in specific forms or meet certain conditions is lawful. Thus, violation of this rule is unlawful under Islamic law.

### **F- Failure to Disclose or Provide Consumers with a Summary of Rights**

It is in the interest of consumers to require CRAs or users to provide to consumers a summary of their rights. This interest is not outweighed by a greater or equal interest. Moreover, no established Islamic rule is contradicted by this requirement. Thus, this requirement is lawful under Islamic law.

### **G- Notice of Discrepancy of Address**

Under the FCRA, when CRAs find a discrepancy in the address provided by a consumer to a creditor, the CRAs must notify the creditor.<sup>1188</sup> When a CRA notices in the application a new address which is substantially different from the addresses in its record, the CRA must provide the user with a notice of the discrepancy of address as a sign of identity theft

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<sup>1185</sup> ABU ISAAC AL-SHATIBI, AL-MUWAFQAQ FI USUL AL-SHARIA, 31 (Mashoor Alsalman ed., Ibn Affan House) (1997). Every objective has three categories: essentials, complimentary, and embellishments.

<sup>1186</sup> See pp. 12-13 for more information about *Qiyas* and operative cause.

<sup>1187</sup> *Holy Quran* 17:23 “And your Lord has decreed that you worship none but Him. And that you be dutiful to your parents. If one of them or both of them attain old age in your life, say not to them a word of disrespect, nor shout at them but address them in terms of honor.”

<sup>1188</sup> 15 U.S.C. § 1681c(h)(1).

possibility. Under Islamic law, this notice protects consumer properties and creditworthiness. The address notice requirement is in line with Islamic law rules. It helps preserve the property of people as one of the five priorities mentioned earlier. Thus, violation of this notice requirement should constitute a violation under Islamic law.

#### **H- Notice of Frivolous or Irrelevant Information**

Under Islamic law, granting CRAs the right to terminate disputes believed to be frivolous or irrelevant is a matter of weighing interests. Islamic law gives great consideration to expert views. Therefore, if impartial experts in the credit reporting industry show that granting such a right is the outweighing interest, then such a right should be granted. However, this right is not absolute. If circumstances change and the interest becomes outweighed by another interest, the other interest should be considered. If we consider granting CRAs the right to terminate disputes that are believed to be frivolous or irrelevant, then requiring notice to be provided to the consumer is lawful. Violation of the notice requirement may give rise to liability.

#### **I- Notice of Reinvestigation Results**

When a consumer disputes accuracy or completeness of his credit report, and the CRA reinvestigates the dispute, the consumer is entitled to a free copy of the credit report if the reinvestigation results in revision of the credit file of consumer.<sup>1189</sup> Under Islamic law, requiring notice of the results of reinvestigation to be provided to consumers is in interest of consumers. This interest is not in contradiction to a greater or equal interest or established Islamic rules. Therefore, violation of this notice requirement is unlawful under Islamic law.

#### **J- Notice of an Adverse Action from CRAs or Third Parties**

Under Islamic law, nothing requires users of a credit report to provide notice to consumers explaining that an unfavorable decision, such as rejection of an employment application, was due to credit information. Nonetheless, since this notice is in the best interest of consumers and it does not contradict an equal or greater interest or established Islamic rules, it should be a requirement, the violation of which would be unlawful.

#### **K- Notice of Prescreening**

A prescreening is a practice in which creditors obtain from CRAs lists of consumers who meet criteria set by the creditors.<sup>1190</sup> Under Islamic law, giving consumers a choice to opt out of prescreening protects their privacy and gives them the opportunity to take advantage of firm credit offers. The interest of consumers in this case is lawful and protecting such interest does not contradict Islamic law. Thus, when the authority regulates such practice and requires notice, failure to provide notice is a violation of the law.

#### **L- Notice of Affiliate Sharing for Marketing**

Giving consumers a chance to opt out of a creditor's practice of sharing information with marketing affiliates protects their privacy and gives them the opportunity to take advantage of the offers. The interest of consumers in this case is lawful and protecting such interest does not contradict Islamic law. Thus, when the authority regulates such practice and requires notice, failure to provide notice is a violation of the law.

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<sup>1189</sup> 15 U.S.C. § 1681i(a)(6)(B)(ii).

<sup>1190</sup> See p.154 for further information.

### **M- Notice of Governmental Agencies' Request**

Under Islamic law, giving consumers notice that their credit reports will be requested by governmental agencies is in the best interest of consumers. The interest of consumers in this case is lawful and regulating such interest does not contradict Islamic law. Thus, when the authority regulates such practice and requires notice, failure to provide notice is a violation of the law.

### **N- Notification of Public Record Information**

Under Islamic law, upon reporting adverse public record information for employment purposes, CRAs are required to provide notice. This serves the interest of consumers and does not contradict an equal or greater interest. In addition, it does not contradict established Islamic rules. Failing to meet this requirement is unlawful.

### **O- Failure to Block Information Resulting from Identity Theft**

Under Islamic law, if a desired result can be achieved by only one means, then an obligation arises to only use that means.<sup>1191</sup> However, if the result can be achieved by more than one means, then an obligation arises to use one of the means, although which one is not specified. Thus, guarding people's property against identity theft can be achieved in different ways. Blocking information is one of them. Therefore, blocking information is highly recommended even it is not obligatory. Once the Islamic authorities enact such rule, obedience becomes obligatory and failures to obey are unlawful.

### **P- Decline to Block or Rescinding Block Notice**

As indicated earlier in regard to blocking information that is allegedly result of identity theft, if a desired result can be achieved by only one means, then an obligation arises to only use that means.<sup>1192</sup> However, if the result can be achieved by more than one means, then an obligation arises to use one of the means, although which one is not specified. Thus, guarding against identity theft can be achieved in different ways in which blocking information is one of them. Therefore, when a CRA declines to block information, or rescinds the block, the consumer is at risk. Therefore, guarding against that risk through notice is highly recommended even though it is not obligatory. Once the Islamic authorities enact such a rule, obedience is obligatory and failure to obey is unlawful.

#### 4.4.3. Possibly Debated Issues

Under this section, these issues can be argued both ways. It can conform or contradict Islamic law depending on the choice of argument. Examples of these issues are as follows.

#### **A- Providing Outdated Information**

Under Islamic law, nothing prevents CRAs from including outdated information so long as the information is accurate. However, laws require the removal of such information after the passage of a certain amount of time. One may inquire whether such a requirement is recognized under Islamic law. One may differentiate between two types of information. The first is information that is derived from public resources and that has no relevance to private rights. The second is information related to private rights.

Regarding the first type of information, one may argue that CRA's removal of such information after the passage of time is allowed because there is no private right involved

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<sup>1191</sup>ALSULAMI, *supra*, note 78, at 276.

<sup>1192</sup>*Id.*

and the interests of consumers outweigh the interest of the public in keeping such information. The second type of information, which is related to private rights, can be divided into two categories; paid debts and unpaid debts. In the case of paid debts, one may argue that the removal of such information is not going to harm private parties whose debts were satisfied, and it protects the consumer interests by giving the opportunity to improve their financial status. In the case of unpaid debts, one may argue that the removal of such information prejudices the rights of creditors. When other creditors extend credit to debtors while unaware of previous debts, it diminishes the first creditors' ability to obtain their full debts, because new creditors share the amount with them. Once prejudice is established, the law does not have the right to favor one party over the other without the less favored party's approval. A jurisprudential rule is established that "there should be no harm and no reciprocal harm."<sup>1193</sup> Thus, this suggests that the removal of such information without the interested party's approval is unlawful even with the passage of time.

### **B- Failure to Provide Free Copies of Credit Report or File as Prescribed**

Under Islamic law, though requiring a CRA to provide free credit reports in the above-mentioned cases is in the interest of consumers, it is problematic. Assuming such a rule is in the interest of consumers, enforcing the interest must not contradict established Islamic rule or contradict an equal or greater interest. In this case, one can clearly conclude that a "credit report" is the property of the CRA. Taking the property of the others without their consent or without providing consideration is against Islamic law. Allah says

*"O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent ..."*<sup>1194</sup>

And the Prophet says *"It is not permissible for you to take the property of a Muslim except with his consent."*<sup>1195</sup>

Based on the verses and tradition, one may argue that requiring a CRA to provide free copies of credit reports without their consent or without consideration is unlawful. Forcing CRAs to produce free copies contradicts Islamic law of coercion-free transactions, thus, cannot justify producing a credit report with no value. In addition, in order for the public interest to be a source of Islamic law, the interest must not contradict an equal or greater interest. In this case, the interest of consumers in obtaining free copies of credit reports is contradicted by the interest of CRAs in gaining a monetary return. On the other hand, one may argue for validity of this rule based on the proposition that the information in the credit report is owned by the consumer. This can be rebutted by stating that the information in the credit report resulted from the effort of the CRA, which pays a considerable amount of money to collect, analyze, maintain, and supply the information. The strongest argument is that the CRAs are not allowed to practice this business unless they adhere to the many requirements of the CIL or the FCRA, one of which is providing free copies. Therefore, by applying for a license for practicing this business, they agreed to adhere to the laws and consented to the practice of providing free credit reports.

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<sup>1193</sup> ABDULRAHMAN ALSUIUTI, ANALOGIES AND SIMILARITIES IN SHAFI FIQH 83 (ALASHBAH WAALNADAI'R FI QUA'ID WA FROA' FIQH ALSHAFIAH) (Scientific Books House, 1<sup>st</sup> ed., 1983). This rule is based on a tradition of the Prophet Muhammad (pbuh) that he adjudicated that there should be no harm and no reciprocal harm.

<sup>1194</sup> *Holy Quran* 4:29.

<sup>1195</sup> OMAR BIN ALMULQIN, SHINE MOON IN EXPLICATION OF TRADITIONS AND SAYINGS OF GREAT EXPLANATION (ALBADR ALMUNAIR FI TAKHRAIG ALAHADITH WA ALATHAR ALWAQIAH FI ALSHARH ALKABAIR) 6/693 (Mustafa Abdulhai et. al. eds., 1<sup>st</sup> ed. 2004)



### C- Characterization of Investigative Report

Obtaining information from a person acquainted with the consumer for a legitimate reason and for a valid interest is lawful. Under Islamic law, the person with the information is advising the person seeking the information. It is not classified in this way under U.S. law. An advisee and an advisor both are immune from liability if the advisor advises the advisee truthfully of the shortcomings of the consumer.<sup>1196</sup> Providing information about a consumer's character, general reputation, personal characteristics, and mode of living is lawful provided such information does not exceed the scope of the question. In addition, if providing the information implicitly is sufficient, then providing it explicitly is discouraged.<sup>1197</sup> For instance, if one asks the advisor about another person for the purpose of hiring him for an important position, the advisor may say he is not suitable, if he believes so, without providing further details, unless the advisee asks for more details. This is an exception from the general rule against backbiting.<sup>1198</sup> Backbiting is speaking about other persons' faults in their absence. Backbiting is considered one of the great sins in Islam on the spiritual level.<sup>1199</sup> There is no fixed punishment prescribed for such behavior, punishment is at the discretion of the court.

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<sup>1196</sup> ALMARZOQI, *supra* note 9, at 156.

<sup>1197</sup> AHMED AL QARAFI, THE DIFERENCIES (AL FURUQ) 4/360 (Khalail Almansour ed., 1<sup>st</sup> ed. 1998).

<sup>1198</sup> MUSLIM BIN AL-HAJJAJ, *supra* note 3, 32/6265, The Prophet Muhammad (pbuh) defined backbiting by asking his Companions "Do you know what is backbiting? They said: Allah and His Messenger know best. Thereupon he said: Backbiting implies your talking about your brother in a manner which he does not like. It was said to him: What is your opinion if I actually find that in my brother, which I made a mention of? He said: If (that failing) is actually found (in him) what you assert, you in fact have backbitten him, and if that is not in him it is a slander." [Emphasis added].

<sup>1199</sup> *Holy Quran* 49:12, Allah says: "**O you who believe! Avoid much suspicion; indeed some suspicions are sins. And spy not, neither backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate it. And fear Allah. Verily, Allah is the One Who forgives and accepts repentance, Most Merciful.**"

## **Fifth Chapter:** **Credit Reporting Damage**

Proof of damage is indispensable element of most FCRA cases.<sup>1200</sup> Courts are not willing to rule in favor of a plaintiff if there is no actual damage involved, unless the violation is willful. In this chapter, I will present the types of damage that consumers may claim. Some damage is recoverable and others are debated among courts or schools of thought.<sup>1201</sup>

### **5.1 Definition of Damage**

The term “damages” is used to describe the harm the plaintiff incurs, as well as the compensation the plaintiff receives for the harm. In this chapter, the first meaning of the term is used. Damage is defined generally as “loss or injury to person or property.”<sup>1202</sup> Loss or injury to person or property includes pecuniary as well as intangible loss, such as bodily, economic, and emotional harm.

### **5.2 Definition of Credit Reporting Damage**

The FCRA does not define credit reporting damage. However, one can define credit reporting damage based on section 1681n. Section 1681n states that “Any person who ... fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of ... any actual damages sustained by the consumer as a result of the failure ...”<sup>1203</sup>

Accordingly, credit reporting damage can be defined as “loss or injury sustained by a consumer as a result of failure to comply with the FCRA.” Loss or injury encompasses pecuniary and intangible loss, additionally bodily, economic, or emotional harm.

### **5.3 Types of Credit Reporting Damage**

Credit reporting damages include the following.

#### **5.3.1 Out-of-Pocket Expenses**

Out-of-pocket expenses are associated with most credit reporting cases. The following are examples of out-of-pocket expenses. The courts reject some of these because of lack of proof or causal relationship:

##### **A- Higher Down Payment**

A consumer may be required to pay a higher down payment as a result of a violation.<sup>1204</sup> For instance, before the violation the consumer was required to pay 10% of the vehicle, but now he is required to pay 25%. This increase in down payment constitutes an out-of-pocket expense.

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<sup>1200</sup> *Larson v. Groos Bank, N.A.*, 204 B.R. 500, 502 (W.D. Tex. 1996).

<sup>1201</sup> BHALA, *supra* note 7, at 389. Islamic Sunni Schools: Hanfi, Malki, Shafi, Hanbli, and Zahiri. They are the living schools among Sunni.

<sup>1202</sup> BLACK’S LAW DICTIONARY, *supra* note 163.

<sup>1203</sup> 15 U.S.C. § 1681n.

<sup>1204</sup> Georg Finder, *Loss of Credit Capacity*, available at <http://creditdamageexpert.com/2010/05/loss-of-credit-capacity/>

Compensating plaintiff for a higher down payment as out-of-pocket expenses is problematic. For instance, when a plaintiff has to make a 25% down payment instead of 10% because of defendant's errors, 15% more than what he is supposed to pay, is characterized as an out-of-pocket expense. However, the plaintiff is not going to pay more than the total amount of the goods. Consider the following example of a plaintiff who wants to buy a house for \$100,000:

<b>Scenario</b>	<b>(A) With errors</b>	<b>(B) With no errors</b>
Down Payment	25,000	10,000
Remaining Amount	75,000	90,000
Total	100,000	100,000

In this example, the total is the same, but if the court allows the plaintiff to recover \$15,000 as out-of-pocket expenses, one may argue that it would be a windfall for the plaintiff. Nevertheless, one can calculate the damages using the discounted cash flow. According to this method, the down payment the plaintiff paid would have generated profits for the plaintiff had the down payment not been paid. This can be shown in the following example:

Actual Payment	\$100,000	\$100,000
Prevailing Interest Rate	5%	5%
Years	5	5
Down Payment	10,000	25,000
First Year	17,143	14,286
Second Year	16,327	13,605
Third Year	15,549	12,958
Fourth Year	14,809	12,341
Fifth Year	14,103	11,753
Present value	87,931	89,942
Difference	-	2,012

In the previous example, the plaintiff, in case of payment of \$25,000 down payment, pays \$89,942 as the present value of the \$100,000. However, he pays \$ 87,931 only in case of payment of \$10,000 down payment. The difference is \$2,012 which is the damage in this example.

### **B- Paying a Security Deposit**

Payment of a security deposit, because of inaccurate information in the credit report, can be recovered if a causal relationship is proven between requiring the deposit and the violation of the FCRA.<sup>1205</sup>

Characterizing paying a security deposit, as a result of the defendant's errors, as out-of-pocket expenses is problematic too. Even though the plaintiff has to pay \$500 as a security deposit, the plaintiff gets the \$500 as a windfall because he is going to get the \$500 after passage of certain time or after the termination of the contract. Nevertheless, one can say that the security deposit the plaintiff paid would have generated profits for the plaintiff had the security deposit not been paid.

<sup>1205</sup> *Konter v. CSC Credit Services Inc.*, 606 F. Supp. 2d 960, 967 (W.D. Wis. 2009) (The court denied the plaintiff's claim because he failed to prove the casual relationship between requiring deposit and the error).

### **C- Spending Time to Resolve and Correct Errors**

Courts held that spending time to resolve and correct inaccurate information in a consumer's credit report is a factor in calculating damages.<sup>1206</sup>

### **D- Purchasing Copies of Credit Report**

Consumers often to pay out of their own pocket to obtain copies of their credit report. In that case, the cost may be recoverable.<sup>1207</sup>

### **E- Copying, Faxing, Mailing Documentary Evidence**

Consumers may recover the cost of copying, faxing, and mailing documents to CRAs to prove their standing. In some cases, consumers need to repeat copying, faxing, and mailing the documents<sup>1208</sup>

### **F- Medical Expenses**

If the consumer needs medical intervention to help combat sleeplessness, anxiety, or depression that results from an inaccurate credit report, the consumer may recover the cost, provided a causal relationship is established.<sup>1209</sup>

### **G- Liquidating Assets Prematurely**

If a consumer is denied credit, it may be necessary to liquidate some of his assets prematurely to secure cash to cover other compelling needs. If the denial of credit is attributed to a violation of the FCRA, he may recover the loss if he proves the casual relationship.<sup>1210</sup>

### **H- Loss of Income by Taking Unpaid Days off Work**

Consumers must spend time to resolve their problems with CRAs. The average time consumers spent in the U.S. during 2002 to solve identity theft problems was 30 hours per person.<sup>1211</sup> Not every issue can be solved over the phone, therefore, some consumers need to take unpaid days off from work to meet with CRA personnel.<sup>1212</sup> A court held that loss of income from taking days off is compensable, provided causation is proven.<sup>1213</sup> Loss of

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<sup>1206</sup> *Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (The court stated, "Finally, Stevenson spent a considerable amount of time since he first disputed his credit report trying to resolve his problems with TRW." However, the court included time spent under the mental anguish umbrella.); *Schaffhausen v. Bank of America, N.A.*, 393 F. Supp. 2d 853, 859 (D. Minn. 2005) (The court found no proof of plaintiff's allegation of time spent to correct the problem.); *Rasor*, 554 P.2d, at 1050 (The court found that spending time to correct the errors is part of actual damages.).

<sup>1207</sup> *Saenz*, 621 F. Supp. 2d, at 1085 (The court held, "Here, the record establishes that Saenz requested copies of his credit report in order to ascertain whether Trans Union had removed the disputed information, and incurred costs for copying and faxing the documentary evidence he provided in connection with his disputes. These out-of-pocket costs constitute cognizable economic damages for FCRA purposes.").

<sup>1208</sup> *Id.*

<sup>1209</sup> *Boris*, 249 F. Supp. 2d, at 859 (However, the court found no causal relationship between medical treatment and the violation.).

<sup>1210</sup> *Valvo v. Trans Union LLC*, No. 04-70S, 2005 U.S. Dist. WL 3618272, at \* 4. (D.R.I. October 27, 2005) (The court found no proof of this type of damages.); *Johnson v. Wells Fargo Home Mortg. Inc.*, 558 F. Supp. 2d 1132, 1133 (D. Nev. 2008) (The court denied defendant's motion because "there are genuine issues of material fact as to whether these alleged damages are cognizable under the FCRA. In the event such damages are cognizable, which will be determined at the time of trial, the court will then consider whether Plaintiff's stocks are too speculative and uncertain to base an award of damages.").

<sup>1211</sup> Federal Trade Commission & Synovate, *supra* note 843, at 7.

<sup>1212</sup> *Morris v. Credit Bureau of Cincinnati Inc.*, 563 F. Supp. 962, 967 (S.D. Ohio 1983) (The court found it as substantial damage; *Robinson v. Equifax Information Services, LLC*, 560 F.3d 235, 240 (4th Cir. 2009) (The court held that loss of income by missing about 300 hours of work is part of actual damages.).

<sup>1213</sup> *Kronstedt v. Equifax*, No 01-C-52-C, 2001 WL 34124783, at \*13 (W.D. Wis. 2001) (The court held, "Specifically, plaintiff contends that she took four days off work in order to meet with lawyers and make telephone calls in order to clear up her credit history. These damages are compensable. However, plaintiff will

income can take the form of a consumer's inability to practice his usual business because of the violation. A court affirmed a jury's award of "past economic loss" of a consumer because of the FCRA violation.<sup>1214</sup>

#### **I- Traveling to CRA Locations**

When the nearest CRA location is miles away, consumers need to travel a number of miles to meet CRA personnel in person and correct the problem.<sup>1215</sup>

#### **J- Late Fees Paid**

When the consumer pays late fees resulting from a transaction based on inaccurate information in his credit report, such fees may be recovered if a causal relationship is established.<sup>1216</sup>

#### **K- Cost Associated with Inability to Finish Construction**

When a consumer starts a project and inaccurate information results in a delay, the cost related to the delay of completion may be recovered if the consumer can prove causation.<sup>1217</sup>

#### **L- Pre-litigation Fees**

Because of the complexity of the FCRA, most consumers need to consult attorneys to solve their problems with CRAs. Attorney fees are recoverable if the cost is incurred as a result of remedying the violation.<sup>1218</sup> However, if the cost is just to notify CRAs of the errors and to ensure compliance with the law, then the cost is not recoverable.<sup>1219</sup>

### **5.3.2 Loss of Credit Expectancy**

Loss of credit expectancy "concerns the ability to obtain and maintain credit after the wrongful act ... damages creditworthiness".<sup>1220</sup> Inaccurate information in credit reports can result in complete or partial denial of the requested credit. Damages are recoverable if they result from complete or partial denial and if causation between the errors and denial is established.<sup>1221</sup> A court held in one case that damages are recoverable when the evidence

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have to prove that any damages claimed for time off work resulted specifically from the reappearance of the derogatory First Tennessee Bank information on her credit report.").

<sup>1214</sup> *Adams v. Phillips*, 2002 WL 31886737, at \*2 (E.D. La. 2002).

<sup>1215</sup> *Morris*, 563 F. Supp., at 967.

<sup>1216</sup> *Johnson*, 558 F. Supp. 2d, at 1129 (The court denied the claim because the plaintiff was not acting in his consumer capacity and held that "... any late fees Plaintiff incurred and paid related to his business and commercial transactions are not consumer transactions; thus, they are not subject to the FCRA.").

<sup>1217</sup> *Id.*

<sup>1218</sup> *Casella v. Equifax Credit Information Services*, 56 F.3d 469, 474 (2d Cir. 1995) (The court held, "The term 'actual damages' may include out-of-pocket expenses for attorney's fees incurred by a plaintiff prior to litigation of his FCRA claims."); *Lewis v. Ohio Prof'l Elec. Network, LLC*, 248 F. Supp. 2d 693, 703-04 (S.D. Ohio 2003) (The court held, "Plaintiff also seeks an award of actual damages for prelitigation attorneys' fees for the attorneys he hired to resolve his consumer history woes. 'Actual damages' under the FCRA may include such prelitigation attorneys' fees if the attorneys' services are retained to remedy a violation of the law.").

<sup>1219</sup> *McClland v. Experian Information Solutions Inc.*, 2006 WL 2191973 at \* 4 (N.D. Ill. July 28, 2006) (The court held, "Out of pocket expenses incurred simply to *notify* a credit reporting agency of an error, and not to enforce compliance with a specific section of the FCRA, are not compensable as 'actual damages' for a violation of the FCRA.").

<sup>1220</sup> Georg Finder, *Loss of Credit Expectancy*, available at <http://creditdamageexpert.com/2011/02/loss-of-credit-expectancy/> (The author differentiates between loss of credit capacity and credit expectancy. Credit expectancy "involves predictable and foreseeable future use of credit as distinct from credit capacity which involves the inability to continue to utilize credit as the injured person could before damage to credit.").

<sup>1221</sup> *Johnson*, 558 F. Supp. 2d, at 1129 (The court held, "If Plaintiff can show that he was denied the credit at issue because of erroneous information reported by Defendant contained in a consumer report, these damages are recoverable under the FCRA.").

showed that the plaintiff many times was either denied or offered less advantageous terms when she attempted to secure a loan.<sup>1222</sup>

### 5.3.3 Loss of Credit Capacity

Loss of credit capacity includes a decrease of credit limit and an increase of rate or premium.<sup>1223</sup> Loss of credit capacity takes several different forms. First, an increase in an insurance premium is a form of loss of credit capacity. When a consumer has insurance at a lower rate, his premium may be increased because of inaccurate information added to his credit report. In that case, a consumer may recover any damages resulting from the violation of the FCRA.<sup>1224</sup> Second, the consumer may have a low interest rate when he applies for a loan. If the interest rate is increased solely because of a violation of the FCRA, the consumer may recover damages resulting from the violation of the FCRA.<sup>1225</sup> Third, the consumer may be offered the same interest rate, but on less advantageous terms such as requiring collateral, or a guarantor, or cosigner to complete the transaction.<sup>1226</sup> Fourth, loss of credit capacity may take the form of a decrease in existing credit limit. Lenders give consumers their credit limit by taking into consideration different factors including credit capacity and creditworthiness. However, when consumer credit reports change because of inaccurate information, the terms of their accounts are most likely changed accordingly. The consumers are entitled to recover damages resulting from a decrease of credit limit because of inaccurate information.<sup>1227</sup>

### 5.3.4 Loss of Job Opportunity

If a consumer loses his job or is unable to find employment because of a violation of the FCRA, then he is entitled to recover damages resulting from the violation. A consumer needs to prove that the violation of the FCRA caused the loss of the job or the inability to find a job.<sup>1228</sup>

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<sup>1222</sup> *Robinson*, 560 F.3d, at 240 (The court held the “evidence presented at trial clearly demonstrates that on numerous occasions Robinson attempted to secure a home mortgage, only to be either denied outright or offered a loan on less advantageous terms than she might have received absent Equifax’s errors.”).

<sup>1223</sup> *Finder*, *supra* note 1204. (The author states, “Loss of credit capacity, refers to the decrease of available credit and/or an increase in the interest rate for available credit, thus an increase in the cost of credit. As a result of those increased costs debt service becomes more expensive. When debt service becomes more expensive, loss of credit capacity is suffered as the injured person loses the ability to continue to use credit in the way it could be used before the damage to credit occurred.”).

<sup>1224</sup> *Millstone v. O’Hanlon Reports Inc.*, 528 F.2d 829, 834 (8<sup>th</sup> Cir. 1976) (The damages were an increase of \$68 per insurance premium); *Boris*, 249 F. Supp. 2d, at 859 (The damage includes increase of \$200 per year.).

<sup>1225</sup> *Schaffhausen*, 393 F. Supp. 2d, at 859 (The court found no proof of plaintiff’s allegation of higher interest rate.); *Bruce v. First U.S.A. Bank, Nat. Ass’n*, 103 F. Supp. 2d 1135, 1140 (E.D. Mo. 2000) (The court denied defendant’s motion for summary judgment because genuine issues of material fact of whether any economic damages suffered by plaintiff is actionable); *Rasor*, 554 P.2d, at 1050 (The court found that an increase of lending rate is part of actual damages.).

<sup>1226</sup> *Robinson*, 560 F.3d, at 240 (The court held the “evidence presented at trial clearly demonstrates that on numerous occasions Robinson attempted to secure a home mortgage, only to be either denied outright or offered a loan on less advantageous terms than she might have received absent Equifax’s errors.”).

<sup>1227</sup> *Johnson*, 558 F. Supp. 2d, at 1129 (However, the court accepted his claim because even though plaintiff was not using credit cards as a consumer, the consumer report was used to make the decision of decreasing the credit. Therefore, damages are recoverable.).

<sup>1228</sup> *Lewis*, 248 F. Supp. 2d, at 693 (The court affirmed summary judgment in favor of defendant because the plaintiff failed to prove causation between the employment harm and inaccuracy in his credit report); *Poore*, 410 F. Supp. 2d, at 573 (Plaintiff was denied a job because of inaccurate information in his credit report.).

### 5.3.5 Lost Opportunity

When a consumer loses an opportunity he would have obtained but for the violation of the FCRA, the consumer is entitled to recover damages resulting from the violation. However, the consumer needs to prove causation between violation of the FCRA and damages in order to recover.<sup>1229</sup> One court held that loss of an opportunity in the home mortgage market could be considered part of actual damages. Nonetheless, when a consumer fails to prove causation, no damages are recoverable. Another court affirmed the district court finding “that, in the absence of any evidence that appellant made an offer to purchase property or applied for a home mortgage, the “lost opportunity” damages he alleged were too speculative.”<sup>1230</sup> Finally, the consumer needs to be acting in his consumer capacity in order to recover. One court held, “Plaintiff is not entitled to business damages unrelated to his status as a consumer as the FCRA was designed to protect the individual consumer, not the individual's businesses.”<sup>1231</sup>

### 5.3.6 Lost Profits

Lost profits may be recoverable if the damages are caused by a violation of the FCRA. Lost profits by nature are uncertain, so they must be reasonably certain in regard to the occurrence and the extent.<sup>1232</sup> Nevertheless, lost profit is recoverable under the FCRA only if the consumer is acting in his consumer capacity. A court denied plaintiff's claim and held that “Accordingly, without the use of a consumer report, any lost business opportunities and anticipated profits relating to Plaintiff's inability to buy, hold and sell real estate are business damages not recoverable under the FCRA.”<sup>1233</sup> Another court affirmed a judgment in favor of the plaintiff, which included the loss of “an opportunity to make a \$35,000 profit on the purchase and sale of a condominium in Florida.”<sup>1234</sup> If the consumer is acting in his business capacity, then the FCRA does not apply.

### 5.3.7 Lost Benefits

Obtaining a credit report to determine the consumer's eligibility for a license or benefit granted by a governmental instrumentality is a permissible purpose.<sup>1235</sup> However, when a license or benefit is denied to a consumer because of inaccuracy in his credit report, for example, the consumer is entitled to recover damages. I found no case law regarding this issue specifically, however, based on the general language of section 1681o and 1681n “any actual damages sustained by the consumer ...”<sup>1236</sup> one can conclude that this type of damage is recoverable. Lost benefits or licenses are actual damages under the damages' definition.

### 5.3.8 Emotional Distress

Emotional distress includes mental suffering, humiliation, embarrassment, anxiety, or emotional anguish. Non-economic damages, including emotional distress, are treated with

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<sup>1229</sup> *Myers v. Bennett Law Offices*, 238 F. Supp. 2d 1196, 1204 (D. Nev. 2002) (The court denied plaintiff claim for the lack of proof.)

<sup>1230</sup> *Robinson*, 560 F.3d at 240; *Casella*, 56 F.3d, at 474

<sup>1231</sup> *Johnson*, 558 F. Supp. 2d, at 1129.

<sup>1232</sup> JAMES S. FISCHER, UNDERSTANDING REMEDIES 59 (Matthew Bender & Co., Inc.) (1999).

<sup>1233</sup> *Johnson*, 558 F. Supp. 2d, at 1129.

<sup>1234</sup> *Adams*, 2002 WL 31886737 at \* 2.

<sup>1235</sup> 15 U.S.C. § 1681b(a)(3)(D).

<sup>1236</sup> 15 U.S.C. § 1681n; 15 U.S.C. § 1681o.

suspicion by courts “because of concerns over genuineness [and] reliability ...”<sup>1237</sup> In addition; some courts do not provide compensation for the emotional distress of people who lack the ability to suffer, such as comatose plaintiffs.<sup>1238</sup> Scholars are in disagreement on the issue of recoverability of pain and suffering.<sup>1239</sup>

Emotional distress is claimed in most FCRA litigation cases. Emotional distress can result from several different violations of the FCRA. A consumer may suffer emotional distress because of denial of credit.<sup>1240</sup> The consumer may suffer emotional distress because of a pecuniary loss that resulted from a violation of the FCRA. For example, a consumer could suffer humiliation because of inaccurate information denied him a job opportunity.<sup>1241</sup> Another example is suffering that results from denial of insurance.<sup>1242</sup> Emotional distress can also result from the dissemination of inaccurate information, such as bad moral character, to third parties.<sup>1243</sup> The perception of the consumer as bankrupt may result in emotional distress.<sup>1244</sup> Emotional distress can also result from having to personally explain to creditors the inaccuracy of the information to try and convince them to grant credit.<sup>1245</sup> Emotional distress can result from discovering “shocking information” in the credit report. A consumer was shocked when he discovered his bad credit rating after maintaining good credit for more

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<sup>1237</sup> FISCHER, *supra* note 1232, at 124.

<sup>1238</sup> *McDougald v. Garber*, 73 N.Y.2d 246, 255 (1989) (The court held, “Accordingly, we conclude that cognitive awareness is a prerequisite to recovery for loss of enjoyment of life. We do not go so far, however, as to require the fact finder to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated.”).

<sup>1239</sup> Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for a Change*, 100 NW. U. L. REV. 87, 88 (2006).

<sup>1240</sup> *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986) (The court held that plaintiff “testified that he was embarrassed by his denial of credit and sustained deep emotional distress because of Chilton’s negligence. The evidence is far from sufficient to justify an award of \$100,000. Despite the excessiveness of the award, however, we believe it is appropriate for us to order a conditional remittitur so as to avoid, if possible, a second trial.”).

<sup>1241</sup> *Poore*, 410 F. Supp. 2d, at 573 (The court denied summary judgment of defendant and stated that plaintiff “testified that he was embarrassed and humiliated as a result of Sterling’s inaccurate report ... The Defendants have offered no evidence that Poore did not, in fact, suffer such emotional distress and humiliation. Accordingly, there is an issue of material fact about whether Poore suffered such damages that a jury must resolve.”).

<sup>1242</sup> *McMillan v. Experian*, 170 F. Supp. 2d 278, 286 (D. Conn. 2001) (The court denied summary judgment and stated that “Because a reasonable jury could conclude that the Colonial Penn insurance denial resulted from misinformation negligently supplied by Associates this Court need not resolve the question left open in *Casella*, of whether a denial of credit or other adverse action is necessary to sustain a claim for damages for emotional distress under the FCRA.”).

<sup>1243</sup> *Collins v. Retail Credit Co.*, 410 F. Supp. 924, 932 (E.D. Mich. 1976) (The court upheld jury’s verdict and stated “Certainly, a libel per se against a young female which clouds her morality and other intangible elements of her reputation has many subtle and indirect adverse effects upon her personal, social and economic life which a jury may very well recognize and give compensation for.”); *Rasor*, 554 P.2d, at 1050 (The court held in favor of the plaintiff because she was injured as a result of inaccurate information regarding her reputation of living with more than one man out of wedlock in the past.).

<sup>1244</sup> *Acton v. Bank One Corp.*, 293 F. Supp. 2d 1092, 1100 (D. Ariz. 2003) (The court denied summary judgment of defendant and stated that “Plaintiff also claims that he was embarrassed by the fact that others in the community unjustifiably perceived him and his wife as bankrupt.”).

<sup>1245</sup> *Stevenson*, 987 F.2d, at 297 (“Stevenson testified that he had to go ‘hat in hand’ to the president of Bank One, who was a business associate and friend, to explain his problems with TRW. As a result, he obtained credit at Bank One. Third, Stevenson had to explain his credit woes to the president of the First City Bank in Colleyville when he opened an account there. With a new president at First City Bank, Stevenson had to explain his situation again. Despite the fact that he was ultimately able to obtain credit, Stevenson testified to experiencing “considerable embarrassment” from having to detail to business associates and creditors his problems with TRW.”).



than fifty years.<sup>1246</sup> Sometimes, emotional distress can result from taking a long time to correct inaccurate information in the consumer's credit report.<sup>1247</sup> Unlawful access of credit report can be a cause of emotional distress. A public defender's unlawful access of a consumer's credit report in a criminal case caused distress to the consumer, as he was afraid that his confidential information would fall into the hands of his family.<sup>1248</sup> However, courts are reluctant to compensate consumers based on their own conclusory statements of being emotionally distressed.<sup>1249</sup>

### 5.3.8.2. Publication Element

The courts are split in regard requiring "publication" of the inaccurate information to third parties as prerequisite to recover emotional distress damages.

#### A- Publication is Required

The first approach requires publication of the inaccurate information in order to recover emotional distress damages. One court held that pain and suffering could not be recovered when the consumer failed to show that defendant communicated the inaccurate information to third parties.<sup>1250</sup> This approach ignores the fact that "pain and suffering" are not limited to cases where the inaccurate information is communicated to a third party. A consumer may still experience pain and suffering even if the information is not communicated to a third party. When a consumer's credit report has lots of errors and after several attempts they are still not corrected, the consumer will have pain and suffering because his requests are continually ignored.<sup>1251</sup> One court limits the publication requirement to the claim of "embarrassment" where the consumer cannot be embarrassed if no communication to a third party is made.<sup>1252</sup> The court reasoned it does not make sense to allow a consumer to recover in the case of "publication" and then bar the consumer from recovering because of the emotional distress he suffered as a result of coping with the inaccuracy.<sup>1253</sup>

#### B- Publication is Not Required

The second approach does not require publication of inaccurate information as a prerequisite to recover emotional distress damages. One court held, "A consumer may suffer

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<sup>1246</sup> *Id.* ("Stevenson testified that it was a 'terrific shock' to him to discover his bad credit rating after maintaining a good credit reputation since 1932.").

<sup>1247</sup> *Thompson*, 682 F.2d, at 514 ("Even after the error was discovered, Thompson spent months pressing SARMA to correct its mistakes and fully succeeded only after bringing a lawsuit against SARMA. This Court is of the opinion that the trial judge was entitled to conclude that the humiliation and mental distress were not minimal but substantial.").

<sup>1248</sup> *Centuori*, 431 F. Supp. 2d, at 1010 ("Plaintiff claims damages stemming from emotional distress caused by Experian's willful or negligent failure to properly screen the Public Defender's application for access to its credit history database, leading to the Public Defender's impermissible access of Plaintiff's credit history.").

<sup>1249</sup> *Robinson*, 560 F.3d, at 241 (The court stated, "Thus, we have distinguished between plaintiff testimony that amounts only to conclusory statements and plaintiff testimony that sufficiently articulates true demonstrable emotional distress.").

<sup>1250</sup> *Casella*, 56 F.3d, at 475 (The court held, "Whether or not we would agree with *Guimond*, we do not believe a plaintiff can recover for pain and suffering when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency." [Emphasis added in original]); *Trikas*, 351 F. Supp. 2d, at 44 (The court cited the same reasoning as *Casella v. Equifax Credit Information Services*).

<sup>1251</sup> *McKeown v. Sears Roebuck & Co.*, 335 F. Supp. 2d 917, 933 (W.D. Wis. 2004) (The court held, "... it makes no sense to apply this requirement to other types of emotional distress.").

<sup>1252</sup> *Id.*

<sup>1253</sup> *Id.*

distress if he has difficulty in correcting his credit history or trouble managing his finances until his history is corrected; this is true regardless whether his erroneous information was actually published to a third party.”<sup>1254</sup>

I believe the “publication” requirement depends on the type of case being litigated. When the consumer alleges that other people knew about the inaccuracy of his credit report, then “publication” should be required. It makes no sense to award emotional distress damages because other people knew about the inaccuracy without proof that the information was already communicated to the others. However, in other cases, consumers may suffer emotional distress even if the information is not communicated to third parties, such as by spending time and effort to correct inaccurate information in the consumers’ credit report.

#### **5.4 Indirect Credit Reporting Damage**

Damage resulting from a violation of the FCRA can be direct or indirect damage. Indirect damage or “consequential damage” are defined as “Losses that do not flow directly and immediately from an injurious act but that result indirectly from the act.”<sup>1255</sup> When it comes to application, I find it difficult to differentiate between “direct” and “indirect” damages.

However, according to the definition, “direct damages” in the credit reporting context are the damages that result naturally from the violation, while indirect damages are the damages that flow naturally but indirectly from the violation. For instance, denial of credit because of inaccurate information in the credit report is a natural result of errors. However, when credit is denied, “which is direct damages”, effort and money spent to correct the errors, flow naturally but indirectly from errors.

From the types of damages discussed, one can conclude that indirect damages are recoverable, so long so they are foreseeable and reasonably flow indirectly from the violation, and the consumer makes reasonable effort to mitigate the damages.<sup>1256</sup>

Most of “out-of-pocket expenses”, loss of profit, and loss of opportunities, are indirect damages. For instance, “taking days off” to correct an inaccurate credit report does not flow directly and immediately from the violation. However, it flows naturally indirectly from the violation, especially if the CRA does not cooperate to solve the issue through the mail or over the phone.

#### **5.5 Mitigation of Damage**

Mitigation of damage means the plaintiff must “make reasonable efforts to lessen damages.”<sup>1257</sup> Such efforts can be actions to lessen damage or negatively by the omission of acts that increase the damage.<sup>1258</sup> The effect of mitigation of damage is to reduce the

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<sup>1254</sup> *Id.*

<sup>1255</sup> BLACK’S LAW DICTIONARY, *supra* note 163.

<sup>1256</sup> *City Nat’l Bank of Charleston v. Wells*, 384 S.E.2d 374, 383, 385 (W. Va. 1989) (“In sum, we conclude that the plaintiff’s evidence of losses due to an impaired credit rating satisfies all the requirements of consequential damages recoverable under the UCC” and “To recover consequential damages, the buyer must establish: (1) causation, (2) foreseeability, (3) reasonable certainty as to amount, and (4) that he is not barred by mitigation doctrines.”).

<sup>1257</sup> FISCHER, *supra* note 1232, at 62.

<sup>1258</sup> *Id.*

recovery of the plaintiff.<sup>1259</sup> Not mitigating damage may result in severing causation between defendant acts and the ultimate outcome.

Under one approach, mitigation of damage is not an applicable doctrine in credit reporting damage. One court stated the court “has been unable to locate any FCRA cases addressing a consumer's duty to mitigate damages.”<sup>1260</sup> Although the court found no precedent, the mitigation of damage doctrine should apply as fairness and justice require. Another court held that “failure of the consumer to mitigate his damages ... should have a “bearing [only] on the [calculation of] damages.”<sup>1261</sup>

One commentator believes that mitigation of damage should not apply because “requiring mitigation would interfere with fulfillment of the statutory purpose behind the provision.”<sup>1262</sup> This argument can be rebutted by stating the defendant is responsible only for the damage he caused. He is not responsible for additional damage caused by plaintiff's refrainment from mitigating damage.

## **5.6 Recovering Damage under Islamic Law**

Damage issues include damage resulting from intentional and non-intentional acts. Damage under Islamic law is discussed under different categories, but mostly under criminal law in regard to bodily harm and under civil liability in regard to destruction, usurping of real estate or personal properties.<sup>1263</sup>

### **5.6.1. Conditions for Recoverability of Damage:**

Islamic scholars provide conditions for recoverability of damage as follows.

#### **1- First Condition: Certainty of Right**

The protected right or interest (body, mental status, money, etc.) must be certain to be achieved but for the negligence. If the right is not certain to be attained, such as uncertain future profit, then damages cannot be recovered because attainment is doubtful. For example, when “A” hits “B's” truck and causes “B's” business to stop, “A” is not liable for lost profit of “B” because realization of the profit is not certain. “B” may lose, the goods may be destroyed, or the market price may drop. Even without “A's” negligence, “B” may not accomplish the profit. It is possible that “B” benefits from the delay of his business by the increase of prices.<sup>1264</sup> However, if the right is certain to be accomplished, then damage is recoverable.<sup>1265</sup> For instance, if “A” causes the electricity of “B's” building to stop for a week and tenants of that building terminate their contracts because of it, such damage is recoverable as the protected right is certain. If there is no harm at all, then there is no remedy even though the defendant breaches a duty.<sup>1266</sup>

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<sup>1259</sup> *Id.* at 63.

<sup>1260</sup> *Graham*, 306 F. Supp. 2d, at 880.

<sup>1261</sup> *Hyde v. Hibernia Nat. Bank in Jefferson Parish*, 861 F.2d 446, 450 (5th Cir. 1988).

<sup>1262</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 480.

<sup>1263</sup> ALMARZOQI, *supra* note 9, at 200.

<sup>1264</sup> *Id.* at 195.

<sup>1265</sup> *Id.* at 196.

<sup>1266</sup> American law has a similar rule known as “Offsetting Benefits Rule”. FISCHER, *supra* note 1232, at 72.

## 2- Second Condition: Damage must be Real

Damage to the protected interest must be real harm in order to be recovered. Harm is not considered real in three cases.

First, harm is not real when, from the act of defendant, the plaintiff receives a benefit that equals or exceeds the harm inflicted.<sup>1267</sup> For instance, when a witness testifies falsely that “A” owes \$1000 to “B”, requiring “A” to pay \$1000 is harm. However, when “B” releases “A” of the payment for free, “A” suffers no monetary damages.

Second, harm must not be certain to happen regardless of defendant’s negligence. For instance, if a cow is going to die soon because it is sick, the shepherd is not liable if he slaughters the cow.<sup>1268</sup> However, he is not allowed to eat the meat, because the meat is the property of the owner. This rule applies only to properties and does not apply to persons. Therefore, a person cannot kill a dying person contending that the person is going to die anyway.<sup>1269</sup>

Third, the result of the defendant’s act must not be the same intended result of the plaintiff.<sup>1270</sup> For example, if “A” hits a wall and causes it to collapse, “A” is not liable for that wall if the plaintiff was planning to destroy it. This rule does not apply if the result is the same but the time or the manner of destruction matters. An example would be if the plaintiff needed the wall for an extra month or he wanted to use the materials of the wall but the defendant caused them to be destroyed.

## 3- Third Condition: Interest must be Protected, Valuable, and Measurable

The interest (human body, human mentality, or property) must be protected, valuable and measurable.<sup>1271</sup> First, some properties are not protected *per se* under Islamic law such as alcohol<sup>1272</sup> and pork. Therefore, destruction of such items, although it is punishable,<sup>1273</sup> does not entail liability, according to the strongest opinion.<sup>1274</sup> Similarly, destruction that results from self-defense is not protected.<sup>1275</sup> When a person defends himself reasonably and destroys a property of the transgressor, he is not liable for the destruction of the transgressor’s property. Likewise, reasonable destruction of the property of a fugitive in the course of pursuing him is not protected.<sup>1276</sup> Also, when the property is placed in a location in an illegal way, the property is not protected.<sup>1277</sup> For instance, if “A” puts a kiosk in the middle of the street against the law, “B” is not liable when he hits the kiosk.

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<sup>1267</sup> American law has a similar rule known as “Special Benefits Rule”. FISCHER, *supra* note 1232, at 73.

<sup>1268</sup> A cow or the like must be slaughtered in order to be permissible to be eaten. If it dies itself without slaughtering, its meat is not lawful. Therefore, the shepherd saved the property of the owner by slaughtering the cow and making it lawful.

<sup>1269</sup> ALMARZOQI, *supra* note 9, at 200.

<sup>1270</sup> *Id.* at 202.

<sup>1271</sup> MUHAMMAD ALDOSARI, CIVIL LIABILITY PREVENTIVES AND ITS JUDICIAL APPLICATIONS 283 (1<sup>st</sup> edition, Ashbilia Treasures House, 2010); MUHAMMAD ABU SAQ, REMEDIES OF TORT IN ISLAMIC JURISPRUDENCE, at 177 (1<sup>st</sup> edition 1999); WAHBA AL-ZUHAYLI, LIABILITY THEORY 57-58 (8<sup>th</sup> edition, the Intellect House & Modern Intellect House, 2008) (1982).

<sup>1272</sup> The purchase or sale of alcohol is prohibited unless for medical purposes.

<sup>1273</sup> It is punishable if the destruction is without ruler’s permission. The punishment is for usurping the authority of the ruler, but not for the destruction itself.

<sup>1274</sup> ALMARZOQI, *supra* note 9, at 203 (Hanfi school provides liability for the destruction of alcohol and pork if the owner is non-Muslim because a non-Muslim has the right to own them.).

<sup>1275</sup> *Id.*

<sup>1276</sup> *Id.*

<sup>1277</sup> *Id.* at 204.

Second, the interest must be valuable and measurable or damages cannot be recovered.<sup>1278</sup> The interest must have monetary value that can be measured or assessed in the market. Similar to tangible property, there are intangible benefits that have market value such as “residency” of houses, rental time of cars, and the like.<sup>1279</sup> Therefore, Islamic scholars differ in regard to the recoverability of moral damage. Although moral damage is valuable, there is no market to assess such value and it cannot be measured.

### 5.6.2. Emotional Distress under Islamic Law

Islamic scholars differ in regard to the recoverability of moral damage which encompasses emotional distress as follows.

#### A- Moral Damages Are Not Recoverable

The first approach is that moral damages cannot be recovered in a monetary form. This approach relies on the scholars’ understanding of textual evidence from the *Holy Quran* and the traditions of the Prophet. This approach reasons that in many instances Islamic law provides criminal punishment for acts resulting in non-pecuniary losses, but does not provide monetary relief. An example would be the case of an accusation of adultery that is found to be false. Islamic law provides that the accuser should be lashed eighty times.<sup>1280</sup> However, no monetary relief is provided to the accused person even though his reputation is damaged.<sup>1281</sup> In addition, reputation is not something that can be equalized to money, as it has no measurable value.<sup>1282</sup> Moreover, moral damage cannot be measured with certainty; therefore, the punishment is the only solution.<sup>1283</sup>

#### B- Moral Damages Are Recoverable

The second approach is that moral damages are recoverable. This approach relies on understanding of the textual evidence from the *Holy Quran*, the traditions of the Prophet, and the ruling of scholars as follows.

- A man lent the Prophet dates. The man came before the due date and asked aggressively for the dates back by grasping the clothes of the Prophet. One of the companions of the Prophet said, “If the Prophet agrees I would kill you”. The Prophet said, “Oh Omar, we need other than this. You should command me to repay my debt and you should command him to ask in a good manner for his debt.” The Prophet then asked the companion to pay the same quantity and add him several kilograms to compensate for “frightening” the man.<sup>1284</sup>
- A well-known scholar in the ninth century (805 C.E)<sup>1285</sup> ruled that “pain” is recoverable if the wound leaves no scar.<sup>1286</sup>
- It has been ruled is that “pain” is recoverable if the defendant beat the plaintiff and left no scar.<sup>1287</sup>

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<sup>1278</sup> *Id.* at 203.

<sup>1279</sup> ABU SAQ, *supra* note 1271, at 180-81.

<sup>1280</sup> *Holy Quran* 24:4.

<sup>1281</sup> Abdulaziz AlGasim, Financial Compensation for Moral Damages in Islamic Jurisprudence in Comparison with Modern Law 32 (1997) (Unpublished Master’s thesis), The Higher Judicial Institute, Riyadh, Saudi Arabia.

<sup>1282</sup> *Id.*

<sup>1283</sup> *Id.*

<sup>1284</sup> *Id.*

<sup>1285</sup> Muhammad bin al Hassan Al Shaibani is the pioneer of International Public Law. [http://en.wikipedia.org/wiki/Muhammad\\_al-Shaybani](http://en.wikipedia.org/wiki/Muhammad_al-Shaybani)

<sup>1286</sup> AlGasim, *supra* note 1281, at 33.

- Some scholars ruled that loss of enjoyment of sexual intercourse or loss of enjoyment of food is recoverable.<sup>1288</sup>
- Allowing “punishment” of acts that cause moral damage is an indication that “punishment” by imposing monetary relief is allowed.<sup>1289</sup>
- The second Caliph in the Islamic Caliphate, who was a feared man, was sitting and a barber was trimming the Caliph’s mustache. The Caliph unintentionally frightened the barber who in turn broke wind. The Caliph gave him 40 dirham<sup>1290</sup> as compensation for frightening him, which caused the man to be embarrassed in front of the people by breaking wind.<sup>1291</sup>
- An overwhelming approach in Islamic schools provides compensation for the miscarriage of a pregnant woman that resulted from being summoned by a ruler.<sup>1292</sup>
- It has been ruled that a person who screams at another person, which causes him to die or lose his mind, is liable.<sup>1293</sup>
- When a person is thrown into a well and dies because of sadness, the actor is liable.<sup>1294</sup>

### C- Chosen Approach

The second approach is the strongest, although courts in Saudi Arabia do follow the first approach. Courts are following the classic jurisprudential opinions. However, since the evidence provided by the second approach is convincing and based on authentic sources of the *Holy Quran*, the Prophet’s traditions, companions’ actions, and opinions of classic scholars in different Islamic schools, courts should switch to the second approach. Saudi courts should recognize that compensating some types of emotional distress or moral damages is not a blind following of other legal systems without evidence from the Islamic legal system itself. Compensating some types of damage for emotional distress or moral damages has its roots in Islamic law. The measurement of the emotional distress will be discussed in the seventh chapter.

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<sup>1287</sup> *Id.*

<sup>1288</sup> *Id.* at 90-91.

<sup>1289</sup> *Id.* at 34.

<sup>1290</sup> Dirham is “a unit of currency in several Arab or Berber nations.” <http://en.wikipedia.org/wiki/Dirham>

<sup>1291</sup> AlGasim, *supra* note 1281, at 83; MUSTAFA AL ZARQA, HARMFUL ACT AND LIABILITY THEREFROM; LEGAL STUDY AND DRAFTING ACCORDING TO THE ISLAMIC TEXTS AND JURISPRUDENCE AND IN DISCUSSING JORDANIAN CIVIL ACT 42 (1<sup>st</sup> edition, The Pen House & The Sciences House, 1988).

<sup>1292</sup> ALMARZOQI, *supra* note 9, at 422; AL ZARQA, *supra* note 1291, at 41.

<sup>1293</sup> MUHAMMAD SIRAJ, TORT IN ISLAMIC JURISPRUDENCE 382 (Education for Publishing and Distribution, 1990).

<sup>1294</sup> *Id.*

**Sixth Chapter:**  
**Burden of Proof and Causation**

**6.1. Burden of Proof of Credit Reporting Breaches**

In general, under the FCRA, the CIL, or Islamic law, the burden of proof rests on the plaintiff. The defendant's action presumably does not deviate from the ideal situation. The plaintiff usually claims something contrary to the ideal situation; thus, he must prove the deviation. In credit reporting cases, the plaintiff is required to prove the deviation as a general rule. In all cases, the consumer needs to introduce evidence of the violation. In most cases, the burden of proof remains with the consumer. In other cases, the burden shifts to the CRA after the consumer's introduction of minimal evidence to rebut the negligent or willful violation. In summary, the level of proof differs from one case to another as indicated below.

**6.1.1. Burden of Proof under the FCRA**

A- Burden of Proof under section 1681d(c) and 1681m(c)

Under sections 1681d(c) and 1681m(c), "no person may be held liable for any violation of ... this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance ...".<sup>1295</sup> The consumer is only required to prove the violation, then the burden of proof is shifted to the violator to prove he maintained reasonable procedures to ensure compliance.

B- Reasonableness of Procedure under section 1681e(b)

CRAs are required to maintain a reasonable procedure under section 1681e(b) to ensure maximum possible accuracy. However, courts split on the consumer's required level of proof in order to shift the burden to CRAs.

a- Shift of Burden of Proof Approach

The first approach requires a minimum level of proof. The consumer need only prove the CRA reported inaccurate information in his credit report. The burden then shifts to the CRA to prove its procedure was reasonable. If the CRA proves its procedure was reasonable, the CRA will not be liable. The most important thing is the reasonableness of the procedure, even if such procedure produces inaccurate information.<sup>1296</sup>

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<sup>1295</sup> 15 U.S.C. § 1681d(c); 15 U.S.C. § 1681m(c).

<sup>1296</sup> Cuculich, *supra*, note 439, at 311; *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991) (The court held, "In order to make out a prima facie violation of section 607(b), the Act implicitly requires that a consumer must present evidence tending to show that a credit reporting agency prepared a report containing "inaccurate" information. If he fails to satisfy this initial burden, the consumer, as a matter of law, has not established a violation of section 607(b), and a court need not inquire further as to the reasonableness of the procedures adopted by the credit reporting agency."); *Smith v. HireRight Solutions Inc.*, 711 F. Supp. 2d 426, 433 (E.D. Pa. 2010) (The court stated, "To establish a case of negligent noncompliance with section 1681e(b), a plaintiff must prove: (1) inaccurate information was included in a consumer's credit report; (2) the inaccuracy was due to defendant's failure to follow reasonable procedures to assure maximum accuracy; (3) injury to the consumer; and (4) the consumer's injury was caused by the inclusion of the inaccurate entry."); *Lambert v. Beneficial Mortg. Corp.*, 3:05-CV-05468-RBL, 2007 WL 1309542 at \* 3 (W.D. Wash. May 4, 2007) (The court stated, "In order to make out a prima facie violation under § 1681 e(b), a consumer must present evidence tending to show that a consumer reporting agency prepared a report containing inaccurate information.").

#### b- Inference of Negligence Approach

The second approach is similar, however, under this approach, the burden of proof is not shifted to the CRAs. Rather the case is presented to the finder of fact, who in turn, “may infer from the inaccuracy the defendant failed to follow reasonable procedure.”<sup>1297</sup>

#### c- Proof of Inaccuracy and Unreasonableness Approach

Under the third approach, the consumer needs to prove both the inaccuracy of the information and provide minimal evidence of unreasonableness from which the trier of fact may infer unreasonable procedure of the CRA.<sup>1298</sup> The evidence needs not to be direct; circumstantial evidence is sufficient.<sup>1299</sup> The courts reasoned that Congress shifted the burden of proof to the CRAs in two of the FCRA sections; therefore, when the burden of proof is not shifted under section 1681e(b), it means that the burden remains with the consumers.<sup>1300</sup>

Under the first and second approach, the consumer is required only to show inaccuracy of information in his credit report, then the burden will be shifted to the CRA or the case will be presented to the trier of fact who may or may not infer unreasonableness of the procedure. Under the third approach, the consumer needs to prove inaccuracy of information in addition to minimal evidence of unreasonableness in which trier of fact may or may not infer reasonableness.

#### C- Burden of Proof under USA PATRIOT Act

Burden of proof becomes more important with the anti-terrorism “USA PATRIOT Act” which allows the government to access credit information more easily. Two main issues may arise. First, a CRA will face flood of suits for supplying private credit information to governmental agencies. Second, more people will invade consumers’ privacy.<sup>1301</sup> Accordingly, one commentator asserts courts should consider proving the existence of inaccurate information in the CRA records as a satisfaction of the burden of proof shouldered upon them.<sup>1302</sup>

One commentator noted the burden of proof, “that credit reporting agency did not follow a reasonable procedure”, on the plaintiff is a difficult standard to meet. Its difficulty stems from the costly discovery stage. The plaintiff cannot afford cases where the potential

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<sup>1297</sup> *Robertson v. Experian Info. Solutions Inc.*, CIV 1:CV-09-0850, 2010 WL 1643579 at \* 4 (M.D. Pa. Apr. 22, 2010) (The court discussed three possible standards which this approach is one of them stating, “Under the most stringent standard, the burden of proof remains with the plaintiff to “produce some evidence beyond a mere inaccuracy in order to demonstrate the failure to follow reasonable procedures.”).

<sup>1298</sup> *Dalton v. Capital Associated Indus. Inc.*, 257 F.3d 409, 416 (4th Cir. 2001) (The court held, “Nothing in the statute suggests that a plaintiff is relieved of the burden of showing that the agency failed to follow reasonable procedures.”).

<sup>1299</sup> *Stewart v. Credit Bureau Inc.*, 734 F.2d 47, 52 (D.C. Cir. 1984) (The court held, “Under this standard a plaintiff need not introduce direct evidence of unreasonableness of procedures: In certain instances, inaccurate credit reports by themselves can fairly be read as evidencing unreasonable procedures, and we hold that in such instances plaintiff’s failure to present direct evidence will not be fatal to his claim.”).

<sup>1300</sup> *Dalton*, 257 F.3d, at 416 (The court held, “Indeed, § 1681e(b) stands in contrast to two other FCRA sections [1681d(c) and 1681m(c)], in which Congress explicitly places the burden on the consumer reporting agency to show the reasonableness of its procedures when it seeks to avail itself of liability exemption provisions ... Therefore, we hold that the plaintiff bears the burden under § 1681e(b) to show that the consumer reporting agency did not follow reasonable procedures.”).

<sup>1301</sup> Cuculich, *supra* note 439, at 314.

<sup>1302</sup> *Id.* at 306.



outcome is less than the expenses.<sup>1303</sup> However, he admits the court cannot disregard the well-settled rule of placing the burden on the plaintiff.

Individual privacy has a fundamental value that cannot be compromised.<sup>1304</sup> Enactment of USA PATRIOT Act mean a CRA will be less concerned in distributing consumer credit information to more people and the government itself will have less incentive to enforce the laws against the CRA. Simply put, consumers become more vulnerable.

The commentator asserts that national security is important, but consumer privacy is also important. He proposes that a balance between the interests of the states and the invasion of privacy can be achieved. His compromise is to ease the burden of proof, so the consumer need only prove the existence of inaccurate information to satisfy a prima facie case without further requiring him to prove the unreasonable procedure.<sup>1305</sup> The endless financial means of a CRA facing the weak consumer constitutes an imbalance in power. The CRA is in a better position to rebut the plaintiff's claim of unreasonableness, thus, they should bear the burden of proof.<sup>1306</sup> The commentator assures that by taking such steps, the liberties of consumers will be protected.<sup>1307</sup> Even though I agree with the author in the outcome, I do not see any reason to link the easing of the burden of proof to the new anti-terrorism acts unless he is asking for the easing of the burden of proof in exchange for the loss of privacy even though they are unrelated.

#### **6.1.2. Burden of Proof of Violations under the CIL and Islamic law:**

The CIL does not provide information as to the burden of proving credit reporting violations. Islamic law governs many aspects of substantive Saudi law, including proof issues.

Under Islamic law, the burden of proof rests on the plaintiff. The Prophet said, "*If the people were given according to their claims, they would claim the lives of persons and their properties, but the oath must be taken by the defendant.*"<sup>1308</sup> In another narration of the tradition, the Prophet said the same with the addition, "*but the evidence is on the plaintiff and the oath must be taken by the defendant*".<sup>1309</sup> The plaintiff "*Mudai*" is the person who claims something contrary to the apparent fact, while the defendant "*Mudaa alih*" is the person who holds to the apparent fact and denies the claim.<sup>1310</sup> The tradition requires that the plaintiff introduce evidence to prove his claim, while the defendant is required to rebut the evidence. If the plaintiff has no proof, then the defendant is required to take an oath, upon the plaintiff's request, that what the plaintiff claims is not true.

However, the burden of proof is not upon the plaintiff in every stage of the lawsuit. The burden is upon the person who claims something contrary to the apparent fact. Any party to the lawsuit may become the "plaintiff" or "defendant" in different stages of the lawsuit and bear the burden of proof. The "defendant" becomes "plaintiff" when he claims something contrary to the apparent fact. For example, when "A" claims that "B" owes him a debt and

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<sup>1303</sup> *Id.* at 319.

<sup>1304</sup> *Id.* at 321.

<sup>1305</sup> *Id.* at 323.

<sup>1306</sup> *Id.*

<sup>1307</sup> *Id.* at 324.

<sup>1308</sup> MUSLIM BIN AL-HAJJAJ, *supra* note 3, 18/4244.

<sup>1309</sup> AHMED ALBAIHAQI, ALSUNAN ALKUBRA, Claims and Evidence Chapter, Tradition No. 1914 (Muhammad Abdulqadir, Scientific Books House, 3<sup>rd</sup> ed., 2003).

<sup>1310</sup> ABDULRAHMAN IBN RAJAB, COLLECTION OF KNOWLEDGE AND WISDOMS 2/226 (JAMI ALULUM WA ALHIKM) (Sha'ib Alarnaoot & Sha'ib Bagis eds., The Message House, 7<sup>th</sup> ed. 2001).

“B” admits the debt but claims that he repaid it, the burden of proving the payment is shifted to “B” because he claims something contrary to the proven fact.

If the FCRA approaches were followed in Islamic courts, then the consumer would be the plaintiff in all cases. Thus, he is required to prove the violations, because the consumer claims something contrary to the apparent fact. The CRAs, furnishers, or users of information are defendants because they hold to the apparent fact that no violation occurred and deny the consumer’s claims.

A violation can be proven by any method.<sup>1311</sup> If “unreasonableness” is an element of the violation, then the consumer needs to prove it without shifting the burden to the defendant, because the proof burden is not shifted unless the consumer satisfies the initial burden. If “unreasonableness” is not an element of a violation, then reasonableness is an affirmative defense. If the plaintiff has no proof at all, the case will not be dismissed, but the defendant is asked, upon the plaintiff’s request, to take an oath that he is not liable. Oath is given a great weight in Islam because of its serious consequences. The Prophet said **“Whoever takes a false oath to deprive somebody of his property will meet Allah while He will be angry with him”**.<sup>1312</sup> If the defendant refuses to take an oath, the scholars split on that issue. The first approach is that the plaintiff is allowed to take a “returned oath” which means the plaintiff takes an oath that the defendant is liable and a verdict will be issued in his favor. The second approach is that a verdict will be issued in the plaintiff’s favor without taking a returned oath.<sup>1313</sup>

The burden of proof can be shifted to the defendant under Islamic law if the defendant is a common contractor.<sup>1314</sup> A common contractor is a person who provides services for different clients and is not an exclusive contractor for any specific client.<sup>1315</sup> In the case of a common contractor, scholars dispute whether the burden shifts to the defendant or stays with the plaintiff. The first approach is that the burden of proof stays with the plaintiff as the general rule.<sup>1316</sup> The second approach is the burden of proof shifts to the defendant because he is in a best position to prove his reasonable act. A plaintiff would have a heavy task if he were required to prove something he has no way to know.<sup>1317</sup> If the defendant fails to prove reasonableness, then he is liable, because negligence is presumed.<sup>1318</sup> For instance, when a CRA makes a mistake, the consumer has no way to prove the CRA was negligent in the furnishing of the information. Therefore, it is unfair to ask the consumer to prove the negligence of the CRA. Rather the CRA should have the burden to prove his reasonableness.

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<sup>1311</sup> Proof methods in civil cases under Islamic law are testimony of third parties (two witnesses), testimony of one witness and oath of plaintiff, defendant’s acknowledgment, writing, plaintiff’s returned oath if defendant refuses to take an oath, knowledge of the judge about the dispute, and circumstantial evidence.

<sup>1312</sup> AL-BUKHARI, *supra* note 3, Volume 3, 40/546. The narrator said: “I had a well in the land of a cousin of mine. The Prophet asked me to bring witnesses (to confirm my claim). I said, ‘I don’t have witnesses.’ He said, ‘Let the defendant take an oath then.’ I said, ‘O Allah’s Apostle! He will take a (false) oath immediately.’ Then the Prophet mentioned the above narration ...”.

<sup>1313</sup> MUHAMMAD ALZUHAILI, *PROOF METHODS IN ISLAMIC JURISPRUDENCE* 389 (Dar Albyan Library, Damascus, 1<sup>st</sup> ed. 1982)

<sup>1314</sup> AL ZARQA, *supra* note 1291, at 51.

<sup>1315</sup> SIRAJ, *supra* note 1293, at 120.

<sup>1316</sup> *Id.*

<sup>1317</sup> *Id.*

<sup>1318</sup> *Id.* at 122.

## 6.2. Burden of Proof of Credit Reporting Damage

As detailed previously, under the FCRA, the CIL, or Islamic law, the burden of proof rests on the plaintiff. The plaintiff is required to introduce sufficient evidence to prove the damages he suffered.<sup>1319</sup>

### 6.2.1. Burden of Proof under the FCRA

As a general rule, a consumer needs to prove damages that result from a violation of the FCRA. However, in emotional distress claims, courts split over what constitutes sufficient proof of damage.

#### A- Proof of Emotional Distress

Proof of emotional distress under the FCRA is different from common law negligent infliction of emotional distress.<sup>1320</sup> Thus, the *Physical Impact* rule<sup>1321</sup> does not apply to FCRA cases.<sup>1322</sup> Courts split over whether the plaintiff must provide evidence of genuine injury or if he can meet the burden by providing his own testimony.

##### a- Only Plaintiff Testimony

If the proof of emotional distress is only plaintiff testimony, the testimony cannot be a conclusory statement. The testimony must be accompanied with a reasonably detailed explanation of the circumstances of the injury.<sup>1323</sup> Nevertheless, the requirement of a reasonably detailed explanation is waived when the defendant's act is inherently degrading action. Some acts reasonably suggest the plaintiff's suffering or distress even without having testimony.<sup>1324</sup> For example, in a house discrimination case, a court awarded emotional distress damage based only on the plaintiff's testimony and held that "... on top of the racial discrimination, those cases involved the inevitable disappointment and frustration involved in being unable to obtain housing".<sup>1325</sup>

##### b- Other Evidence

Other evidence includes the injured party's conduct and other people's observations.<sup>1326</sup> The proof may be in the form of "expert medical or psychological evidence of damages ...

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<sup>1319</sup> *Robinson*, 560 F.3d, at 240 (The court stated, "In this case, Robinson bears the burden of proving actual damages sustained as a result of Equifax's activities.").

<sup>1320</sup> *Levine*, 437 F.3d, 1124 (The court held, "requirements for a *prima facie* claim for the negligent infliction of emotional distress are dissimilar from the requirements for a *prima facie* claim that a credit reporting agency provided a credit report to a third party for an impermissible purpose in willful violation of FCRA. For the latter claim, which is defined by statute, the existence of compensable emotional distress is relevant to the amount of damages a plaintiff will ultimately recover, not to whether an individual has adequately stated a *prima facie* claim". [Emphasis added in original]).

<sup>1321</sup> BLACK'S LAW DICTIONARY, *supra* note 163 (Defines, "The common-law requirement that physical contact must have occurred to allow damages for negligent infliction of emotional distress").

<sup>1322</sup> *Levine*, 437 F.3d, at 1124.

<sup>1323</sup> *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 971 (7th Cir. 2004) (The court cited a previous holding, "We have required that when 'the injured party's own testimony is the only proof of emotional damages, he must explain the circumstances of his injury in reasonable detail; he cannot rely on mere conclusory statements.'").

<sup>1324</sup> *Kronstedt*, 2001 WL 34124783, at \*12 (The court cited another case that stated, "more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress.").

<sup>1325</sup> *United States v. Balistrieri*, 981 F.2d 916, 932 (7th Cir. 1992).

<sup>1326</sup> *Cousin*, 246 F.3d, at 371.

[such as] sleeplessness, anxiety or depression.”<sup>1327</sup> The proof must be certain; therefore, the U.S. Supreme Court held that “...neither the likelihood of such injury nor the difficulty of proving it [emotional distress] is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”<sup>1328</sup>

For instance, a consumer met the emotional distress burden of proof by showing “headaches, sleeplessness, skin acne, upset stomach, and hair loss.”<sup>1329</sup> In addition, her co-worker testified that “in response to her continued problems with Equifax, Robinson “would be crying” and “screaming” and often she was “upset ... [and] stressed.”<sup>1330</sup>

### **6.2.2. Burden of Proof of Damage under the CIL and Islamic law:**

As discussed earlier,<sup>1331</sup> the burden of proof rests on the party who claims something contrary to the apparent fact as a general rule.

Under Islamic law, the consumer who claims that he suffered damages is the plaintiff and is required to prove the damages. The reason is that the consumer claims something contrary to the apparent fact. The CRAs, furnishers, or users of information are defendants because they hold to the apparent facts that no damages occurred and deny consumer’s claims.

Proof of damages can be through any method.<sup>1332</sup> If the plaintiff has no proof at all, the case will not be dismissed, but the defendant is asked, upon the plaintiff’s request, to take an oath as stated earlier.<sup>1333</sup> If he refuses to take an oath, the plaintiff is allowed to take a “returned oath” or a verdict will be issued in the plaintiff’s favor without taking a returned oath.<sup>1334</sup>

Under Islamic law, the plaintiff is not considered to be one who can provide testimony and the plaintiff is not considered a witness. Testimony under Islamic law is defined as “one’s telling of a right for a person against another person in the place of adjudication.”<sup>1335</sup> Thus, testimony must serve the interest of another person but cannot serve the interest of the testifier himself. Regardless of the dispute among Islamic schools on the recognition of “emotional distress” recoverability, self-serving testimony cannot serve as basis for recovering damages.

Moreover, one testimonial condition is that the witness must not have an interest in the testimony either to obtain benefits or to avoid hardship.<sup>1336</sup> Therefore, scholars dispute whether to accept or reject testimony of some people because of the probability of the existence of interest. For example, a close familial relationship is a reason to reject testimony under one approach.<sup>1337</sup> Similarly, enmity or being an adverse party is another reason to

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<sup>1327</sup> *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 939 (5th Cir. 1996).

<sup>1328</sup> *Carey v. Piphus*, 435 U.S. 247, 264 (1978).

<sup>1329</sup> *Robinson*, 560 F.3d, at 241.

<sup>1330</sup> *Id.*

<sup>1331</sup> *See* p. 184.

<sup>1332</sup> Under Islamic law the testimony of third parties (two witnesses), testimony of one witness and oath of plaintiff, defendant’s acknowledgment, writing, plaintiff’s returned oath if defendant refuses to take an oath, knowledge of the judge about the dispute (under one approach), and circumstantial evidence are all methods of proof in civil cases.

<sup>1333</sup> *See* p. 184.

<sup>1334</sup> ALZUHAILI, *supra* note 1313, at 389.

<sup>1335</sup> *Id.* at 104.

<sup>1336</sup> *Id.* at 130.

<sup>1337</sup> *Id.* at 130-31 (For instance, there are three approaches to deciding whether to accept testimony of a son or daughter for the interest of the father or the mother and vice versa. The first approach is that neither is accepted. The second approach is that testimony of the son or daughter for the father or mother’s interest is accepted but

reject testimony.<sup>1338</sup> Finally, when the witness has an interest in his testimony, it is not accepted, such as a partner's testimony for his partner in regard to the shared assets of both.<sup>1339</sup>

One of the proof methods under Islamic law is strong circumstantial evidence. The strength of circumstantial evidence is an objective test.<sup>1340</sup> Circumstantial evidence ranges from decisive circumstantial evidence to weak.<sup>1341</sup> Only decisive or strong circumstantial evidence is accepted, although it can be rebutted.<sup>1342</sup> For example, when a person is caught in front of a house with bloody knife and a murdered person is found in that house, it is decisive circumstantial evidence that he is the murderer. However, this evidence can be rebutted by proving that the blood is not human blood and that the person is an animal butcher who stopped in front of the house coincidentally. Thus, a judge can rule in favor of a plaintiff if the decisive or strong circumstantial evidence is unrebutted.

The burden of proof can be shifted to the defendant under Islamic law if the defendant is a common contractor according to one approach as stated earlier.<sup>1343</sup>

### 6.3. Causation

#### 6.3.1. Causation under US law

Causation is defined as “the causing or producing of an effect”.<sup>1344</sup> Causation is often “addressed as certainty that the loss or damages ... resulted from injury.”<sup>1345</sup> Causation is one of the most complex areas of law, because cause can produce more than one effect, and effect can be attributed to more than one cause.<sup>1346</sup>

In the context of credit reporting damages, the plaintiff is required to prove the violation of the FCRA is the cause in fact of the damages.<sup>1347</sup> To allow recovery on the speculation that the violation may cause the damage would, “make the FCRA completely overflow the boundaries of causation.”<sup>1348</sup> Causation is not required to be certain, thus, mere inference is enough.<sup>1349</sup> The plaintiff must prove it is more likely than not the future losses will occur to

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not the opposite. The third approach is that it is accepted so long so the witness is impartial and virtuous. The same debate exists in regard to accepting spouse's testimony for the interest of the other. However, brothers, sisters, and uncle's testimonies are accepted in the dominant view.).

<sup>1338</sup> *Id.* at 131.

<sup>1339</sup> *Id.*

<sup>1340</sup> *Id.* at 491.

<sup>1341</sup> *Id.* at 493.

<sup>1342</sup> *Id.* at 517.

<sup>1343</sup> AL ZARQA, *supra* note 1291, at 51. *See* page 186.

<sup>1344</sup> BLACK'S LAW DICTIONARY, *supra* note 163.

<sup>1345</sup> FISCHER, *supra* note 1232, at 102.

<sup>1346</sup> *Id.* at 107.

<sup>1347</sup> *Johnson*, 558 F. Supp. 2d, at 1122 (The court held, “Plaintiff bears the burden of proving that his damages were, in fact, caused by Defendant's violation.”); *Lewis*, 248 F. Supp. 2d, at 701 (The court held, “To prevail on a claim for actual damages under the FCRA, Plaintiff must prove that Defendants' violation of the Act caused him injury.”).

<sup>1348</sup> *Myers*, 238 F. Supp. 2d, at 1204 (The court denied plaintiff claim for the lack of proof and causation. The court stated, “Specifically, Plaintiff Samuel Myers' assertion that he was damaged because he may not have received pre-screen promotions is entirely speculative and without merit [and] ... would make the FCRA completely overflow the boundaries of causation.”); FISCHER, *supra* note 1232, at 108.

<sup>1349</sup> *Philbin*, 101 F.3d, at 968 (3d Cir. 1996) (The court held, “We deem it sufficient that, as with most other tort actions, a FCRA plaintiff produce evidence from which a reasonable trier of fact could infer that the inaccurate entry was a ‘substantial factor’ that brought about the denial of credit.”).

recover them.<sup>1350</sup> This causal relationship is not required if the damages claimed are attorney's fees or punitive damages.<sup>1351</sup> In addition, proof of causation is not required when there is no actual damage at all, as when the plaintiff seeks statutory or nominal damages.

The following are standards used to establish causation. However, every standard depends on the type of the alleged violation and to whom the burden of proof is allocated.

#### A- "But For" Test

Some courts apply the "but for" test to establish causation between a violation of the FCRA and the damages. The consumer needs to "show that the harm would not have occurred absent" the violation of the FCRA.<sup>1352</sup> When there is more than one cause that contributes to the damages, it is difficult for the plaintiff to prove that only these causes were responsible for the harm. In that event, the courts apply the "substantial factor" test to establish causation.

#### B- "Substantial Factor" Test

When there is more than one possible cause, the consumer may meet his burden of proof that a causal relationship exists between the violation and the damage by producing "evidence from which a reasonable trier of fact could infer that the inaccurate entry was a 'substantial factor' that brought about" the damages.<sup>1353</sup> For instance, one court held that although the lender gave no reason for the denial of credit, the absence of accurate information could lead the trier of fact to infer that inaccurate information was a substantial factor in the denial of the credit.<sup>1354</sup> The consumer "need not eliminate the possibility that 'correct adverse entries or any other factors' also entered into the decision to deny credit."<sup>1355</sup> If the violation of the FCRA is not, by itself, sufficient to produce the damage but it can produce the damage with another factor, "each [factor] may then be considered a substantial factor in bringing about the denial of credit and therefore a cause of plaintiff's injury."<sup>1356</sup> The courts under this approach consider it "inappropriate to saddle a plaintiff with the burden of proving that one of those factors was *the* cause of the decision."<sup>1357</sup> (Emphasis in original).

#### C- "Res Ipsa Loquitur" Test

Under one courts' approach, the *Res Ipsa Loquitur* rule<sup>1358</sup> may be used to establish causation between the violation of the FCRA and the damages. In one of the decisions, a court held that the burden of proof is not shifted to CRAs but rather the case may be presented to the finder of fact, who in turn, may infer from the inaccuracy that the defendant

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<sup>1350</sup> FISCHER, *supra* note 1232, at 109.

<sup>1351</sup> *Lewis*, 248 F. Supp. 2d, at 701 (The court held, "other forms of damages such as attorneys' fees and punitive damages may be available even if Plaintiff cannot prove a causal link between Defendants' violations of the act and Plaintiff's other damages.").

<sup>1352</sup> *Philbin*, 101 F.3d, at 966; *Lee v. Experian Info. Solutions*, 2003 WL 22287351 at \*6 (N.D. Ill. 2003) ("it appears that it concluded that Philbin could not show that the inaccurate information was the "but for" cause of his injury, because he could not show that the harm would not have occurred absent the inaccurate entry").

<sup>1353</sup> *Philbin*, 101 F.3d, at 968.

<sup>1354</sup> *Id.*

<sup>1355</sup> *Id.* at 969.

<sup>1356</sup> *Id.*

<sup>1357</sup> *Id.*

<sup>1358</sup> BLACK'S LAW DICTIONARY, *supra* note 163 (Defines, "The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence that establishes a prima facie case").

failed to follow reasonable procedure.<sup>1359</sup> Under this approach, the inaccuracy has been caused by an instrumentality under the exclusive control of the defendant. Such a defendant is in a far better position to prove that reasonable procedures were followed than a plaintiff is to prove the opposite.<sup>1360</sup>

### **6.3.2. Severing of Causation**

Causation between the FCRA violation and damages may be severed by an act of the plaintiff himself or by an act of another. In that case, the plaintiff cannot recover the damages because he cannot prove that his damages were caused by the defendant's act.

#### **A- Intervening Cause**

Intervening cause is “[a]n event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury.”<sup>1361</sup> This intervening cause does not break the chain of causation if the intervening cause is foreseeable. Thus, one court held that the CRA is liable because of its violation of the FCRA even though the direct injury was a result of identity theft. Identity theft was an intervening cause but not a superseding one.<sup>1362</sup>

#### **B- Superseding Cause**

Superseding cause is “An intervening act or force that the law considers sufficient to override the cause for which the original tortfeasor was responsible, thereby exonerating that tortfeasor from liability.”<sup>1363</sup> This superseding cause can be from the plaintiff himself or from third parties.

##### **a- Plaintiff's Superseding Cause**

For instance, a court held that the “Plaintiff cannot recover for the injury under § 1681i because Plaintiff cancelled the Coventry Home contract ... more than two weeks before Equifax's 30-day reinvestigation period expired ...”<sup>1364</sup> The act of the plaintiff's “cancelation” of the contract is the cause of the loss he suffered. Although errors in his credit report would cause adverse action against him, his cancelation of the contract served as superseding cause. Similarly, one court held that causation between a plaintiff's damages that resulted from a third party's knowledge of her credit report and the CRA's violation of the FCRA was severed when the plaintiff “voluntarily informed a potential creditor she was the victim of identity theft when applying for a home mortgage.”<sup>1365</sup>

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<sup>1359</sup> *Robertson*, 2010 WL 1643579 at \*4 (The court discussed three possible standards. This approach states, “Under the most stringent standard, the burden of proof remains with the plaintiff to ‘produce some evidence beyond a mere inaccuracy in order to demonstrate the failure to follow reasonable procedures.’”).

<sup>1360</sup> *Philbin*, 101 F.3d, at 965.

<sup>1361</sup> BLACK'S LAW DICTIONARY, *supra* note 163.

<sup>1362</sup> *Lambert v. Hartman*, 517 F.3d 433, 438 (6th Cir. 2008).

<sup>1363</sup> BLACK'S LAW DICTIONARY, *supra* note 163.

<sup>1364</sup> *Acton*, 293 F. Supp. 2d, at 1100.

<sup>1365</sup> *Field v. Trans Union LLC*, 2002 WL 849589 at \*5 (N.D. Ill. 2002).

### b- Third Parties' Superseding Cause

When the damages result from an outside cause, such as from “market fluctuation”, the outside cause supersedes the negligence of the defendant.<sup>1366</sup> In another case, a court found that plaintiff’s mental anguish is not attributable to the defendant’s action because of a third party’s act. Therefore, the causal relation is severed.<sup>1367</sup> Similarly, when the credit report that caused denial of credit was obtained from a third party other than the defendant, an intervening cause superseded the causal link between the violation of the FCRA and the damages.<sup>1368</sup> Finally, damages may be a result of identity theft which serve as a superseding cause to the defendant’s negligence,<sup>1369</sup> unless the identity theft resulted naturally from the defendant’s negligence.<sup>1370</sup>

### 6.3.3. Causation under Islamic Law

To establish liability under Islamic law, the plaintiff must prove causation between the damages and the violation.<sup>1371</sup> Causation includes acts that cause damages directly, and acts that cause the damages indirectly.<sup>1372</sup> For example, when “A” hits “B” with a stick, “A’s” act is the direct cause in fact of the injury. Similarly, when “A” throws “B” in a lion’s cage, although the lion is the direct cause of injury to “B”, “A’s” act is an indirect cause of “B’s” injury. The general rule is the direct actor is liable for damages even if he has no intent to cause it.<sup>1373</sup>

Islamic schools differ concerning the exact meaning of “causation” if there is an intervening act between the act and the result.

#### A- Cause and Reason Approach

One approach differentiates between “reason” and “cause.” The first act is the “reason” while the intervening act is the “cause”. However, if the “cause” is a voluntary act of a human, animal, or bird, then the actor is not liable. For instance, when “A” opens the cage of a bird and the bird flies away, opening the cage is “reason” of loss but flying is the “cause” of the loss.<sup>1374</sup> If the “cause” depends on the “reason”, then the actor is liable. For example, when “A” drives a horse and the horse steps and smashes something, even though the “cause” of damage is stepping on the property, the driver is liable because the “cause” (stepping) is a result of the “reason” (driving the horse).<sup>1375</sup> If the “cause” does not depend on the “reason”, then the actor is not liable. For instance, when “A” puts a flaming coal in

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<sup>1366</sup> *Caltabiano v. BSB Bank & Trust Co.*, 387 F. Supp. 2d 135, 141 (E.D.N.Y. 2005) (The plaintiff “... has already stated the interest rate was higher because of interest rate market fluctuation and not his credit report.”).

<sup>1367</sup> *Stevenson*, 987 F.2d, at 296 (However, the court found other bases for mental anguish awards.).

<sup>1368</sup> *County Vanlines Inc. v. Experian Info. Solutions Inc.*, 205 F.R.D. 148, 154 (S.D.N.Y. 2002) (However, if the case is defamation, then the original defendant is not absolved because the last statement of defamation is no better than the first one. The court pointed out, “Although defendant may have obtained erroneous information from a third party, this fact alone would not absolve defendant of liability in a defamation suit ... the courts have said many times that the last utterance may do no less harm than the first, and that the wrong of another cannot serve as an excuse to the defendant.”).

<sup>1369</sup> *Field*, 2002 WL 849589 at \*6 (“However, Field fails to produce evidence her emotional distress and her need for therapy were specifically caused by CSC’s failure to reinvestigate or adopt reasonable procedures.”).

<sup>1370</sup> *Lambert*, 517 F.3d, at 438.

<sup>1371</sup> SIRAJ, *supra* note 1293, at 204.

<sup>1372</sup> ALMARZOQI, *supra* note 9, at 214-215; ALDOSARI, *supra* note 1271, at 322.

<sup>1373</sup> ABU SAQ, *supra* note 1271, at 52.

<sup>1374</sup> SIRAJ, *supra* note 1293, at 220.

<sup>1375</sup> *Id.* at 219.



the street and the wind carries it to “B’s” property, “A” is not liable because the wind is the cause of carrying the flaming coal.<sup>1376</sup>

#### B- Reasonable Cause Approach

The dominant approach requires only that the act causes the result in regular circumstances. However, the actor will be released from liability if he acts reasonably, because occurrence of harm with reasonable care is rare.<sup>1377</sup> For instance, when “A” opens the cage of a bird and the bird flies away, he is liable because it is foreseeable that the bird would fly when the cage is opened.<sup>1378</sup> Under this approach, the actor is still liable for his act even if an act of another intervenes. For instance, when “A” chases “B” with a knife and “B” starts running and hits another person, “A” is liable for the act of “B” because it is foreseeable that scared person being chased would do that.<sup>1379</sup>

The following points are based on both approaches. Scholars in the first approach sometimes share the same ruling on issues with the dominant approach even though they have different reasoning.

### 6.3.4. Severing of Causation

#### A- Intervening Cause

Islamic law does recognize “intervening cause” and divides it into two categories: plaintiff’s intervening cause and outsider’s intervening cause.

##### a- Plaintiff’s Intervening Cause

Plaintiff’s intervening cause supersedes the defendant’s act in the following scenarios.

##### 1- Plaintiff’s Assumption of Risk

If the plaintiff exposes himself to risk of a condition created by the defendant with knowledge of the condition, the defendant is not liable although he created the condition that caused the damage.<sup>1380</sup> For instance, when a person digs a well, he is not liable for injury of the plaintiff if the plaintiff throws himself intentionally into the well.<sup>1381</sup> Although the digging of the well is the cause of plaintiff’s injury, the digger is not liable because the intervening cause of the plaintiff superseded the causation of the defendant.

However, if the plaintiff has no choice but to expose himself to risk of a condition created by the defendant with knowledge of the condition, defendant will not be absolved from liability.<sup>1382</sup>

##### 2- Plaintiff’s Negligence in Avoiding Risk

If the plaintiff is negligent in avoiding the risk of a condition, created by the defendant, with the ability to avoid it, then the causal link is severed.<sup>1383</sup> For instance, when “A” throws

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<sup>1376</sup> *Id.* at 220.

<sup>1377</sup> *Id.* at 228.

<sup>1378</sup> SIRAJ, *supra* note 1293, at 230.

<sup>1379</sup> *Id.* at 231.

<sup>1380</sup> ALDOSARI, *supra* note 1271, at 379.

<sup>1381</sup> ALMARZOQI, *supra* note 9, at 217.

<sup>1382</sup> *Id.* at 218.

<sup>1383</sup> *Id.* at 222; ALDOSARI, *supra* note 1271, at 379.

“B” in a fire and “B” had the ability to get out quickly without injury but he did not., “A” is not liable because “B’s” negligence severed the causation between “A’s” act and the injury. In fact, “B’s” continuous stay in the fire is the cause of injury.<sup>1384</sup>

### 3- Plaintiff’s Negligence in Mitigating the Damage

If the plaintiff is negligent in avoiding the consequences of the act of the tortfeasor, there is debate among Islamic schools whether causation is severed in regard to non-mitigated damages.<sup>1385</sup> The failure of a plaintiff to take protective steps after suffering an injury or loss can reduce the amount of the plaintiff’s recovery. For example, when “A” opens the animal barn while the owner is watching, the owner should mitigate the damage by closing the door. If he does not close it and the animals are lost, scholars split over “A’s” liability. The first approach is that the causation is not severed even if the damage is not mitigated by closing the door.<sup>1386</sup> The rationale is that the wrongdoing does not entail burdening the plaintiff with a duty to mitigate the damage.<sup>1387</sup> The second approach is that causation is severed if the owner in the example does not mitigate the damages.<sup>1388</sup> The rationale is that ability to mitigate damages constitutes a superseding act. But for the owner’s failure to mitigate, the damage would not have happened.<sup>1389</sup>

### 4- Plaintiff’s Unreasonable Reaction

If the plaintiff reacts unreasonably to the act of the defendant, then his action constitutes a superseding cause that severs causation.<sup>1390</sup> For example, when “A” bites “B’s” hand, if “B” takes away his hand and causes the teeth of “A” to fall, this reaction is considered reasonable; thus, there is no liability on “B” but rather he is entitled to recover from “A”. If “B” for example cuts off his hand to get away from “A”, his reaction is considered unreasonable and causation is severed in regard to extra damages other than biting.

#### b- Outsider’s Intervening Cause

Outsider’s intervening cause can be an act of God or the acts of third parties. Each one of them has its own ruling as follows.

#### 1- Act of God

Acts of God sever the causal link if three conditions are met.

<sup>1384</sup> ALMARZOQI, *supra* note 9, at 223.

<sup>1385</sup> ALMARZOQI, *supra* note 9, at 225; *McCord v. Green*, 362 A.2d 720, 725-26 (D.C. 1976). This a comparison table between legal doctrines:

Doctrine	Time of Occurrence	Party to Act	Effect
Mitigation of damage (avoidable consequences)	After the occurrence of defendant’s wrongful act	Plaintiff	Bar plaintiff’s recovery of the avoidable damage
Last clear chance doctrine	After the occurrence of defendant’s wrongful act	Defendant	Impose liability on the defendant
Contributory negligence	Before or with the occurrence of defendant’s wrongful act	Plaintiff	Bar plaintiff’s recovery partially or completely

<sup>1386</sup> ALSUIUTI, *supra* note 1193, at 142 (“Silence does not amount to consent; therefore, if he is silent watching his property while it is being destroyed with ability to stop the tortfeasor, tortfeasor is still liable.”).

<sup>1387</sup> ALMARZOQI, *supra* note 9, at 225-226.

<sup>1388</sup> *Id.* at 226.

<sup>1389</sup> *Id.* at 226-227.

<sup>1390</sup> *Id.* at 227.

- **The act must be unforeseeable:** If the act is foreseeable, the causal link is not severed.<sup>1391</sup> For instance, when “A” ignites a fire during a calm day with no expectation of wind, “A” is not liable if the wind spreads the fire and destroys other properties. However, if “A” ignites a fire during a stormy day or during a calm day with expectation of wind, then he is liable.<sup>1392</sup>
- **The act must be unavoidable:** If the act is avoidable, the causal link is not severed.<sup>1393</sup> For instance, as in the example above, if “A” is able to put out the fire after the wind starts but he does not, he is liable.<sup>1394</sup>
- **No negligence on the part of defendant:** If all other conditions are met, the defendant is still liable if his action is negligent. For example, if “A” puts a heavy object on his roof, he is liable even if an unforeseeable wind throws it on someone without ability to avoid it, if he is negligent in not tying the object securely.<sup>1395</sup>

## 2- Act of Third Parties

Acts of third parties are “acts” that occur in addition to the original negligence by the defendant that caused an injury. Therefore, if there are multiple causes, the trier of fact needs to decide which cause produced the injury. Acts of third parties are subject to a different ruling concerning the severing of causation depending on one of two scenarios.

### C- Type of Third Parties’ Act is the Same as Defendant’s Act

If the third parties’ act is the same type as the defendant’s act, then scholars differentiate between direct and indirect act.

If both third parties’ act and defendant’s act are direct, the party whose act was the strongest cause is liable. If the acts are the same or the strongest cause is unknown, both parties share liability.<sup>1396</sup> For instance, if “A” and “B” hit “C” and he dies, the person who causes the fatal injury is the liable. If they share the same fatal injury or if it is unknown who causes it, both share liability equally.

If both acts are indirect, the party with the strongest cause is liable.<sup>1397</sup> However, a precondition of attributing liability to the strongest cause is that both actors must be negligent and capable of being held liable.<sup>1398</sup> For instance, if “A” negligently puts a stone in the street, and “B” negligently digs a well, if “C” stumbles upon the stone and falls into the well, “A” will be held liable because the “stumbling” resulted from the stone and, but for the stone, “C” would not have fallen into the well. Similarly, if “A” unties an animal and “B” opens the door of the barn, which causes animal’s loss, the opening of the door is the strongest cause.

### D- Type of Third Parties’ Act is different from Defendant’s Act

If the type of third parties’ act is different from defendant’s act, liability is attached to the direct act because there is no intervening act between the “direct act” and the “damages”

<sup>1391</sup> ALDOSARI, *supra* note 1271, at 356; AL-ZUHAYLI, *supra* note 1271, at 33.

<sup>1392</sup> ALMARZOQI, *supra* note 9, at 231.

<sup>1393</sup> ALDOSARI, *supra* note 1271, at 359; AL-ZUHAYLI, *supra* note 1271, at 33.

<sup>1394</sup> ALMARZOQI, *supra* note 9, at 233.

<sup>1395</sup> *Id.* at 233.

<sup>1396</sup> ALMARZOQI, *supra* note 9, at 253; ALDOSARI, *supra* note 1271, at 394; ABU SAQ, *supra* note 1271, at 84; AL-ZUHAYLI, *supra* note 1271, at 38; AL ZARQA, *supra* note 1291, at 113.

<sup>1397</sup> SIRAJ, *supra* note 1293, at 235.

<sup>1398</sup> ALMARZOQI, *supra* note 9, at 253.

unlike an “indirect act” which is not closely related to the damages.<sup>1399</sup> For instance, when “A” gives “B” a pistol and “B” shoots “C”, “B” is liable because his act is the direct act while “A’s” act is indirect one.

#### a- Exceptions to the Rule

This general rule has exceptions in which liability may be attached to an indirect actor or both direct and indirect actors. Some of these exceptions are overlapping as follows:

- **First:** If liability cannot be attributed to the actor because he is legally incapable, such as an insane person,<sup>1400</sup> animal, or machine, then liability is upon the indirect actor. For instance, when “A” commands “B” (an insane person) to kill “C”, “B” is not liable but rather “A”. Similarly, when “A” throws “B” into a machine that injured him, the liability cannot be attributed to the machine even though the machine is the direct actor that caused injury;
- **Second:** If the direct actor is immune because he followed legal due process, the liability is upon the indirect actor. For instance, if a person is imprisoned because of false testimonies, the judge and executor of the judgment are not liable because they followed legal due process. The liability in that case will be attributed to the false testifiers;<sup>1401</sup>
- **Third:** If the direct cause is legal and the indirect cause is illegal, the liability is upon the indirect actor.<sup>1402</sup> For instance, when “A” intentionally or negligently puts a stone in the street in which “B” stumbles upon, “B” is not liable if his fall causes property to be destroyed because his walking is legal. However, “A” is liable for his indirect cause that results in the property damages.
- **Fourth:** If an indirect act is as strong in producing the effect alone as a direct act, then the indirect and direct actors share liability.<sup>1403</sup> For instance, when a person rides a horse and another person holds its halter, both of them are liable for damages resulting from the horse because the direct actor (rider) and the indirect actor (holder) can produce the result in the absence of the other person.<sup>1404</sup>
- **Fifth:** If an indirect actor has bad faith while the direct actor is a bona fide actor, the liability is upon the indirect actor.<sup>1405</sup> For instance, when “A” puts poison in a pond in which people drink from, when “B” drinks and get hurt, “A” is liable even though “B” is the direct actor.
- **Sixth:** If the direct act is based on the indirect act, the liability is upon the indirect actor.<sup>1406</sup> For instance, when “A” asks “B” to dig a well on land which “A” claims to be his own, “A” is liable to the true owner of the land.

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<sup>1399</sup> ALMARZOQI, *supra* note 9, at 261; ALDOSARI, *supra* note 1271, at 326; AL-ZUHAYLI, *supra* note 1271, at 39.

<sup>1400</sup> Note that if there is no indirect actor, the direct actor is liable even if he is insane.

<sup>1401</sup> MUHAMMAD IBN OTHAIMEEN, THE INTERESTING EXPLANATION OF THE ZAD (ALSHARH ALMUMTI’ ALA ZAD ALMUSTQNI’) 14/91-94 (Ibn Aljawzi House, 1<sup>st</sup> ed. 2002); IBRAHIM ALDABO, SECURITY OF BENEFITS IN ISLAMIC JURISPRUDENCE, A COMPARATIVE STUDY OF ISLAMIC AND CIVIL LAW, 188 (Ammar House) (1997).

<sup>1402</sup> ALDOSARI, *supra* note 1271, at 327; ALDABO, *supra* note 1401, at 187; ABU SAQ, *supra* note 1271, at 81; AL-ZUHAYLI, *supra* note 1271, at 41.

<sup>1403</sup> ALDOSARI, *supra* note 1271, at 329; ABU SAQ, *supra* note 1271, at 80; AL-ZUHAYLI, *supra* note 1271, at 43-44.

<sup>1404</sup> ALDOSARI, *supra* note 1271, at 329.

<sup>1405</sup> AL ZARQA, *supra* note 1291, at 91.

<sup>1406</sup> *Id.*

- **Seventh:** If an indirect actor induces a direct actor, the liability is upon the indirect actor.<sup>1407</sup> For instance, when “A” tells “B” that “C” is his son and allows him to deal with him, “A” is liable to “B” for any transaction because of misrepresentation.
- **Eighth:** If there are aggravating circumstances on the part of the indirect actor, liability will be attached to him.<sup>1408</sup> For instance, when a depositor guides a thief to the place of the deposit, the depositor is liable for the lost deposit even he is an indirect actor. However, the depositor has the right of recourse from the thief.
- **Ninth:** If an indirect actor forces the direct actor to cause the harm, the liability is upon the indirect actor if the direct actor is insolvent, based on the majority view.<sup>1409</sup> For example, when “A” forces “B” to damage “C’s” car, “B” is liable to “C”, however, if “B” is insolvent, the liability will be passed to “A”.

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<sup>1407</sup> *Id.*

<sup>1408</sup> *Id.* at 92.

<sup>1409</sup> *Id.*

## Seventh Chapter: Credit Reporting Remedies

Scholars state that for every legal wrong there must be a remedy.<sup>1410</sup> The rationale behind remedies is to place the plaintiff in the position he would have occupied but for the legal wrong.<sup>1411</sup> Credit reporting damages are no different. In this chapter, I will present different types of remedies that place the plaintiff in his rightful position.

### Measurement of Credit Reporting Damages Remedies under U.S. law

#### 7.1. Nominal Damages

Nominal damages are defined as “A trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated.”<sup>1412</sup> Nominal damages can be traced to the fourteenth century.<sup>1413</sup> They are awarded to remedy violations that “cause no measurable actual loss or substantial injury” to vindicate plaintiff rights.<sup>1414</sup> Nominal damages are few cents or dollars.<sup>1415</sup> The main benefits of nominal damages are: interruption of an attempt to acquire property by prescription,<sup>1416</sup> vindicating the plaintiff’s rights,<sup>1417</sup> possibility of recovering punitive damages, and possibility of recovering attorney’s fees and costs.<sup>1418</sup>

##### 7.1.1. Nominal Damages under U.S. Law

In general, to recover nominal damages, the claim must be complete without the need to show actual damages, such as breach of contract.<sup>1419</sup> If the case is not complete unless actual damages are proven, such as negligence, then, according to the orthodox attitude, no nominal damages will be awarded.<sup>1420</sup> Under the FCRA, courts split over whether nominal damages are recoverable if no actual damages are shown.

#### Nominal Damages Are Recoverable

The first approach is that the plaintiff is entitled to nominal damages in the absence of a showing of actual damage; thus, the plaintiff is entitled to recover punitive damages.<sup>1421</sup>

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<sup>1410</sup> FISCHER, *supra* note 1232, at 1; CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, West Publishing Co., at 85 (1935).

<sup>1411</sup> James Fischer, *The Puzzle of the Actual Injury Requirement for Damages*, 42 LOY. L.A. L. REV. 197, 197; MCCORMICK, *supra* note 1410, at 165.

<sup>1412</sup> BLACK’S LAW DICTIONARY, *supra* note 163 (It is known as contemptuous damages, too.).

<sup>1413</sup> James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages* 15 (2011) (Northwestern Public Law Research Paper No. 11-41, *available at* SSRN: <http://ssrn.com/abstract=1795341>)

<sup>1414</sup> FISCHER, *supra* note 1232, at 7; MCCORMICK, *supra* note 1410, at 85.

<sup>1415</sup> MCCORMICK, *supra* note 1410, at 87.

<sup>1416</sup> *Id.* at 92.

<sup>1417</sup> Pfander, *supra* note 1413, at 1.

<sup>1418</sup> Pfander, *supra* note 1413, at 7; MCCORMICK, *supra* note 1410, at 93.

<sup>1419</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 484.

<sup>1420</sup> MCCORMICK, *supra* note 1410, at 89.

<sup>1421</sup> *Russell v. Shelter Financial Services*, 604 F. Supp. 201, 203 (W.D. Mo. 1984) (“... although he has not shown any actual injury resulting from Shelter Financial’s violation of the FCRA, plaintiff is entitled to nominal damages in the sum of one dollar and punitive damages in an amount to be determined by the jury.”).

## Nominal Damages Are Not Recoverable

The second approach is that the plaintiff is not entitled to nominal damages in the absence of a showing of actual damage. This approach rejects an award of nominal damages because showing actual damages is treated as necessary to the cause of action.<sup>1422</sup> Moreover, the FCRA provides statutory damages in lieu of nominal damages.<sup>1423</sup> One commentator argues that even in a jurisdiction that requires proof of actual damages, nominal damages should be awarded if the plaintiff proves the existence of actual damages but fails to prove the extent of actual damages because the injury is presumed, and because another area of law provides so.<sup>1424</sup>

### 7.1.2. Nominal Damages under Islamic Law

Islamic law requires proof of damages for any kind of remedy. No remedy is provided for violation of a legal right without proving damages of any kind. Therefore, nominal damages are not recognized under Islamic law. However, a judge has wide discretion under Islamic law to punish the violator with a variety of punishments called *Ta'zir*. *Ta'zir* punishment is authorized for crimes that have no fixed punishment under Islamic law.<sup>1425</sup> *Ta'zir* ranges from a verbal warning to severe punishment such as a life sentence or execution depending on the severity of the crime.<sup>1426</sup>

## 7.2. Statutory Damages

Statutory damages are defined as “Damages provided by statute ... as distinguished from damages provided under the common law.”<sup>1427</sup> Statutory damages contain a punitive element.<sup>1428</sup>

### 7.2.1. Statutory Damages under U.S. Law

The FCRA provides for statutory damages in willful non-compliance violations.<sup>1429</sup> However, statutory damages are in lieu of actual damages, thus, if actual damages are greater than statutory damages, the consumer should demand only actual damages and vice versa.<sup>1430</sup> Those statutory damages are intended as a deterrent to the wrongdoers.<sup>1431</sup> Furthermore, statutory damages encourage consumers to act as an attorney general in their

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<sup>1422</sup> *Cousin*, 246 F.3d, at 371 (“Here, in this negligent noncompliance action, there was insufficient evidence of actual loss. Therefore, we need not award any nominal damages, and we make no determination as to whether Cousin has satisfied all the purported elements of a negligent noncompliance with § 1681e(b) claim to warrant nominal damages.”); *Hyde*, 861 F.2d, at 448 (“Nominal damages to vindicate a technical right cannot be recovered unless actual loss has occurred.”)

<sup>1423</sup> *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 345-46 (N.D. Ill. 2002) (“As held above, the section provides for statutory damages in lieu of actual damages. Thus, if plaintiff proves a § 1681n violation, an award of statutory damages is appropriate and there is no need for an award of nominal damages.”).

<sup>1424</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 486.

<sup>1425</sup> BHALA, *supra* note 7, at 1287 (Crimes under Islamic law can be divided in regard to the punishment of crimes into fixed punishment and crimes without fixed punishment.).

<sup>1426</sup> ABDUL QADIR OUDAH, *ISLAMIC CRIMINAL LAW* 685 (Arabic Book House, 1968) (1949).

<sup>1427</sup> BLACK'S LAW DICTIONARY, *supra* note 163.

<sup>1428</sup> Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J. L. & PUB. POL'Y, 601, 3 (2005), available at <http://ssrn.com/abstract=706201>.

<sup>1429</sup> 15 U.S.C. § 1681n(a)(1)(A) (Provides, “(a) In general. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of (1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000”).

<sup>1430</sup> 15 U.S.C. § 1681n(a)(1)(A).

<sup>1431</sup> Scheuerman, *supra* note 502, at 117.

private capacities to police the conduct of the wrongdoer.<sup>1432</sup> Moreover, statutory damages guarantee a minimum redress if the actual harm is difficult to prove or it does not exist.<sup>1435</sup>

In many instances, consumers do not have incentive to bring actions for FCRA violations because they do not know about the violations or because the cost of the action is too high.<sup>1434</sup> Lawyers, as the drivers of this type of cases,<sup>1435</sup> found a new mechanism to enforce the FCRA statutory damages in favor of their clients, and of course for their own benefit as well.

#### **7.2.1.1. Measurement of Statutory Damages**

The FCRA provides the range of statutory damages which is from \$100 to \$1,000,<sup>1436</sup> however, the FCRA does not provide any factors that influence choosing the lower or the higher limit.<sup>1437</sup> Thus, the amount is left to the trier of fact to determine.<sup>1438</sup> For instance, one court upheld a jury's award of \$1,000 as statutory damages.<sup>1439</sup> However, there is no clue why the jury chose the maximum amount of statutory damages not the low limit or another amount.

One commentator provides criteria to help in determining the amount of statutory damages through analyzing cases under the Fair Debt Collection Practices Act (FDCPA) as both acts aim to protect consumers. The factors are: "defendant sophistication, the clarity of the requirements ... violated, the defendant's persistent denial of its illegal act, the defendant's failure to bring its practices into compliance despite ample time to do so, prior violations and liability of the defendant for the same illegal act, multiple violations, multiple accounts or transactions that were the subject of the same violation, the importance of deterrence, the consumer's injury, egregiousness of the violation, and the existence of the defendant's liability insurance."<sup>1440</sup>

The forgoing criteria are helpful in measuring the culpability of the defendant; however, I believe they do not provide guidance in measuring statutory damages. Since statutory damages are in lieu of actual damages, I believe that the range is to compensate the consumer with the higher of two damages: the actual and the statutory damages. For instance, when the actual damages are \$650, the consumer can either demand actual or statutory damages but not both. However, the consumer can provide evidence of his actual damages to be considered in calculating the statutory damages. However, if the damages are non-pecuniary, then the trier of fact should try to value the damages accordingly within the range.

#### **7.2.1.2. Statutory Damages Excessiveness**

Statutory damages are one of the strong incentives of class actions. However, it raises the due process issue related to excessiveness. When combining aggregated statutory damages claims and class actions, the result is over-deterrence in the form of excessiveness. It is being claimed that Congress never considered the potential aggregation of statutory damages. The U.S. Supreme Court in many instances recognized the excessiveness of

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<sup>1432</sup> *Id.* at 111.

<sup>1433</sup> *Id.* at 107.

<sup>1434</sup> *Id.* at 108.

<sup>1435</sup> *Id.* at 114.

<sup>1436</sup> 15 U.S.C. § 1681n(a)(1)(A).

<sup>1437</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 493.

<sup>1438</sup> *Id.*

<sup>1439</sup> *Saunders v. Equifax Info. Servs., L.L.C.*, 469 F. Supp. 2d 343, 348 (E.D. Va. 2007).

<sup>1440</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 494.



punitive damages. Accordingly, aggregated statutory damages should be treated as punitive damages in the case of excessiveness.<sup>1441</sup> Such treatment should be done before the certification of the class action as delay may lead to an unfair settlement even if the defendant has done no wrong.

A class action mechanism raises a constitutional issue of “excessiveness of statutory damages” that violates due process in many cases.<sup>1442</sup> A class action has three features that make it an incentivizing tool for plaintiffs. First, the number of plaintiffs is very large. Second, the loss sustained by each plaintiff is small. Third, the cost of litigation is high compared to the outcome of the case.<sup>1443</sup>

A class action serves a deterrent as it uncovers the wrongdoer’s violations and requires him to give up his ill-gotten gain.<sup>1444</sup> Commentators assert that both a class action mechanism and statutory damages serve the same objectives in encouraging litigation that are otherwise costly or not worthy. Class actions turn small claims into one giant case that makes it attractive to pursue. Statutory damages guarantee minimum recovery in violations that may result in actual damages difficult to prove, nominal damages, or no damages at all.<sup>1445</sup>

Combining aggregated statutory damages claims and class action claims will result in over-deterrence in the form of excessiveness.<sup>1446</sup> One commentator notes the U.S. Supreme Court prohibits excessive statutory damages through due process principle.<sup>1447</sup> The principle of excessive statutory damages has developed over the years. Elaboration of statutory damages was done in the punitive damages context even though the principle derived originally from statutory damages jurisprudence.<sup>1448</sup>

The principle started with the finding that the fine imposed was so grossly excessive that it amounted to a deprivation of property without due process of law.<sup>1449</sup> Determining statutory damages to be grossly excessive depends on “reasonableness test”.<sup>1450</sup> Another component was added to the principle so that statutory damages must be proportionate to the offense.<sup>1451</sup> Years later, the U.S. Supreme Court noted that due process imposes substantive limits, which may not be exceeded.<sup>1452</sup>

Another era began when the U.S. Supreme Court adopted a new standard to define the meaning of “excessiveness”. It has become known as the “*BMW standard*”.<sup>1453</sup> In *BMW of North Am., Inc. v. Gore*, the U.S. Supreme Court identified three guideposts to determine the excessiveness; the reprehensibility of the defendant’s conduct, the relationship between the actual harm or potential harm to the plaintiff and the punitive damage award, and the comparable civil or criminal penalties for the defendant’s conduct.<sup>1454</sup>

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<sup>1441</sup> Evanson, *supra* note 1428, at 3.

<sup>1442</sup> Scheuerman, *supra* note 502, at 104.

<sup>1443</sup> Evanson, *supra* note 1428, at 109; Williams, *supra* note 497, at 315.

<sup>1444</sup> Scheuerman, *supra* note 502, at 109.

<sup>1445</sup> *Id.* at 107-8.

<sup>1446</sup> *Id.* at 106 (In one instance, the potential minimum statutory damages were almost half of the net worth of the wrongdoer company. In another example, the potential minimum statutory damages were \$1.9 billion even though the net income of the company was only \$68 million. Another example, the potential minimum statutory damages were 600% greater than the company’s net worth.).

<sup>1447</sup> *Id.* at 115.

<sup>1448</sup> *Id.* at 116.

<sup>1449</sup> *Id.* at 117.

<sup>1450</sup> *Id.* at 119.

<sup>1451</sup> *Id.* at 118.

<sup>1452</sup> *Id.* at 119.

<sup>1453</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)

<sup>1454</sup> Scheuerman, *supra* note 502, at 119.

One commentator believes the *BMW* standard should apply to statutory damages.<sup>1455</sup> Another commentator notes that even though the *BMW standard* was derived from the statutory damages context, most courts refuse to apply it to aggregated statutory damages. Courts deny such application because of “wholly disproportionate” standard which measures excessiveness against the public harm rather than the harm to the plaintiff’s. The standard was abandoned in punitive damages applications.<sup>1456</sup> The rationale in not applying the *BMW standard* is that there is a difference between punitive damages and statutory damages. The difference is the jury awards punitive damages while the legislators award statutory damages. Thus, awarding statutory damages accomplishes Congress’ goal of deterrence.<sup>1457</sup> It is notable that few courts applied the *BMW standard* implicitly without further discussion. Only small minority of court apply *BMW standard* explicitly.<sup>1458</sup>

Another argument is that statutory damages are awarded because of the difficulty in calculating damages, thus, the *BMW standard* should not apply. This argument can be rebutted because punitive damages are awarded even though they are incalculable damages, such as pain and suffering or harm to reputation.<sup>1459</sup>

Others argue that statutory damages are imposed because of low actual damages; therefore, the *BMW standard* should not apply. However, this feature is also available in punitive damages. The U.S. Supreme Court allows for higher punitive damages in cases with low compensatory damages.<sup>1460</sup>

Regardless of what standard is applied, most courts defer the due process issue until the class certification is completed.<sup>1461</sup> The courts reason that statutory damages are treated as punitive damages; thus, the court can reduce the amount of the award after the judgment via remittitur.<sup>1462</sup> Also, courts respect the separation of powers; therefore, the issue of statutory damages should be altered by Congress.<sup>1463</sup>

One of commentators notes the U.S. Supreme Court finds no analytical difference between statutory damage and punitive damage awards.<sup>1464</sup> Therefore, it does not make sense to apply one standard for punitive damages and another for statutory damages. In addition, it is more practical to consider the issue of due process during certification stage, not after it.<sup>1465</sup> Some courts reject class certification in FCRA cases. Denial of certification does not prevent consumers from bringing cases in their individual capacities.<sup>1466</sup>

To apply the *BMW standard* of excessiveness to statutory damages,<sup>1467</sup> we must examine first the applicability of the *BMW standard* to the statutory damages. The first factor is the reprehensibility of the defendant’s conduct.<sup>1468</sup> When assessing this factor, the court must consider whether the conduct is repeated or was isolated, whether the harm is intentional, a

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<sup>1455</sup> Evanson, *supra* note 1428, at 3.

<sup>1456</sup> Scheuerman, *supra* note 502, at 123.

<sup>1457</sup> *Id.* at 124.

<sup>1458</sup> *Id.* at 124-26.

<sup>1459</sup> Evanson, *supra* note 1428, at 36.

<sup>1460</sup> *Id.* at 41.

<sup>1461</sup> Scheuerman, *supra* note 502, at 127.

<sup>1462</sup> McClure, *supra* note 408, at 299.

<sup>1463</sup> Scheuerman, *supra* note 502, at 128-31 (The author asserts that respecting the legislatively prescribed amount in statutory damages is not accepted without judicial scrutiny. Therefore, when the constitutionality of such a prescribed amount is challenged; the court must examine the issue.).

<sup>1464</sup> *Id.* at 119.

<sup>1465</sup> *Id.* at 131.

<sup>1466</sup> McClure, *supra* note 408, at 299.

<sup>1467</sup> Scheuerman, the autor, has applied it to Fair and Accurate Credit Transaction Act, which is one of the FCRA amendments in 2003, so its relation to the dissertation is clear.).

<sup>1468</sup> Evanson, *supra* note 1428, at 43.

result of malice, trickery or mere negligence, whether the harm was physical or merely economic, whether the conduct was indifferent to, or in reckless disregard of the other, and whether the target is financially vulnerable. Any award of statutory damages in the absence of these factors is doubtful.<sup>1469</sup>

The second factor of the *BMW standard* is the relationship between the penalty and plaintiff's harm. The court must make sure that statutory damages are reasonable and proportionate to the harm to the plaintiff. Thus, an award of \$240 million for failing to print the expiration date on a receipt is neither reasonable nor proportionate to the harm of plaintiff.<sup>1470</sup> However, the issue in the statutory damages context is that courts do not necessarily make a finding of the actual damages before determining the statutory damages. Therefore, this factor may be difficult to apply. Courts should make a finding of the actual damages in order to determine the ratio of actual damages and the statutory damages.<sup>1471</sup>

The third factor of the *BMW standard* is to consider the comparable sanctions in other statutes. This factor can be accomplished by looking at the same statutory damages in the statute to examine how deliberately the statutory damages were set.<sup>1472</sup> The court should look at cases brought under the same statute and compare it to the case at hand,<sup>1473</sup> or look to other administrative and criminal penalties.<sup>1474</sup>

One commentator stresses that considering the comparable sanctions in other statutes can be applied, provided that legislators engaged in deliberative decision making. Consequently, courts must consider whether the legislators deliberately chose the amount of statutory damages. Additionally, a court must take into consideration whether legislators considered the amount of statutory damages in the case of aggregation. If one of them is missing, court should not abide by the amount of statutory damages prescribed by legislators.<sup>1475</sup>

The commentator examines legislators' deliberative decision-making in FACTA and the FCRA. He concludes that a review of legislative history of both acts reveals that Congress never considered the potential aggregation of statutory damages.<sup>1476</sup>

The commentator shows that one representative introduced the statutory damages clause but the bill died.<sup>1477</sup> Afterward, a new bill containing the statutory damages was introduced by the same representative and prevailed.<sup>1478</sup> However, the minimum of the statutory damages was \$300 which was changed later to be \$100 after reconciliation of the two bills. No history shed light on why Congress chose this specific amount, nor why Congress adopted the statutory damages in the first place.<sup>1479</sup>

One commentator believes that aggregate statutory damages are unpredictable as legislators do not contemplate them.<sup>1480</sup> Another commentator concludes that statutory damages prescribed by Congress are no different from punitive damages award by the jury

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<sup>1469</sup> Scheuerman, *supra* note 502, at 133.

<sup>1470</sup> *Id.* at 135.

<sup>1471</sup> Evanson, *supra* note 1428, at 43.

<sup>1472</sup> *Id.* at 44.

<sup>1473</sup> *Id.* at 46.

<sup>1474</sup> *Id.* at 47.

<sup>1475</sup> Scheuerman, *supra* note 502, at 136.

<sup>1476</sup> *Id.*

<sup>1477</sup> *Id.* at 140.

<sup>1478</sup> *Id.* at 141.

<sup>1479</sup> *Id.*

<sup>1480</sup> Evanson, *supra* note 1428, at 33-34 ("But an aggregator does not give the legislature any sort of predictability advantage over a jury when it chooses an amount for a violation to be multiplied by other factors with no upward limit as in the California case.").

as they are both arbitrary. Thus, a court should not give deference to statutory damages.<sup>1481</sup> In supporting his argument, the commentator shows that the Truth in Lending Act (TLA)<sup>1482</sup> deals with the same issue of aggregation statutory damages. Nevertheless, courts dealt with the issue differently and declined to certify the class action. That, in turn, led Congress to acknowledge that aggregation statutory damages claims were not intended and amend the act.<sup>1483</sup>

One commentator argues that if we admit the *BMW standard* should apply to statutory damages class action claims, we have to address the issue of excessiveness during the certification stage not post-judgment.<sup>1484</sup> Some argue that if the court is going to apply the punitive damages standard to statutory damages, the court needs to address the issue after the judgment, as is the case with punitive damages. For punitive damages a court needs to wait until the jury reaches its verdict to determine its excessiveness. Statutory damages can be calculated before the certification by multiplying the number of members of the class by the statutory damages amount. Excessiveness can be determined easily in certain class actions even with minimum statutory damages.<sup>1485</sup>

Others argue the due process issue can be resolved after judgment through remittitur. Yet, reducing the amount after the judgment results in a violation of the plain text of the statutes that provide for statutory damages. For instance, the FCRA provides a minimum of \$100 for statutory damages. When the court reduces the aggregated statutory damages after judgment, all plaintiffs will get less than the guaranteed minimum provided by the FCRA. This explicitly contradicts the plain text of the FCRA.<sup>1486</sup>

Another problem is that most class action cases end in an unfair settlement on the defendant side. For many reasons, a defendant in class action involving aggregated statutory damages will settle even if he has good chance to win on the merits.<sup>1487</sup> First, the defendant could fear plaintiff blackmailing settlement after certification especially in multi-million dollar cases where the defendant may risks his reputation and assets if the he refuses to settle. Second, class action cases affect the reputation and stock price of any company.<sup>1488</sup>

Interestingly, in most class action settlement cases the real winners are the lawyers.<sup>1489</sup> Because of this, it seems more fair and just to determine the issue of due process before certification of class action. If determined later, it is too late to keep the defendant from settling and losing millions of dollars for a technical error that does not harm the plaintiffs.<sup>1490</sup>

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<sup>1481</sup> Scheuerman, *supra* note 502, at 143; Evanson, *supra* note 1428, at 34 (“... deference accorded to a statutory award should not be absolute ...”).

<sup>1482</sup> 15 U.S.C. §1601.

<sup>1483</sup> Scheuerman, *supra* note 502, at 146.

<sup>1484</sup> *Id.* at 147.

<sup>1485</sup> *Id.*

<sup>1486</sup> *Id.* at 148 (If we assume that we have 100,000 members of a class action, multiply that by \$100 = \$10,000,000. So, for example, if the court finds the amount to be excessive the court will reduce it to \$1000,000 which means every member will get only \$10 instead of \$100 which he may have earned had he brought his own suit.).

<sup>1487</sup> *Id.* at 149.

<sup>1488</sup> *Id.* at 150.

<sup>1489</sup> *Id.* (In one instance, the lawyer received \$110,000 while each consumer received \$4.00.).

<sup>1490</sup> *Id.* at 151.

### 7.2.2. Statutory Damages under Islamic Law

Statutory damages are a form of remedy if there is a violation but no harm, or the harm is difficult or impossible to be calculated. However, under Islamic law, monetary remedies are only available when three elements are proven: violation, harm, and causation. Therefore, one could say “statutory damages” are not recognized under Islamic law. If there is no harm or damages, then the *prima facie* case is not established. Thus, no damages will be available. However, the wrongdoer usually will not go free. *Ta’zir* punishment can be imposed to deter him. For instance, when a CRA violates the FCRA or the CIL but there is no harm to the plaintiff, the judge will not award the plaintiff any monetary relief; however, the judge has discretion to punish the CRA with a monetary fine that goes to the public treasury, not to the plaintiff.

### 7.3. Actual Damages

Actual damages are defined as “An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.”<sup>1491</sup>

#### 7.3.1. Measurement of Economic Losses

Market value is the normal standard of measurement of damages in case of total destruction.<sup>1492</sup> However, in case of partial destruction, the basic test to measure damages is the difference between values, pre-injury and post-injury, referred to as “diminution in value”.<sup>1493</sup> However, determining the value of property differs from one property to another.<sup>1494</sup> There are three methods of measuring damages. Using one method or another should, theoretically, produce the same result. However, different outcomes may result because of subjective judgments such as net earnings of a property or the like.<sup>1495</sup> The trier of fact uses one method if the other methods are not suitable.<sup>1496</sup> For instance, capitalization of earnings is a good method to measure damages of commercial properties, but it is not suited to measure damages of personal vehicles.<sup>1497</sup>

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<sup>1491</sup> BLACK’S LAW DICTIONARY, *supra* note 163 (It also known as compensatory damages; tangible damages; real damages.).

<sup>1492</sup> MCCORMICK, *supra* note 1410, at 165.

<sup>1493</sup> FISCHER, *supra* note 1232, at 25.

<sup>1494</sup> *Id.* at 26.

<sup>1495</sup> *Id.* at 28.

<sup>1496</sup> *Id.*

<sup>1497</sup> *Id.*

### 7.3.1.1. Market Value

#### 7.3.1.1.1. Market Value of Personal Property

Market value can be determined by knowing what a willing buyer would pay a willing seller for the property.<sup>1498</sup> Purchase cost, expert opinion, insurance cost, and similar sales serve as indicators of the market value.<sup>1499</sup> Determining market value may be an easy task if the same type of property is widely offered in the market. However, it becomes more difficult when the property is unique.<sup>1500</sup> For instance, when “A” loses his car because of “B” negligence, the measure is the value of a similar car a willing buyer would pay a willing seller.<sup>1501</sup>

In the case of total destruction of personal property, the measure is neither cost of purchase nor cost of replacement, but rather the fair market value.<sup>1502</sup> In the case of partial destruction of property, the measure is diminution of value, or cost of repair if less than the diminution of value.<sup>1503</sup> For instance, if the cost of repair is \$100 and the diminution of value is \$150, then the measure is the cost of repair.

Another approach allows cost of repair if the cost does not exceed pre-injury value.<sup>1504</sup> For instance, if the value of a barge before partial destruction is \$40,000 and the cost of repair is \$50,000, then the measure is the diminution in value because repairing the barge is considered economic waste.

The effect of following one approach or the other becomes clear when there is no diminution in value but the property is damaged. According to the first approach, the plaintiff would recover nothing because there is no diminution in value and the cost of repair is greater than diminution in value. In the other approach, the plaintiff would recover the cost of repair because the cost does not exceed the value of the property.

Still, when cost of repair does not restore the property to its pre-injury value, the measure is both the cost of repair and any remaining diminution in value.<sup>1505</sup> For instance, when the value pre-injury is \$10,000 and after repair the value is \$8,000, the plaintiff is entitled to \$2,000 in addition to the cost of repair.

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<sup>1498</sup> FISCHER, *supra* note 1232, at 26; MCCORMICK, *supra* note 1410, at 165.

<sup>1499</sup> FISCHER, *supra* note 1232, at 426-427.

<sup>1500</sup> *Id.* at 26.

<sup>1501</sup> *Id.*

<sup>1502</sup> *Nunan v. San Francisco*, 38 Cal. 689, 690 (1869) (“The plaintiff was entitled to recover the value of his subscription book, but not the amount that the subscription cost him. The proper enquiry is not what any article of property cost, but what it was worth when destroyed.”); MCCORMICK, *supra* note 1410, at 470.

<sup>1503</sup> MCCORMICK, *supra* note 1410, at 470; *Smith v. Hill*, 237 Cal. App. 2d 374, 47 Cal. Rptr. 49 (Cal. Ct. App. 1965) (The court held, “The measure of damage for wrongful injury to personalty is the difference between the market value immediately before and after the injury or the reasonable cost of repair where such cost is less than the depreciation in value.”).

<sup>1504</sup> *Hewlett v. Barge Bertie*, 418 F.2d 654, 657 (4th Cir. 1969) (The court held, “If she [barge] is not a complete loss and repossession or repairs are both physically and economically feasible, then the reasonable cost of recovery, including repairs and an allowance for deprivation of use, is the measure. But if the reclamation expense including repairs exceeds the ship’s just value at the time of the casualty, or if repairs are not both physically and economically practicable, then it is a constructive total loss ...”).

<sup>1505</sup> *Kirkhof Elec. Co. v. Wolverine Exp., Inc.*, 269 F.2d 147, 148 (6th Cir. 1959) (The court held, “For the reasons herein stated the court is satisfied that the plaintiff is entitled to recover the cost of repairs, plus the cost of shipping, plus the cost of certain advertising ...”).

#### 7.3.1.1.2. Market Value of Real Property

Market value of real property is determined by diminution in value.<sup>1506</sup> However, the plaintiff is not precluded from demanding cost of repair as an alternative measurement of damages if the cost of repair does not exceed the pre-injury value.<sup>1507</sup> Another approach, allows the cost of repair even if the cost of repair exceeds diminution in value.<sup>1508</sup> The law differentiates between permanent and temporary damages, although such a distinction is not an easy one.<sup>1509</sup> One commentator notes the terms “permanent and temporary damages” are unfortunate because terms refer to the nature of the injury and its reparability; however, courts consider the cost of repair not the reparability.<sup>1510</sup> Damages are considered temporary if the damages are repairable and permanent if the damages are irreparable.<sup>1511</sup> The measurement of permanent damages is diminution in value.<sup>1512</sup> The measurement of temporary damages is cost of repair.<sup>1513</sup>

#### 7.3.1.1.3. Value to the Owner

When personal or real property has no market value or the market value is inadequate, the measurement is the value to the owner.<sup>1514</sup> This is true in the case of personal items such as clothing, furniture, books, pictures, etc. which are worth more to the owner than they are worth on the market.<sup>1515</sup> When measuring the value to the owner, a trier of fact should take into account the cost of the goods, the extent of use, and its condition at the time of loss.<sup>1516</sup> However, the plaintiff must show why the value of his property is different from the market value.<sup>1517</sup> For example, one court held that market value of a factory was not the appropriate measure of value as the market value reflected the value after the Law of Prohibition, and does not reflect the actual value of the plant.<sup>1518</sup>

Sentimental value is not to be considered when measuring value to the owner as it is too difficult to be measured.<sup>1519</sup> However, I believe it is difficult to detach sentimental value from value to the owner. The property becomes more valuable to the owner because of its sentimental value to him.

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<sup>1506</sup> *Jordan v. Stallings*, 911 S.W.2d 653, 663 (Mo. App. 1995) (“The measure of damages to real property, where the property can be restored to its former condition, is the difference in its fair market value before and after the injury, or the cost of restoring it, whichever is less.”).

<sup>1507</sup> *Green v. Gen. Petrol. Corp.*, 205 Cal. 328, 336 (1928) (“If the cost of repairing the injury by removing the debris deposited by the defendant oil company, and otherwise restoring the premises to their original condition, amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value, then the value of the property is the proper measure.”).

<sup>1508</sup> FISCHER, *supra* note 1232, at 461.

<sup>1509</sup> *Id.* at 459.

<sup>1510</sup> *Id.* at 460.

<sup>1511</sup> *Id.* at 459.

<sup>1512</sup> *Miller v. Cudahy Co.*, 858 F.2d 1449, 1456 (10th Cir. 1988) (“The measure of damages for permanent injury to real property is the difference in the fair market value of the land before and after the injury.”).

<sup>1513</sup> FISCHER, *supra* note 1232, at 460.

<sup>1514</sup> MCCORMICK, *supra* note 1410, at 170.

<sup>1515</sup> *Id.*

<sup>1516</sup> *Id.*

<sup>1517</sup> *Id.*

<sup>1518</sup> *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176, 183, 159 N.E. 902 (1928) (The court held, “Therefore, the strict rule that market value or market price is an exclusive measure of damage does not apply.”).

<sup>1519</sup> Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat*, 34 N. Y. L. Sch. L. Rev. 411, 416, 420 (1989).

#### 7.3.1.1.4. Market Value of Services

Market value can be used to measure services provided by the plaintiff. If the consumer takes unpaid days off to solve an inaccuracy in his credit report, the damages are measured by multiplying the number of days by the daily income of the consumer.<sup>1520</sup> For instance, if the consumer misses five days and his daily income is \$120, the damage is \$600. A court held that spending time to resolve and correct inaccurate information in a consumer's credit report is a factor in calculating damages.<sup>1521</sup> Another court held that loss of income from taking days off is compensable, provided proof and causation are established.<sup>1522</sup>

If the consumer is self-employed, one can analogize this issue to cases that involve loss of earning capacity because of bodily injury. However, this is a complicated issue because the money he receives does not reflect the value of the service in the market.<sup>1523</sup> One commentator suggests that a distinction must be drawn between the value of the service and the return on the investment. The measurement should be the value of the service not the return on investment, because the concern is the value of the plaintiff's service and not the return on the investment.<sup>1524</sup> The fair measurement is the cost of finding a replacement with the same qualifications.<sup>1525</sup>

However, the issue becomes problematic when the consumer is unemployed because of an inability to find a job or because of his age or work nature, such as child or a homemaker. In the case of an unemployed person because of inability to find a job, the question arises: is he entitled to compensation for the time he spent even though his time has no value in terms of employment? One can analogize this issue to cases that involve loss of earning capacity because of bodily injury. For instance, courts award recovery for loss of earning capacity to unemployed people with proof only of the capability to work.<sup>1526</sup> Capability to work includes many factors such as age, health, education, training, experience, employment chance, and employee's willingness to work.<sup>1527</sup>

If the person is unemployed because she is a homemaker, time spent in household service is the first element that must be established.<sup>1528</sup> Scholars are split on whether the measurement is the cost of a replacement or the cost of opportunity that the homemaker gives up because of being a homemaker.<sup>1529</sup> For instance, when the home chores cost \$50 per day if a housemaid is hired, then the measurement is \$50 per day multiplied by number of missed days, for the cost of a replacement. If cost of opportunity is the measurement, then one looks to the qualifications of the homemaker and her value in the market if she would be employed.

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<sup>1520</sup> FISCHER, *supra* note 1232, at 375.

<sup>1521</sup> *Rasor*, 554 P.2d 1041, 1050 (The court found that spending time to correct the errors is part of actual damages.).

<sup>1522</sup> *Kronstedt*, 2001 WL 34124783, at \*13 (The court held, "Specifically, plaintiff contends that she took four days off work ...These damages are compensable...").

<sup>1523</sup> FISCHER, *supra* note 1232, at 375.

<sup>1524</sup> *Id.*

<sup>1525</sup> *Id.* at 376.

<sup>1526</sup> *Storrs v. L.A. Traction Co.*, 134 Cal. 91, 66 P. 72 (1901) (The court held that "... the fact that there was no proof of earnings, or of any specific amount that he was capable of earning, cannot deprive him of the right to compensation for his earning capacity, of which the jury may judge, and, in the exercise of a wise discretion, fix the amount of damages to be recovered therefor; and their verdict thereupon will not be disturbed, if it does not appear to be excessive.").

<sup>1527</sup> FISCHER, *supra* note 1232, at 372.

<sup>1528</sup> Wm. Gary Baker & Michael Seck, DETERMINING ECONOMIC LOSS IN INJURY AND DEATH CASES, Trial Practice Series, McGraw-Hill, Inc. at 17 (1993).

<sup>1529</sup> *Id.* at 377.



Measurement of the time spent to correct the errors can be easily measured, although it is difficult to keep records of all of spent time. For instance, time of traveling to and from the CRA location is measurable and no one can dispute it. Similarly, telephone calls to the CRA are recorded and the exact time can be known by obtaining the records of the CRA.

### 7.3.1.2. Replacement Cost

If the market value is not easily obtainable, then replacement of the property is the measure of value.<sup>1530</sup> However, replacing the property with a similar property and conditions is difficult. Therefore, the replacement cost must be reduced to reflect the depreciation of value of the lost property.<sup>1531</sup> When “A” destroys “B’s” house, “A” may be required to provide the cost of purchase or construction of a new house. Because the destroyed house is an old one, “B” is going to be in a better position than before the destruction; thus, the cost of replacement must be reduced to be equal to the actual cost of the destroyed house.<sup>1532</sup>

### 7.3.1.3. Capitalization of Earnings

Capitalization of earnings is an alternative method to measure damages. This method provides a valuation of the property based on its earnings.<sup>1533</sup> Measured earnings can be based on current, past, or future earnings.<sup>1534</sup> For example, when a property’s value is \$1 million and its current income is \$100,000, its capitalization of earnings factor is 10.

Similar to the capitalization of earnings approach is the “value of the interest” under Islamic law. Value of interest means the value of income gained from a property or earned by a person. For instance, when a defendant holds a plaintiff intentionally for a week, the plaintiff is entitled to wages he lost or the amount a person similar to him may lose.<sup>1535</sup> Similarly, when the defendant steals a car, the owner is entitled to the value of renting the car for the same period even if he does not rent it.<sup>1536</sup>

### 7.3.1.4. Cost of Repair

Cost of repair is different from replacement cost. Cost of repair means the cost to repair the damaged property while replacement cost indicates a total loss of the property. However, the problem is that the cost of repair does not account for the diminution in value in all cases. Repair of property does not guarantee bringing the property to its prior condition and value.<sup>1537</sup> The issue becomes clearer when the cost of repair is greater than the diminution in value. For example, according to *Hewlett v. Barge Bertie*<sup>1538</sup>, a dent to a barge does not

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<sup>1530</sup> *Id.* at 26.

<sup>1531</sup> *Id.*

<sup>1532</sup> *Id.* at 27.

<sup>1533</sup> *Id.*

<sup>1534</sup> *Id.* (Current earning capitalization is measured based on the capitalization factor. The capitalization factor is the ratio of the value of the property to the current amount of income it produces. For example, if the property’s value is \$500,000 and its income is \$50,000, the factor is 10. Past earning is measured based on the income of the property in the past years multiplied or divided by factors. The future earnings method is based on estimated future income discounted to present value.)

<sup>1535</sup> AL ZARQA, *supra* note 1291, at 159.

<sup>1536</sup> SIRAJ, *supra* note 1293, at 535.

<sup>1537</sup> FISCHER, *supra* note 1232, at 29.

<sup>1538</sup> *Hewlett*, 418 F.2d at 656.

diminish the barge's value; however, the court held that the owner has the right to have his dent repaired.<sup>1539</sup>

Medical expenses can be considered a "cost of repair" for human body and mind. The measurement of medical expenses is the reasonable value of the service not the billed service.<sup>1540</sup> For instance, if a bill of a surgery is \$10,000, but the reasonable cost of the same surgery is \$8,000, then the defendant needs to pay only \$8,000.

Costs resulting from a violation of the FCRA directly or indirectly are measured by the actual costs the consumer spent. For instance, an invoice of medical treatment is the measure of the damages that result from the violation. However, such costs must be reasonable in order to be recovered.<sup>1541</sup> One factor to determine reasonableness of the costs is the fair market value of the service or goods.

### **7.3.1.5. Measuring Loss of Credit**

Loss of credit can be measured in different ways depending on the facts and circumstances of any given case as follows.

#### **7.3.1.5.1. Pre-approved Loan Rate Approach**

Damages can be measured through a comparison of the pre-approved loan rate and the actual higher rate due to a violation. The difference between the pre-approved rate and the actual higher rate is the measurement of damages.<sup>1542</sup> For instance, if the consumer was pre-approved to get a loan at 5%, but because of the violation he was only able to obtain the same loan at 6%, the difference, 1%, is the damage.

#### **7.3.1.5.2. Varying Rates of Credit Score Approach**

A comparison of consumer credit scores with and without inaccurate information is another way of measuring damages. For example, a consumer's credit score is 700 with inaccurate information in his credit report, but his credit score improves to 730 after removing the inaccurate information. The trier of fact looks at the difference in the interest rate offered to a score of 700 and a score of 730 and that is the damage suffered.<sup>1543</sup>

#### **7.3.1.5.3. Increased Rate Approach**

If a rate is offered to the consumer higher than the rate he received from lenders or insurers before the violation, the damages are measured by the difference between the original rate and the increased rate. For example, if the consumer is insured for \$1000 per year, but because of a violation, the premium increases to \$1500, the damage is the difference between the two rates, \$500.

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<sup>1539</sup> *Id.* at 658 (The court reasoned, "... the cost of repairs is considered an accurate measure. Diminution in value is always dependent upon an opinion, while repairs are not quite so speculative.").

<sup>1540</sup> FISCHER, *supra* note 1232, at 380.

<sup>1541</sup> *Id.* at 380.

<sup>1542</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 478.

<sup>1543</sup> *Id.*

#### 7.3.1.5.4. Decrease Credit Limit Approach

If the consumer's credit limit is \$7,000 monthly, but because of a violation, the limit is decreased to \$5,000 monthly, the damages are the difference between the original and decreased limits.

#### 7.3.1.6. Lost Job Measurement

If a consumer misses a job opportunity, the measurement of damages is difficult. The consumer lost the job opportunity; however, what is the extent of the damages? Is it the loss for a specific period? Or is it for the whole contract? What if the consumer does not mitigate the damages by trying to find a comparable, or even a lower paying job? What if the consumer finds a job after the trial? The consumer must mitigate damages by trying to find a replacement job.<sup>1544</sup>

The fair ruling, in my opinion, is to allow the consumer to recover only the period of unemployment by requiring the defendant to pay the same monthly income that the consumer should have received on an installment basis. However, this is difficult to apply. This method is not in accordance with American law that requires a lump sum payment.<sup>1545</sup>

#### 7.3.1.7. Lost Opportunity

When a consumer loses an opportunity, he would have obtained but for the violation of the FCRA, the consumer is entitled to recover damages resulting from the violation. However, the consumer needs to prove causation between violation of the FCRA and damages in order to recover. One can infer from a court's decision that loss of an opportunity in the home mortgage market could be considered part of actual damages.<sup>1546</sup> Another court affirmed the district court finding "that, in the absence of any evidence that appellant made an offer to purchase property or applied for a home mortgage, the "lost opportunity" damages he alleged were too speculative."<sup>1547</sup>

#### 7.3.1.8. Lost Profits Measurement

In lost profits cases, experts usually use financial data from the plaintiff's records. The experts then show how much the plaintiff would have profited had defendant's act not been done. Expenses must be discounted from the lost profits unless the plaintiff proves that his expenses remain the same.<sup>1548</sup> Four factors should be taken into consideration when calculating lost profits: the period of damages, lost revenue, expenses, and present value.<sup>1549</sup>

In case of lost profits, the measurement of damages is the net profits measured by reasonable certainty.<sup>1550</sup> Certainty requires "a reasonable degree of persuasiveness in the proof of the fact and of the amount of the damage."<sup>1551</sup> However, certainty does not mean

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<sup>1544</sup> *Id.* at 70.

<sup>1545</sup> FISCHER, *supra* note 1232, at 51.

<sup>1546</sup> *Id.* at 1205 (The court denied plaintiff's claim for the lack of proof).

<sup>1547</sup> *Robinson*, 560 F.3d at 240; *Casella*, 56 F.3d at 474

<sup>1548</sup> FISCHER, *supra* note 1232, at 60.

<sup>1549</sup> *Id.* at 61 (Present Value means: "the present award [that] if invested would generate the same stream of dollars." For example, if the award is \$100 for future losses, the amount will be reduced to the present value through discounting the specific rate (8% for example) to ensure that after the passage of the time the plaintiff receives \$100 but not \$115 because of his investment of the award.)

<sup>1550</sup> *Turner v. PV Int'l*, 765 S.W.2d 455, 465 (Tex. App. 1988) (writ denied); *LeBlanc v. LeBlanc*, 778 S.W.2d 865 (Tex. 1989).

<sup>1551</sup> MCCORMICK, *supra* note 1410, at 99.

proving the exact amount.<sup>1552</sup> Moreover, when difficulty in reaching certainty is caused by the wrong act of the defendant, uncertainty is accepted.<sup>1553</sup>

Net profits are “what remain in the conduct of a business after deducting from its total receipts all of the expenses incurred in carrying on the business”.<sup>1554</sup> Experts use different approaches to measure lost profits depending on the facts and legal theories asserted.<sup>1555</sup> Under all approaches, lost profits should be discounted to present value.<sup>1556</sup>

#### 7.3.1.8.1. The “Before and After” Approach

Under this approach, lost profits during the loss period are measured by comparing the plaintiff’s revenue before the occurrence of the wrongful act and after the occurrence of the wrongful act.<sup>1557</sup> The decrease in revenue after the occurrence of the wrongful act is the lost profits.<sup>1558</sup> The plaintiff’s past performance must be based on accurate historical accounting records.<sup>1559</sup>

#### 7.3.1.8.2. The “Yardstick” Approach

This approach, utilizes a “yardstick” as a basis to estimate what revenue the plaintiff’s business would have earned but for the wrongful act of the defendant.<sup>1560</sup> The plaintiff must demonstrate the comparability of his business to the yardstick.<sup>1561</sup> This “yardstick” can be the performance of the plaintiff at a different location, industry average, or experience of non-party businesses.<sup>1562</sup>

#### 7.3.1.8.3. The “Market Share” Approach

An expert “compares the business’s market share in a specific industry before and after the event giving rise to the damages and applies the change in market share to total market revenues to determine lost revenues”.<sup>1563</sup>

#### 7.3.1.8.4. The “Budget” Approach

Under this approach, an expert will use the business’ own budget or forecast prepared for a purpose other than litigation. The expert will compare actual operation results to the past forecast to determine its accuracy.<sup>1564</sup> If the budget is accurate, then future lost profits can be estimated based on this approach.

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<sup>1552</sup> FISCHER, *supra* note 1232, at 60; MCCORMICK, *supra* note 1410, at 101.

<sup>1553</sup> MCCORMICK, *supra* note 1410, at 101.

<sup>1554</sup> *Id.*

<sup>1555</sup> HON. MARTIN “MARTY” LOWY, PROVING AND DEFENDING LOST PROFITS DAMAGES, 10 (2011).

<sup>1556</sup> LOWY, *supra* note 1555, at 11; RICHARD POLLACK, ET AL., CALCULATING LOST PROFITS, 25 (American Institute Of Certified Public Accountants Practice Aid 06-4 2006) (It can be purchased as a PDF download at [www.cpa2biz.com](http://www.cpa2biz.com)).

<sup>1557</sup> *Id.*; KARL WEISHEIT, LOST PROFITS: AN ATTORNEY GUIDE TO DEALING WITH DAMAGES EXPERTS, 19 (Dallas Bar Association (CLE Presentation) 2010).

<sup>1558</sup> POLLACK, *supra* note 1556, at 25.

<sup>1559</sup> *Id.*

<sup>1560</sup> LOWY, *supra* note 1555, at 10; WEISHEIT, *supra* note 1557, at 46.

<sup>1561</sup> POLLACK, *supra* note 1556, at 26.

<sup>1562</sup> LOWY, *supra* note 1555, at 10; WEISHEIT, *supra* note 1557, at 46; POLLACK, *supra* note 1556, at 26.

<sup>1563</sup> WEISHEIT, *supra* note 1557, at 39.

<sup>1564</sup> WEISHEIT, *supra* note 1557, at 43; POLLACK, *supra* note 1556, at 26.

#### 7.3.1.8.5. The “Out-of-Pocket Costs” Approach

Under this approach, an expert will calculate lost profits based on out-of-pocket costs incurred because of the wrongful act.<sup>1565</sup>

#### 7.3.1.8.6. The “Decrease in Value” Approach

An expert will value the plaintiff’s business before and after the occurrence of the wrongful act. The measurement of damages is the decrease in the value of the business due to the wrongful act.<sup>1566</sup>

#### 7.3.1.9. Lost Licenses or Benefits Measurement

If the consumer loses a benefit he should have received but for the violation, the damage is the value of the benefit. For example, if a person receives food stamps benefits, and the violation causes him to become ineligible, the value of the food stamps benefit is the measure of damages.

The issue becomes more difficult when a consumer loses, or is denied a license because of the violation. For instance, when the license of a professional is revoked because of a violation (listing him wrongfully as a criminal for example), the damages can be measured by looking at the income he received in the last year for a similar period as the non-practicing period, according to reliable, historical accounting records.<sup>1567</sup>

The issue becomes more complex when the consumer is denied a license for the first time without having engaged in a licensed prior practice. An example would be a recent graduate of medical school who applies for a medical license for the first time and is denied because of wrongful information in his credit report. I think this case can be analogized to the measurement of lost profits of “start-up businesses”.

In the past, start-up business damages were denied because they are inherently speculative and uncertain.<sup>1568</sup> However, the courts recently began moving toward allowing recovery. The Texas Supreme Court’s reason for allowing lost profits for a start-up business is that “The focus is on the experience of the persons involved in the enterprise and the nature of the business activity, and the relevant market”.<sup>1569</sup> Proof of similar business profits and profits made by the wrongful defendant, if relevant, may be introduced.<sup>1570</sup>

Different factors should be taken into consideration when measuring the lost profits of a new business: the plaintiff’s business plan, availability of capital, plaintiff’s prior experience, the obstacles to entry in the industry, the quality of available records, and the economy of the specific location.<sup>1571</sup> Damages can be measured from the expected date of practice had the license been granted until the granting of the license, looking at the income comparable practitioners receive.

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<sup>1565</sup> POLLACK, *supra* note 1556, at 49.

<sup>1566</sup> *Id.*

<sup>1567</sup> MCCORMICK, *supra* note 1410, at 107 (“Where the issue is as to the profits which would have been made in a period of interruption of an “established” business, the *past profit* may be shown” [Emphasis in original]).

<sup>1568</sup> POLLACK, *supra* note 1556, at 51.

<sup>1569</sup> *Tex. Instruments v. Teletron Energy Mgmt.*, 877 S.W.2d 276, 280 (Tex. 1994) (The court held, “For example, if lost profits were recoverable for damage to a business activity of the XYZ Corporation, they should not be denied simply because the activity was conducted by a subsidiary newly formed for that purpose which XYZ controlled and managed. The focus is on the experience of the persons involved in the enterprise and the nature of the business activity, and the relevant market”).

<sup>1570</sup> MCCORMICK, *supra* note 1410, at 108.

<sup>1571</sup> POLLACK, *supra* note 1556, at 51.

## 7.3.2. Measurement of Actual Damages under Islamic Law

### 7.3.2.1. Real and Personal Properties

Islamic law provides four options to compensate for damaged or destructed real and personal properties depending on the situation.<sup>1572</sup>

#### 7.3.2.1.1. Providing a Substitute

Providing a substitute is fairer than requiring mere payment of value.<sup>1573</sup> The reason being when the defendant is required to pay the value of the property, he will pay the value without any associated costs. Thus, the plaintiff will expend time, effort, and transportation to obtain a substitute property. However, when the defendant is required to provide a substitute, he will spend the time, effort, and transportation until he obtains a substitute.<sup>1574</sup> Shifting this task to the person who caused the damage is fairer.

Property is either fungible or non-fungible.<sup>1575</sup> In case of fungible property, a defendant has to provide the plaintiff with a substitute property based on the dominant approach.<sup>1576</sup> Based on the prevailing opinion, the plaintiff has the right to get the value of the property unless the defendant refuses.<sup>1577</sup> If the substitute is not available in the same area, scholars differ on whether the defendant must obtain it from other markets.<sup>1578</sup> If the defendant finds a substitute in the market, but it is more expensive than similar properties, then the strongest opinion is that the defendant does not have to obtain a substitute but rather pay the value of similar properties.<sup>1579</sup>

To attain fairness, damaged property and the substitute must be similar in regard to the type, description, value, purpose, and usage.<sup>1580</sup> However, scholars are split on whether total similarity of some properties can be attained or not. The first approach is that similarity can be attained in all properties. Thus, a substitute is appropriate in every case.<sup>1581</sup> The second approach is that similarity cannot be achieved as properties differ in their parts, description, and manufacturing quality; therefore, it is fair to demand the value of the damaged property and not a substitute.<sup>1582</sup>

#### 7.3.2.1.2. Payment of Monetary Value

If there is no substitute for the damaged property or there is a substitute but it cannot be obtained, then the defendant has to pay the value of the damaged property.<sup>1583</sup> Payment

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<sup>1572</sup> ALMARZOQI, *supra* note 9, at 499.

<sup>1573</sup> SIRAJ, *supra* note 1293, at 529.

<sup>1574</sup> *Id.*

<sup>1575</sup> ABU SAQ, *supra* note 1271, at 239 (Fungible property is property that has a substitute in the market such as wheat, oil, unmanufactured gold etc. However, when an addition or alteration is made to the property, it becomes non-fungible. Non-fungible property is property that has no substitute in the market or has a substitute but the property is different from the substitute because of additional features added to it such as manufactured gold, land, animals, etc.).

<sup>1576</sup> ALMARZOQI, *supra* note 9, at 465; ABU SAQ, *supra* note 1271, at 231; AL-ZUHAYLI, *supra* note 1271, at 92.

<sup>1577</sup> ALMARZOQI, *supra* note 9, at 466.

<sup>1578</sup> *Id.* at 466 (The first approach is that the defendant has to procure it even if the shipping is costly. The second approach is that he does not have to procure it unless the shipping is not costly. The third approach is that if the price in the other market is similar or less than the local market of the parties then he has to procure a substitute.); ABU SAQ, *supra* note 1271, at 250-51.

<sup>1579</sup> ALMARZOQI, *supra* note 9, at 467; ABU SAQ, *supra* note 1271, at 251; ALDABO, *supra* note 1401, at 112.

<sup>1580</sup> ALMARZOQI, *supra* note 9, at 493; ABU SAQ, *supra* note 1271, at 263.

<sup>1581</sup> ALMARZOQI, *supra* note 9, at 494.

<sup>1582</sup> *Id.* at 495.

<sup>1583</sup> ALMARZOQI, *supra* note 9, at 467; ABU SAQ, *supra* note 1271, at 249; AL-ZUHAYLI, *supra* note 1271, at 94.

should be in the currency of the place of damage.<sup>1584</sup> If the place of damage is not an appropriate place to measure the value, such as in the desert or sea, then the value of the closest market is the appropriate place to determine the value.<sup>1585</sup>

If the damaged property has no value at the time of the damage such as unripe crops, then the measurement is the value of mature crops.<sup>1586</sup> If it is known the property is damaged but number, weight, size etc. is unknown, then the measurement is through speculation provided that value is reasonable.<sup>1587</sup> For instance, when one person sets fire to the field of another person and no information is available as to the number of trees, ages of trees, and fruit, then speculation of the burnt trees is the measurement.

On the other hand, if the damage is so great that the purpose of the property is unattainable, one approach gives the plaintiff the right to ask for diminution in value and keep the property, or to take the full value of the property and give the defendant the damaged property.<sup>1588</sup> Non-attainment of the property is a subjective standard; therefore, if the defendant only causes a slight defect in the property, the owner has the right to ask for the full value of the property and give the defendant the damaged property, if he proves that his purpose of the property is no longer served. For instance, if the defendant cuts the tail of a horse of a noble man, the defect is slight in the view of lay people, but the noble man cannot ride such a horse.<sup>1589</sup>

Another approach is the measurement is the diminution in value in every case even if the damage frustrates the purpose of the owner.<sup>1590</sup> For instance, when a person grinds the wheat of another person, the owner still owns the wheat and the defendant has to pay only the diminution in value.<sup>1591</sup>

If the property's parts are separable but loss of one of them renders the other useless, the defendant has to pay the full value of the property and take the useless parts on one of the approaches.<sup>1592</sup> The other approach is that the defendant pays the value of the damaged part in addition to the diminution in value.<sup>1593</sup> For instance, if the defendant damages one piece of shoe pair, he has to pay the value of the damaged piece in addition to the difference between the value of the shoes pre and post damage.<sup>1594</sup>

#### 7.3.2.1.3. Diminution in Value

If the property is partially damaged, the measurement is the diminution in value. The diminution of value is measured in one of two ways.<sup>1595</sup> First, the diminution in value is the difference between the value of the property before and after the damage.<sup>1596</sup> Second, the defendant restores the property to its prior condition at his expense, then the difference between the value of the property before and after the damage in addition to restoration

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<sup>1584</sup> ALMARZOQI, *supra* note 9, at 467.

<sup>1585</sup> *Id.* at 497.

<sup>1586</sup> *Id.* at 498.

<sup>1587</sup> *Id.* at 498-99.

<sup>1588</sup> ALMARZOQI, *supra* note 9, at 468; ABU SAQ, *supra* note 1271, at 216; AL-ZUHAYLI, *supra* note 1271, at 131.

<sup>1589</sup> ABU SAQ, *supra* note 1271, at 218.

<sup>1590</sup> AL-MAQDISI, *supra* note 269, at 144/5.

<sup>1591</sup> ABU SAQ, *supra* note 1271, at 219.

<sup>1592</sup> *Id.* at 220-21.

<sup>1593</sup> ALMARZOQI, *supra* note 9, at 483-84; ABU SAQ, *supra* note 1271, at 221.

<sup>1594</sup> ABU SAQ, *supra* note 1271, at 222.

<sup>1595</sup> *Id.* at 223.

<sup>1596</sup> SIRAJ, *supra* note 1293, at 536.

expenses is the measurement.<sup>1597</sup> For instance, when the defendant makes a hole in shirt worth \$100, and the cost of sewing is \$20, the defendant has to pay \$20. If the value of the shirt after sewing is \$70, then the diminution in value is only \$10.

#### 7.3.2.1.4. Restoration

The fourth option is to ask the defendant to restore the property to its prior condition, if possible.<sup>1598</sup> For instance, if one person fills in another person's well, he has to take the soil out of the well. If the defendant hits a car, he has to restore it to its prior condition. However, if the restoration does not return the property to its prior condition, he has to pay the diminution in value in addition to restoration.<sup>1599</sup>

Value to the owner is not a recognized concept under Islamic law but rather the fair market value even if the market value is inadequate.

#### 7.3.2.2. Market Value of Services

Scholars debate whether the value of the services of a person can be compensated.<sup>1600</sup> The first approach is that value of services is not recoverable because the services are not owned by any one.<sup>1601</sup> The second approach is similar, except when the services are owed to another person, in which case the value is recoverable.<sup>1602</sup> For example, when an unemployed person is wrongfully prevented from going to work, the value of his services are not recoverable, because no one owns his services and his services have not been performed. If the person is an employee, then he can recover the value of his services because the employer owns his services. The third and prevailing approach is that value of his services is recoverable regardless of his work status because his services can be measured.<sup>1603</sup> The measurement of services is the fair market value of similar services performed by a similar person with the same qualifications.<sup>1604</sup>

#### 7.3.2.3. Out-of-Pocket Expenses

If the consumer incurs expenses because of a violation, the consumer is entitled to recover those expenses, provided they are reasonable.<sup>1605</sup> Moreover, the consumer is entitled to recover any other associated damages. For instance, if out-of-pocket expenses compelled the consumer to borrow money, then he is entitled to recover the increase in the interest rate.<sup>1606</sup> Similarly, if the consumer sells some of his assets at a lower price, he is entitled to the difference between the selling price and the fair market value of his assets.<sup>1607</sup> If the consumer has to pay a higher down payment, it is reasonable to allow recovery. However, since in the end the consumer will pay the same total amount, one could argue a wrongdoer may be required to pay the consumer the extra down payment, but the consumer would pay

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<sup>1597</sup> ABU SAQ, *supra* note 1271, at 223.

<sup>1598</sup> ALMARZOQI, *supra* note 9, at 471.

<sup>1599</sup> *Id.* at 472.

<sup>1600</sup> ALMARZOQI, *supra* note 9, at 194.

<sup>1601</sup> *Id.* at 193.

<sup>1602</sup> *Id.*

<sup>1603</sup> *Id.* at 194.

<sup>1604</sup> *Id.*

<sup>1605</sup> Email from Dr. Sami Al-Suwailem, to Mansour Alhaidary (Nov. 5, 2011). Dr. Sami is a well-known scholar in Islamic finance. He is the deputy director of the Islamic Research and Training Institute which is under the umbrella of the Islamic Development Bank.

<sup>1606</sup> *Id.*

<sup>1607</sup> *Id.*



the amount to the wrongdoer later on an installment basis.<sup>1608</sup> For instance, if the down payment is \$10,000 and the monthly payment is \$500, but because of the wrongful act, the down payment becomes \$20,000, the wrongdoer should pay the \$10,000 and the consumer should repay that \$10,000 to the wrongdoer on installment basis.

Similarly, when the consumer is required to pay a security deposit, the violator should pay the security deposit instead of the consumer, if practical. However, if the consumer pays the security deposit resulting in other associated damages, then the consumer is entitled to recover.<sup>1609</sup>

#### **7.3.2.4. Measuring Loss of Credit<sup>1610</sup>**

##### *7.3.2.4.1. Increase of Interest Rate*

If the damages to a consumer are an increase in the interest rate,<sup>1611</sup> the measurement of damages is the increase, provided the consumer concluded the loan contract or the time when the damage is most likely to happen has passed. If there is an increase, but the consumer does not complete the transaction and does not need to complete a similar transaction or the realization of damage is not certain, then there is no recovery because the damage has not been realized.<sup>1612</sup> Another view tends not to make an award to the consumer but rather requires the CRA to correct the underlying errors, which in turn will decrease the interest rate of the consumer.<sup>1613</sup> However, this view does not take into consideration the cases in which the consumers conclude transactions without knowing of the interest rate they deserve. Similarly, this view does not consider when consumers need access to credit immediately without an ability to wait until their credit reports are corrected.

##### *7.3.2.4.2. Decrease in Credit Capacity*

One approach does not allow recovery if the damages to a consumer are merely a decrease in his credit capacity if there is no damage because of that decrease.<sup>1614</sup> For instance, if a consumer's credit capacity is \$1,000 and his credit capacity decreases to \$500 because of a CRA violation, there is no damage because of that decrease. However, if the decrease in credit capacity results in other damages, then the consumer is entitled to recover only the increase in interest. For example, if a consumer's credit capacity is \$1,000, his credit capacity decreases to \$500, and the consumer borrows the other \$500 at the same interest rate, then there is no recovery. However, if he borrows the other \$500 at a higher interest rate, then he is entitled to the difference. Similarly, if the consumer sells some of his assets at a lower price because of that decrease, he is entitled to the difference between the selling price and the fair market value of his assets.<sup>1615</sup>

Another view allows recovery based on the theory of prevention of benefits from coming into existence,<sup>1616</sup> because the wrongdoer prevented the consumer from borrowing

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<sup>1608</sup> Email from Dr. Suliman Aldakheel, to Mansour Alhaidary (Nov. 16, 2011). Dr. Aldakheel's Ph.D dissertation was about Compensations of Loan Delinquency Damages.

<sup>1609</sup> Al-Suwailem, *supra* note 1605; Aldakheel, *supra* note 1608.

<sup>1610</sup> The issues presented have not been dealt with before in the same context; therefore, I contacted some of the scholars in Saudi Arabia to get their opinions regarding these issues.

<sup>1611</sup> Most of the interest-based transactions in the financial system are unlawful under Islamic law. For more information regarding Islamic finance see: BHALA, *supra* note 7, at 678.

<sup>1612</sup> Al-Suwailem, *supra* note 1605.

<sup>1613</sup> Aldakheel, *supra* note 1608.

<sup>1614</sup> Al-Suwailem, *supra* note 1605.

<sup>1615</sup> *Id.*

<sup>1616</sup> *Infra* page 219.

money. Borrowing money must be a benefit that is certain or more likely to exist. But for wrongdoer's act, the consumer would have been granted a loan.<sup>1617</sup> However, since the consumer is going to repay the loan, the damages are the increase in interest rate. Allowing recovery of the amount of the loan would result in a windfall for the consumer.

#### 7.3.2.4.3. Denial of Credit

In general, if a consumer is denied credit, then the consumer may not recover the amount that he intended to borrow as there is no apparent damage because of that denial.<sup>1618</sup> However, if the denial results in other damages, then the consumer is entitled to recover only the increase in interest. For example, if a consumer's expected loan (\$1,000) is denied, and the consumer borrows the \$1,000 at the same interest rate, then there is no recovery. However, if he borrows the \$1,000 at a higher interest rate, then he is entitled to the difference.<sup>1619</sup> Similarly, if the consumer sells some of his assets at a lower price because of that denial, he is entitled to the difference between the selling price and the fair market value of his assets.<sup>1620</sup> I believe that if the consumer finds no lender because of the violation, it is reasonable to require the wrongdoer to lend him the same amount at the same terms and conditions.

#### 7.3.2.5. Lost Jobs Measurement

If the consumer loses his job or loses a certain opportunity to obtain a job, then he is entitled to recover provided that he could not easily find a comparable job.<sup>1621</sup> The measurement of damages is what the consumer would have received from the lost job.<sup>1622</sup> Moreover, the consumer is entitled to recover any damages that resulted from indebtedness because of losing the job. If the consumer finds a job, then he is entitled to receive the difference between the two jobs, if there is any.<sup>1623</sup> If the opportunity to obtain a job is not certain, then the consumer is entitled to recover the cost of finding a job but not the income of such a job.<sup>1624</sup> For instance, if the consumer was offered a job, but because of the violation, he was rejected, his opportunity is certain. However, if he has a chance to obtain the job but it is not certain, then he is entitled to recover the cost of finding a job.

#### 7.3.2.6. Lost Opportunity

The lost opportunity concept is not known by its name but rather by the nature of the concept. Under Islamic law, generally lost opportunity is not recoverable because a plaintiff has not lost anything but a chance.<sup>1625</sup> The chance by itself has no monetary value under Islamic law<sup>1626</sup> as there cannot be a market for chances. Even supposing a chance market

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<sup>1617</sup> Email from Mr. Abdulmalik Al Mazroua, to Mansour Alhaidary (Nov. 17, 2011). Mr. Al Mazroua is a senior associate in AlGasim Law Firm in association with Allen & Overy LLP.

<sup>1618</sup> Al-Suwailem, *supra* note 1605.

<sup>1619</sup> *Id.*

<sup>1620</sup> *Id.*

<sup>1621</sup> ALMARZOQI, *supra* note 9, at 196.

<sup>1622</sup> *Id.*

<sup>1623</sup> Al-Suwailem, *supra* note 1605

<sup>1624</sup> *Id.*

<sup>1625</sup> ABU SAQ, *supra* note 1271, at 125.

<sup>1626</sup> *Id.*

could be established, it would be similar to gambling, which is prohibited in Islamic law.<sup>1627</sup> However, one can say that a lost opportunity is recoverable in some cases including a *Bay' Al-Urbun* contract<sup>1628</sup> and usurpation cases. In a *Bay' Al-Urbun* contract, the seller, according to the prevailing approach, has the right to keep the down payment if the buyer does not complete the contract.<sup>1629</sup> The seller preserves the goods for the benefit of the buyer; therefore, the seller deserves the money because he lost an opportunity to sell the goods in the market.<sup>1630</sup>

In usurpation cases the owner of the usurped assets, according to the strongest approach, has the right to recover fair market value of the period of use of the assets, even if the usurper did not use the assets and even if the assets were not prepared for lease.<sup>1631</sup> Holding the assets prevents the owner from having an opportunity to profit from the asset.

### 7.3.2.7. Lost Profits Measurement

Islamic schools debate the issue of lost profits in three contexts: usurpation, intentional delinquency in loans, and prevention of benefits from coming into existence.

#### 7.3.2.7.1. Usurpation of Property

Scholars debate whether a usurper is liable for the lost profits of usurped property. The first approach tends not to award lost profits because a usurper is liable for the property in the case of destruction; therefore, he should keep the profits.<sup>1632</sup> The juristic maxim provides that “*profits follows responsibility*”<sup>1633</sup> which means that whoever bears the risk is entitled to the profits. Another approach holds the usurper liable for property’s benefits even if the benefits do not exist, because the usurper prevents the owner from gaining the benefits.<sup>1634</sup> For instance, when a person usurps another person’s animal, the usurper is liable for the fair market value of the use of that animal even if the usurper has not used it.<sup>1635</sup> The fair market value is for the benefits that do not exist because the usurper prevented them from coming into existence.

#### 7.3.2.7.2. Usurpation of Money

When a person usurps money of another person, scholars have different opinions regarding lost profits. The first approach allows the owner to take profits the usurper made from this money.<sup>1636</sup> However, no recovery if the usurper did not trade in it.<sup>1637</sup> The second

<sup>1627</sup> *Holy Quran* 5:91 “**Satan wants only to excite enmity and hatred between you with intoxicants (alcoholic drinks) and gambling, and hinder you from the remembrance of Allah and from prayer. So, will you not then abstain?**”

<sup>1628</sup> BHALA, *supra* note 7, at 664 (*Bay' Al-Urbun* is a description of a contract in which a down payment is to be forfeited if the contract is not completed because of buyer’s repudiation.).

<sup>1629</sup> *Id.*

<sup>1630</sup> Abdullah Bin Muni’, *Delay in Repayment of Debt by a Wealthy Person is a form of Oppression that Frees His Reputation and Punishment*, 2 International Islamic Fiqh Academy Journal, 93, 102 (1986); NASIR ALJUOFAN, COMPENSATION FOR LOSS OF BENEFIT WHICH ITS CAUSE OF EXISTENCE IS ESTABLISHED 56 (Al-Rushd Publishing 2008).

<sup>1631</sup> ALDABO, *supra* note 1401, at 269-70.

<sup>1632</sup> SIRAJ, *supra* note 1293, at 173.

<sup>1633</sup> ALSUIUTI, *supra* note 1193, at 135.

<sup>1634</sup> ALJUOFAN, *supra* note 1630, at 51-52.

<sup>1635</sup> AHMED IBN TAYMIYYAH, *THE GREAT FATAWAS*, 5/421 (Scientific Books House, 1987).

<sup>1636</sup> SHIHAB AL-DIN AL-QARAFI, *ALZAKHAIRAH*, at 8/317 (Muhammad Hijji *ed.*, West Islamic House, 1st ed., 1994); SIRAJ, *supra* note 1293, at 185.

<sup>1637</sup> AL-QARAFI, *supra* note 1636, at 8/317; SIRAJ, *supra* note 1293, at 189.

approach denies recovery of lost profits in any case.<sup>1638</sup> The third approach allows recovery of lost profits if the owner usually engages in trade regardless of the usurper's status.<sup>1639</sup> The fourth approach differentiates between situations as follows:

- If an owner is not engaged in trade, and the usurper did not trade using the money, then no lost profits may be recovered.
- If an owner is engaged in trade and usurper did not trade using the money, then the owner may recover profits that the owner usually generates, unless trade during the usurpation period is not profitable.
- If an owner is engaged in trade and insolvent usurper traded using the money, then the owner may recover profits that the usurper generated or profits that the owner usually generates which is greater.
- If an owner is not engaged in trade, and the insolvent usurper traded using the money, then the owner may recover profits that the owner usually generates, unless trade during the usurpation period is not profitable.
- If an owner is not engaged in trade, and the solvent usurper traded using the money, then no lost profits may be recovered because profits follow responsibility<sup>1640</sup>

#### 7.3.2.7.3. Delinquency in Loans

Scholars agree creditors are not entitled to lost profits from insolvent debtors.<sup>1641</sup> However, scholars are split over awarding lost profits from solvent delinquent debtors. The first approach allows creditors to recover lost profits they would have earned but for the delinquency of debtors.<sup>1642</sup> However, no prior agreement on liquidated damages is allowed, because that is a form of *Riba* (usury). The court is the one in charge of assessing and awarding lost profits.<sup>1643</sup> The second approach allows recovery based on a prior agreement on liquidated damages, but without a specific amount or percentage. Creditors and debtors may agree in advance that loss of profit is recoverable, provided creditors suffer an actual loss.<sup>1644</sup> The third and prevailing approach, denies recovery of lost profits in loan contracts because of similarity to interest-based loans. However, the court has wide discretion to punish solvent delinquent debtors through imprisonment, forced sale, and the like.<sup>1645</sup>

#### 7.3.2.7.4. Prevention of a Benefit from Coming into Existence

When lost profits are certain or more likely to be realized but for the wrongful acts, they are recoverable according to the prevailing opinion. Under Islamic law, damages consist of two types: damage by way of destroying something that exists and damage by way of preventing a non-existent benefit from coming into existence.<sup>1646</sup> Benefits that are certain to be realized or more likely to be realized are recoverable if they are forfeited because of

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<sup>1638</sup> AL-QARAFI, *supra* note 1636, at 8/317.

<sup>1639</sup> AL-QARAFI, *supra* note 1636, at 8/317.

<sup>1640</sup> *Id.*

<sup>1641</sup> Bin Muni', *supra* note 1630, at 95; Mustafa Al Zarqa, *Is it Shariah Accepted to Require Procrastinated Debtors to Compensate Creditors?*, 2/2 Islamic Economy Research Journal 103, 112 (1985).

<sup>1642</sup> Al Zarqa, *supra* note 1640, at 105; Bin Muni', *supra* note 1630, at 95; Alsiddiq Aldarir, *Agreement on Obliging a Solvent Debtor to Compensate for Damages of Delinquency*, 3/1 Islamic Economy Research Journal 117, 118 (1985).

<sup>1643</sup> Al Zarqa, *supra* note 1640, at 110.

<sup>1644</sup> Aldarir, *supra* note 1642, at 118.

<sup>1645</sup> Nazih Hammad, *Permissible Ways of Securing Repayment of Debt and the Invalidity of Financial Compensation for Delinquency*, 3/1 Islamic Economy Research Journal 107, 107 (1985).

<sup>1646</sup> ALJUOFAN, *supra* note 1630, at 35.

wrongdoing.<sup>1647</sup> Certainty is not required but rather probability is sufficient if benefits are typically realized in usual practice.<sup>1648</sup>

Loss of future profits or future benefits is characterized as preventing non-existent benefits from coming into existence.<sup>1649</sup> Lost profits are benefits that are prevented from being realized by a consumer because of the wrongdoer's act. For example, when an independent contractor quits a farm without completing his duty and without terminating the contract, the independent contractor is liable to the farm's owner for the lost crops, even though they do not exist yet, because the cause of existence of the crops is established.<sup>1650</sup> But for the wrongdoer's act, the crops would have ripened and been harvested.<sup>1651</sup> *Ibn Taymiyyah* states the previous example and adds: "... quitting the duty without termination is unlawful and deceit, and quitting is cause of non-existence of the crops, so it is the same as if the crops have been destroyed intentionally after they existed".<sup>1652</sup>

#### 7.3.2.7.5. Measurement of Lost Profits

One suggestion to measure lost profits is to award the plaintiff the minimum reasonable profits that he would have earned if he had dealt in trade.<sup>1653</sup> Another suggestion is to measure lost profits to similar profits the consumer realized during the same period.<sup>1654</sup> Lost profits for new businesses are unlikely to be recovered under Islamic law because of its speculative nature.

The "Before and After" Approach is more likely to be accepted as a measurement for lost profits. Other approaches which concern new businesses, such as the "Yardstick", "Market Share", and "Budget", are unlikely to be accepted under Islamic law because of their speculative nature. I believe "Out-of-Pocket" costs and the "Decrease in Value" approaches are not related to lost profits. Both costs incurred in the "out-of pocket" approach and "Decrease in Value" are part of the actual damages, not lost profits.

#### 7.3.2.8. Lost License or Benefit Measurement

If the consumer is denied a license because of a violation, the consumer is entitled to recover. However, the measurement of damages differs from a case to another. If the applicant is applying for a license for the first time, and but for the violation he would have obtained a license, then the applicant is entitled to recover similar income that he was supposed to earn had he been licensed.<sup>1655</sup> However, if the applicant is applying for a renewal, and he stopped practicing because of the denial, then he is entitled to recover the average amount he used to earn for the same period in the last years of his practice.<sup>1656</sup>

If the consumer is denied benefits because of the violation, the consumer is entitled to recover the value of such benefits.<sup>1657</sup> For instance, if the consumer is eligible for food stamps but he becomes ineligible because of the violation, then he is entitled to recover the

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<sup>1647</sup> *Id.*

<sup>1648</sup> *Id.*

<sup>1649</sup> *Id.*

<sup>1650</sup> *Id.*

<sup>1651</sup> *Id.*

<sup>1652</sup> IBN TAYMIYYAH, *supra* note 1635, at 406/5.

<sup>1653</sup> Al Zarqa, *supra* note 1640, at 112.

<sup>1654</sup> Aldarir, *supra* note 1642, at 118.

<sup>1655</sup> Al-Suwailem, *supra* note 1605.

<sup>1656</sup> *Id.*

<sup>1657</sup> *Id.*

value of the food stamps for the whole period.<sup>1658</sup> If the loss of benefits results naturally in other damages, the consumer is entitled to recover those damages. For instance, if the consumer becomes sick because of the loss of the benefit, then the consumer is entitled to recover the cost of medical care. Similarly, if the consumer is laid off from his job because of the sickness that resulted from the loss of benefits, the consumer is entitled to recover.<sup>1659</sup>

#### 7.4. Measurement of Non-Economic Losses

Non-economic loss, which includes emotional distress, is difficult to measure because of subjectivity.<sup>1660</sup> Measuring emotional distress is an attempt to measure the immeasurable.<sup>1661</sup> The jury is told, the “only real measuring stick they can employ is their “collective enlightened conscience.”<sup>1662</sup> However, since jurors have different subjective views, subjectivity may lead to inadequate or excessive award.<sup>1663</sup> Courts are concerned with excessiveness more than inadequacy.<sup>1664</sup> However, there is no bright line to separate an excessive from an inadequate award.<sup>1665</sup> An award is determined to be excessive if it shocks the conscience of the court.<sup>1666</sup> This standard is subjective, and what shocks one court may not shock another court.<sup>1667</sup> Subjective awards, theoretically, can be minimized by comparing the award to similar cases.<sup>1668</sup> Since no two cases are alike, similar awards in comparable cases are arbitrary, too.<sup>1669</sup>

##### 7.4.1. Golden Rule Method

One way to measure emotional distress is to ask the jurors to put themselves into the plaintiff’s shoes to determine the amount of compensation for pain and suffering the plaintiff deserves. This method is the “Golden Rule” argument and is rejected by courts. If this method is used, a mistrial should be announced.<sup>1670</sup> This method is rejected because such an award would not be based on evidence but rather on bias and passion.<sup>1671</sup>

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<sup>1658</sup> *Id.*

<sup>1659</sup> *Id.*

<sup>1660</sup> FISCHER, *supra* note 1232, at 132.

<sup>1661</sup> William S. Bach, Comment: *Damages-Pain and Suffering-Use of a Mathematical Formula*, 60 Mich. L. Rev. 612, 612 (1961-1962).

<sup>1662</sup> Avraham, *supra* note 1239, at 90.

<sup>1663</sup> FISCHER, *supra* note 1232, at 135.

<sup>1664</sup> *Id.*

<sup>1665</sup> *Id.*

<sup>1666</sup> *Havinga v. Crowley Towing & Transp. Co.*, 24 F.3d 1480, 1484 (1st Cir. 1994) (“the damages awarded for economic loss exceed any rational evaluation of the evidence ... and that the awards for noneconomic injuries are so grossly excessive as to “shock the conscience.”).

<sup>1667</sup> FISCHER, *supra* note 1232, at 135.

<sup>1668</sup> *Matthews v. Turner*, 566 So. 2d 133, 135 (La. Ct. App. 1990) (The court held, “Courts cannot, of course, mechanically adhere to prior quantum verdicts. Here, a reasonable award for Sabrina's physical pain and mental suffering would not exceed \$50,000.00. We are unaware of any award beyond this for pain and suffering of such a relatively short duration. No comparable awards exceeding \$50,000.00 have been cited for us.”).

<sup>1669</sup> FISCHER, *supra* note 1232, at 136.

<sup>1670</sup> *Goutis v. Express Transp., Inc., Div. of F.V. Miranda, Inc.*, 699 So. 2d 757 (Fla. Dist. Ct. App. 1997) (“While [a] golden rule argument suggests to jurors that they put themselves in the shoes of one of the parties, and is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence ... [t]o be impermissible, the argument must strike at that sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to receive in a similar situation.”); Avraham, *supra* note 1239, at 91.

<sup>1671</sup> FISCHER, *supra* note 1232, at 137.

## 7.4.2. Per Diem Method

Another method to measure emotional distress is the “per diem”<sup>1672</sup> argument. Per diem is based on an attempt to divide pain and suffering by days or time, assign a value for each time, and multiply the assigned amount by the number of units.<sup>1673</sup> Courts are sharply split over this argument.<sup>1674</sup>

### 7.4.2.1. Per Diem is Not Accepted

The first approach, followed in the minority of American jurisdictions, rejects this argument for different reasons. First, the calculation of the award is not based on evidence or scientific method but rather on an arbitrary assignment of value per unit of time.<sup>1675</sup> Second, because counsel cannot suggest a total amount for pain and suffering recovery, it is reasonable not to allow per diem.<sup>1676</sup> Third, allowing a per diem argument will result in attorneys’ giving testimony and expressing opinions and conclusions without evidentiary basis.<sup>1677</sup> Fourth, juries are misled by per diem arguments, which results in excessive awards.<sup>1678</sup> Fifth, a per diem argument causes defendant prejudice as he cannot rebut such an argument because there is no evidence to rebut. If he answers, he seems, in the jury’s eyes, to be endorsing such a method of calculation.<sup>1679</sup>

### 7.4.2.2. Per Diem is Accepted

The second approach, adopted by the majority of American jurisdictions, accepts the per diem argument for several reasons.<sup>1680</sup> First, guidance is provided to the jury. It is not left to decide arbitrarily.<sup>1681</sup> Second, it is questionable to say the per diem method misleads the jury.<sup>1682</sup> Third, it is not true that calculation based on per diem is without foundation. The jury needs to estimate the amount using this method or another based on the evidence provided.<sup>1683</sup> Fourth, suggesting an amount for pain and suffering by the attorney is a mere aid to the jury.<sup>1684</sup> Fifth, the per diem method is provided for illustration purposes and does not serve as evidence.<sup>1685</sup> Sixth, there is no prejudice to the defendant as he can oppose the per diem argument by suggesting his own amount.<sup>1686</sup> Seventh, if there is a danger of mistake because of using the per diem method, the role of the court is to police such a

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<sup>1672</sup> BLACK’S LAW DICTIONARY, *supra* note 163 (“Based on or calculated by the day.”).

<sup>1673</sup> Avraham, *supra* note 1239, at 91; FISCHER, *supra* note 1232, at 138.

<sup>1674</sup> *Waldron v. Hardwick*, 406 F.2d 86, 89 (7th Cir. 1969) (The court stated that “Although there is a sharp split among the state authorities on the use of the so-called ‘unit-of-time’ argument, the federal courts of appeal which have considered the question generally have permitted such arguments.”).

<sup>1675</sup> *Ratner v. Arrington*, 111 So. 2d 82, 88-89 (Fla. Dist. Ct. App. 1959).

<sup>1676</sup> *Id.*

<sup>1677</sup> *Id.*

<sup>1678</sup> *Id.*

<sup>1679</sup> *Id.*

<sup>1680</sup> *Beagle v. Vasold*, 417 P.2d 673, 676 (Cal. 1966).

<sup>1681</sup> *Id.* at 678.

<sup>1682</sup> *Id.* at 680.

<sup>1683</sup> *Id.* at 678.

<sup>1684</sup> *Ratner*, 111 So. 2d at 89.

<sup>1685</sup> *Beagle*, 417 P.2d at 678.

<sup>1686</sup> *Id.* at 681.

mistake.<sup>1687</sup> Another approach accepts the per diem approach with the cautionary instruction of the judge that this method is not evidence.<sup>1688</sup>

### 7.4.3. Lump Sum Method

The third method to measure the damages for emotional distress is a lump sum amount as compensation.<sup>1689</sup> This method is permitted by most American jurisdictions.<sup>1690</sup>

### 7.4.4. Schedules and Scenarios

One group of scholars proposed a solution to reduce the unpredictability of award. They suggest the system should make schedules and scenarios of injuries and awards available by which the damages could be calculated.<sup>1691</sup> The purpose of this method is to standardize the “remedy for similar categories of injuries and avoid past variance.”<sup>1692</sup> This proposal is opposed by others who say schedules and scenarios do not serve the goal of deterrence and compensation. In addition they are administratively complicated.<sup>1693</sup> Furthermore, it does not solve the problem of variance because of wide ranges of damages and awards.<sup>1694</sup>

### 7.4.5. Fictional Market

Another method to measure pain and suffering is to create a market. This can be done based on how much people ask for doing risky jobs. The premium that is added to the risky job can be the value of the pain and suffering.<sup>1695</sup> However, one of the limitations on this approach is that no market value can be determined for all risks and injury.<sup>1696</sup> A similar approach tries to measure the value of pain and suffering based on the value of life. Under this approach, the value is determined based on studies of the value of life. The problem with this approach is that it renders unpredictable life values which range from \$600,000 to \$16.2 million.<sup>1697</sup> Even if one assumes a stable life value, an estimation of the worth of a body part is a problem.<sup>1698</sup>

### 7.4.6. Willingness to Pay to Eliminate Risk

One of the approaches that measures pain and suffering suggests basing the value on how much people are willing to pay before the injury to eliminate the loss.<sup>1699</sup> This approach is criticized because asking the jury to estimate the cost of elimination of risk on a case-by-

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<sup>1687</sup> *Id.*

<sup>1688</sup> *Mkt. Tavern, Inc. v. Bowen*, 92 Md. App. 622, 657 (1992) (The court held, “Indeed, in its principal brief on appeal, Market Tavern did not even argue that the trial judge erred in failing to give a cautionary jury instruction; rather, it simply asserted that the per diem argument was ‘improper’. That argument is meritless.”).

<sup>1689</sup> FISCHER, *supra* note 1232, at 138.

<sup>1690</sup> *Id.* at 139.

<sup>1691</sup> Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 533 (Aug. 1984).

<sup>1692</sup> Avraham, *supra* note 1239, at 102-03.

<sup>1693</sup> *Id.* at 101.

<sup>1694</sup> *Id.* at 104.

<sup>1695</sup> Michael J. Moore & W. Kip Viscusi, *Doubling the Estimated Value of Life: Results Using New Occupational Fatality Data*, 7 J. POL’Y ANALYSIS & MGMT., 476, 484-87 (Spring 1988); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 833 (1995).

<sup>1696</sup> Avraham, *supra* note 1239, at 105.

<sup>1697</sup> *Id.*

<sup>1698</sup> *Id.*

<sup>1699</sup> Geistfeld, *supra* note 133, at 804-05.



case basis is costly and ad difficult task.<sup>1700</sup> In addition, this method may suit pure pain and suffering cases but is not suitable for mixed bodily and pain and suffering cases.<sup>1701</sup>

#### **7.4.7. Cost to Purchase Insurance Coverage**

Another approach to measure pain and suffering is to ask the jury to assess the cost of purchasing pain and suffering insurance coverage.<sup>1702</sup> This approach is criticized because of unpredictability and its high administrative cost.<sup>1703</sup>

#### **7.4.8. Non-Binding Age-Adjusted Multipliers**

This approach is based on considering medical cost as a measure of pain and suffering. This approach suggests a creation of a system of non-binding age-adjusted multipliers.<sup>1704</sup> First, a multiplier is to be created. This multiplier may be derived from past awards, predetermined legislator's multipliers, or different multipliers for different type of injuries. This multiplier should differ because of age of the plaintiff. After determining medical costs and a multiplier, medical cost is to be multiplied by the multiplier and the result is the damages of pain and suffering. For instance, if the medical cost is \$0-100,000, and the multiplier is 0.5, the pain and suffering damages are \$0-50,000.<sup>1705</sup> Since this method is not binding, then it loses its value. It should allow slight deviation from the method but not complete non-binding method.

#### **7.4.9. Suggested Method**

Pain and suffering are beyond calculation. However, this fact does not mean the defendant goes free. This fact also does not mean defendants should be punished more than is needed. Allowing arbitrary compensations is not fair for plaintiffs or defendants. It is not fair for a plaintiff to receive an amount considerably lower than another plaintiff in a comparable case. Similarly, it is also not fair for a defendant to pay an amount higher than another defendant in a comparable case.<sup>1706</sup> For example, why is the pain of Y worth \$10,000,000, while the pain of X worth only \$1,000,000? Do we have an accurate tool to measure the pain of both of them? Or it is true that Y gets more because he is able to influence the jury while X is not able to do so? It is true that no two cases are alike, and that courts try to award similar amounts in comparable cases. However, different verdict amounts suggest that there needs to be a clear standard.

Since there is no way to accurately and objectively calculate the amount of pain or compensation, and since pain and suffering differ from one person to another, the standard must be made objectively. A line must be drawn to attain the objectives of compensation, justice, and fairness.

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<sup>1700</sup> Avraham, *supra* note 1239, at 106.

<sup>1701</sup> *Id.* at 108.

<sup>1702</sup> John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for Non-pecuniary Losses*, 21 J. LEGAL STUD. 371, 379-80 (Jun. 1992).

<sup>1703</sup> Avraham, *supra* note 1239, at 109.

<sup>1704</sup> *Id.* at 111.

<sup>1705</sup> *Id.*

<sup>1706</sup> Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages*, (With Notes on Cognition and Valuation in Law) 107 YALE L.J. 2132 (1998). ("In particular people with similar injuries are often awarded very different amounts of damages.").

In my opinion, the line can be drawn based on the following:<sup>1707</sup>

### **A- Human Experience of Pain is Equal:**

Since there is no way to measure pain and suffering, the presumption should be that all human lives are equal in value.<sup>1708</sup> Thus, the value of experiencing pain and suffering should be the same. Of course this is not an accurate statement in all cases; however, since we cannot prove who suffers more, we should treat all people equally.

### **B- Levels of Pain**

Different acts produce different results. Therefore, levels of pain and suffering should be created to cover all possibilities such as severe, moderate, and mild pain.<sup>1709</sup> For example, the National Association of Insurance (NAIC) Scale of Injury Severity could be used for this purpose.<sup>1710</sup>

### **C- Degrees of Pain**

Within each level above (severe, moderate, and mild pain), pain and suffering differ. Two people with mild pain may differ as one of them may be close to moderate pain while the other is close to feeling nothing. Thus, different degrees within each level should be created. In bodily injury for example, burns are divided into four degrees and within each degree there are two levels.<sup>1711</sup>

One could say that we can treat the level of pain the same as the level of bodily injury pain and award pain and suffering accordingly. However, pain and suffering that is not a result of bodily injury should be classified arbitrarily, then it should be classified arbitrarily in regard to the degree of pain level (severe, moderate, and mild pain).

For example, fourth degree burns are classified as “severe”, thus the pain level should be classified as “severe”. Then, we fit this classification into degrees of gravity and seriousness. Although, fourth degree burns are severely painful, they cannot be equalized to the pain of cancer. Therefore, the classification of fourth degree burns can be severe pain at the third degree, while, pain of cancer is severe pain at the tenth degree.

### **D- Maximum Compensation Limit**

A maximum compensation limit should be set for every pain level (For example: severe = \$ 1,000,000, moderate = \$500,000, mild = \$ 200,000). Then, each degree of pain level is to be classified from 1-10 such as (severe pain, 3 degree = \$300,000). One study suggests a damages schedule or a comparable cases table be created so the jury can refer to it.<sup>1712</sup> I

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<sup>1707</sup> The Cass et al. study suggests a similar approach in solving unpredictability problem of punitive damages. “If the basic problem is simple unpredictability, the legal system might reduce that problem by asking juries not to come up with dollar amounts, but to rank the case at hand among a preselected set of exemplar cases, or by using a bounded scale of numbers rather than an unbounded scale of dollars ... Through this route, it would be possible to reduce variability and to ensure that jury judgments about appropriate dollar punishments do not reflect the likely unrepresentative views of twelve randomly selected people, but those of the population as a whole. The result would be a form of predictable populism.”

<sup>1708</sup> SIRAJ, *supra* note 1293, at 202.

<sup>1709</sup> See, David Baldus, John C. MacQueen, & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995) (This study suggests this classification of severity and duration of pain, but to be used with the scenarios and schedules method.).

<sup>1710</sup> Avraham, *supra* note 1239, at 94.

<sup>1711</sup> <http://en.wikipedia.org/wiki/Burn>

<sup>1712</sup> Cass et al., *supra* note 1706, at 90 and 97 (“If the psychology of such awards is similar to that of punitive damage awards, it will make sense to consider reforms of the sort discussed here. This could be done by moving in the direction of a damage schedule to cabin the jury’s judgment or by using a set of comparison cases for jury or judicial guidance. On this view, an administrative or legislative body might create a kind of

believe the maximum compensation for pain and suffering can be set not to exceed the value of a life. That means if the value of life in the case of a death is \$1 million, the pain and suffering should not exceed such a limit. Islamic law puts a value on life and bodily injury.<sup>1713</sup> Therefore, such a method can be followed to attain the goals of fairness and predictability.

### **E- Per Diem Method**

After classifying the level and degree of the pain, then we must turn to the duration of pain. If “A” and “B” experience severe pain at the third degree, it is not fair they get the same amount of compensation if one of them suffers longer than the other. At this point, we can use the per diem method to measure the compensation. However, it is difficult to set the duration to ensure a person can receive full compensation according to his pain level and pain degree. Again, we must draw an arbitrary line to solve this problem.

For example, “A” hits “B” in an accident, “B” stays a week in the hospital for treatment. “B” should provide expert witness testimony that describes his level of pain (severe, moderate, or mild). Then he must prove the degree of the pain (from 1-10). Then the trier of fact divides the total amount by the duration to measure the compensation.

I do not claim that my method is flawless, based on scientific studies, or that I evaluate the economic or legal consequences of the method. It is a combination of other methods, choosing the good elements and avoiding the problematic ones. I added additional components without claiming originality, as they may be already exist in literature.

### **F- A Similar Approach**

This approach is similar to the Islamic approach in translating parts of the human body into a dollar value. One could say the Islamic model has fixed and variable values depending on the case, provided that the variable value does not exceed the fixed value. In addition, the court is not allowed to provide compensation before the stabilization of the plaintiff’s injury.<sup>1714</sup> The reasoning is that compensation depends on the extent of the injury which may increase or decrease.<sup>1715</sup>

#### **a- Fixed Value Model**

Islamic law provides fixed values in cases of unintentional murder,<sup>1716</sup> or unintentional bodily injury.<sup>1717</sup> In the case of unintentional murder, the value of the human body is equal to

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‘pain and suffering grid’, ‘libel grid’, or ‘sexual harassment grid’, combining the basic elements of disparate cases into presumptively appropriate awards.”

<sup>1713</sup> See *infra* pp. 226-27.

<sup>1714</sup> SIRAJ, *supra* note 1293, at 458.

<sup>1715</sup> *Id.* 458-59.

<sup>1716</sup> AL-MAQDISI, *supra* note 269 at 8/210; Abdullah Alkhamees, *Valuation of Muslim’s Blood-Money in Saudi Riyal*, 15/27 UMM AL-QURA UNIVERSITY’S MAGAZINE, 479, 486 (2004); ABU SAQ, *supra* note 1271, at 295 (In the case of intentional murder, the kin of the murdered has the right either to demand execution of the murderer, forgive him, or ask for any amount of money without limitation. If the murderer agrees, he can release himself by paying the blood-money or he will be executed.

<sup>1717</sup> BHALA, *supra* note 7, at 1293 (Islamic law categorizes murder and bodily injury in four categories according to the Hanfi and some Hanbli scholars: intentional, quasi-intentional, mistake, and indirect homicide.); ALI ALKHAFIF, ALDAMAN (LIABILITY) IN ISLAMIC JURISPRUDENCE, 164-66/2 (Arabic Intellect House, 1997) (1971) (The categories of murder and bodily injuries are: Malki school: intentional and mistake; Hanafi school: intentional, quasi-intentional, mistake, and indirect homicide; Shafi and Hanbli schools: intentional, quasi-intentional, and mistake.).

4.25 kg of gold “blood-money”<sup>1718</sup> as compensation to the family for the loss of life.<sup>1719</sup> In the case of unintentional bodily injury, Islamic law categorizes injuries into loss of limbs, loss of senses and interests, and wounds.<sup>1720</sup> In the case of loss of limb, the value of the limb depends on the number of the limbs on the body. If there is only one limb such as the nose, the value is the same as the whole body, which is 4.25 kg of gold.<sup>1721</sup> If there are two limbs, the one that is lost equals half of the blood-money, and so on.<sup>1722</sup> If the injury causes loss of a sense or interest, then each sense or interest equals whole blood-money. However, if the loss is partial, the compensation depends on the level of loss.<sup>1723</sup> For instance, “A” hits “B” in an accident and “B” loses his sight, hearing, tasting, and sexual ability. The valuation of the loss is four blood-monies (4.25 × 4 = 17 kg of gold). Wounds are divided into two categories. The first category is wounds with a fixed value based on textual authorities.<sup>1724</sup> For example, if the wound cuts the flesh and shows the bone, the blood-money is what equals 212.5 grams of gold.<sup>1725</sup> The second category is under the variable value model.

### **b- Variable Value Model**

Under this model, wounds with no fixed value are variable because of the subjectivity in assessing the injury.<sup>1726</sup> In that case, the method is to consider the value of a wounded slave and compare his value with an un-wounded slave. The diminution of value is the measure of compensation.<sup>1727</sup> Since slavery has ended, an alternative method is to measure the percentage of wounds to the whole body.<sup>1728</sup> Once the percentage is determined, the value will be equal to the percentage of the whole blood-money of that part.<sup>1729</sup> For instance, if the wound is determined to be three percent of the hand, then the blood-money of this wound will be 127.5 gram of gold, as that is three percent of the blood-money for the hand.

However, in the case of intentional murder or bodily injury, because of its seriousness, assignment of value does not apply. The injured person or kin of the murdered has the right

<sup>1718</sup> BLACK’S LAW DICTIONARY, *supra* note 163. Blood-money is: “A payment given by a murderer’s family to the next of kin of the murder victim”.

<sup>1719</sup> AL-MAQDISI, *supra* note 269, at 290/8; ALKHAFIFAIF, *supra* note 1717, at 182/2; ABU SAQ, *supra* note 1271, at 296; SIRAJ, *supra* note 1293, at 442 (There are different standards to measure the blood-money: 100 camels, 4.25 kg of gold, 35.7 kg of silver, 200 cows, or 2000 sheep. However, scholars are split over which is the main measure and which is the substitute. The first approach is that 100 camels is the main measure and the others are substitutes. The other approach is that all of them are equal. In addition, scholars split over when to switch from camel value to the other measures. I choose to use the gold measure which easier for the reader.); Alkhamees, *supra* note 1716, at 495 (In Saudi Arabia, courts apply “value of camel standard” which renders an unsatisfactory result because of the inaccurate valuation of the camel price. The translated amount equals \$26,666 while the value of the camels is greater. The value of 100 camels now ranges now from \$50,000 to \$76,000 depending on the quality of camels. In addition, scholars split over the blood-money of women. The first approach is that they are the same as men. The second approach is that they are half of the blood-money. Although both approaches rely on textual authorities, it seems that the second approach takes into consideration the earning capacity of women. Men in Islamic cultural are responsible for maintenance of their homes, therefore, when a family loses a man, it loses its income. However, when the house loses a woman, the income stream is not completely cut off.).

<sup>1720</sup> AL-MAQDISI, *supra* note 269, at 340/8; ALKHAFIFAIF, *supra* note 1717, at 195/2.

<sup>1721</sup> ABU SAQ, *supra* note 1271, at 309.

<sup>1722</sup> *Id.* at 317.

<sup>1723</sup> *Id.* at 334, 344.

<sup>1724</sup> *Id.* at 346-352.

<sup>1725</sup> AL-MAQDISI, *supra* note 269, at 367/8.

<sup>1726</sup> ABU SAQ, *supra* note 1271, at 353.

<sup>1727</sup> AlGasim, *supra* note 1281, at 108; ALKHAFIFAIF, *supra* note 1717, at 200/2.

<sup>1728</sup> ABU SAQ, *supra* note 1271, at 357.

<sup>1729</sup> ALMARZOQI, *supra* note 9, at 492.

to ask for any amount even if it exceeds the fixed value, to ask for retaliation, or forgo any compensation at all.<sup>1730</sup>

Thus, I can say under Islamic law, setting the maximum compensation of pain and suffering not to exceed the value of life is a fair measurement. Indeed, loss of life sometimes is better than severe pain and suffering; however, comparing severe pain and suffering to loss of life by providing a similar compensation seems fair.

One commentator criticizes providing different compensations on the basis of different social status or earning capacity because the reason for compensation is the “harm”; it is not the social status or earning capacity.<sup>1731</sup> He suggests that legislators’ responsibility is to assign values for bodily injuries that apply to all people and not leave the issue to triers of fact.<sup>1732</sup> Other commentators, even though they disagree with the idea of assigning values for bodily injuries, believe it is “unattractive, if not invidious, for courts to have to calculate a person’s grief in money term.”<sup>1733</sup> They believe that providing different compensations for similar injuries based on earning capacity supports an unequal distribution of wealth among society.<sup>1734</sup>

## 7.5. Punitive Damages

Punitive damages are defined as “Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif., damages assessed by way of penalizing the wrongdoer or making an example to others.”<sup>1735</sup>

Historically, punitive damages are traced to Code of Hammurabi and the Old Testament.<sup>1736</sup> They mainly serve two purposes; deterrence and punishment.<sup>1737</sup> Punitive damages are designed to punish and deter socially unacceptable conduct or conduct accompanied with malice.<sup>1738</sup>

Punitive damages play an important role in the American legal system. In 2001 alone, total punitive damages were over one hundred and twenty billion dollar in the U.S.<sup>1739</sup> Forty

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<sup>1730</sup> BHALA, *supra* note 7, at 1295.

<sup>1731</sup> SIRAJ, *supra* note 1293, at 433.

<sup>1732</sup> *Id.* at 434.

<sup>1733</sup> R.W.M. DIAS & B.S. MARKESINIS, *TORT LAW 415-16* (Oxford University Press) (1984).

<sup>1734</sup> *Id.* at 393.

<sup>1735</sup> BLACK’S LAW DICTIONARY, *supra* note 163 (It is known as exemplary damages; vindictive damages; punitive damages; presumptive damages; added damages; aggravated damages; speculative damages; imaginary damages; smart money; and punies.).

<sup>1736</sup> David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 368 (1994); FISCHER, *supra* note 1232, at 694.

<sup>1737</sup> *Molzof v. United States*, 502 U.S. 301, 306 (1992) (“Court’s decisions make clear that the concept of “punitive damages” has a long pedigree in the law...It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.”); Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won’t Be The Last Word*, 37 AKRON L. REV. 779, 780 (2004); Owen, *supra* note 1736, at 373 (Owen provides other functions of punitive damages which are: educating the wrongdoers and others, retribution, compensation, and law enforcement by the victims.); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 134 (1982-1983).

<sup>1738</sup> FISCHER, *supra* note 1232, at 696.

<sup>1739</sup> RICHARD L. BLATT ET AL., *PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE*, West’s Handbook Series, Thomson WEST, at 17 (2005).

six states out of the 50 states permits recovery of punitive damages on various grounds.<sup>1740</sup> However, the four states permit recovery of punitive damages implicitly under compensatory damages.<sup>1741</sup> Since punitive damages are awarded because of notorious acts, thirty two states do not permit punitive damages in case of vicarious liability.<sup>1742</sup> The conduct that gives rise to punitive damages is: malice is required, exceeding gross negligence but malice is not required, gross negligence is sufficient, and other states enacted various statutory requirements for the conduct which differ from one statute to the other.<sup>1743</sup> Standard of proving conduct that gives rise to punitive damages is: proof beyond reasonable doubt, proof by clear and convincing evidence, or proof by preponderance of the evidence.<sup>1744</sup>

Courts split over whether the wealth of the defendant can be a factor in determining the amount of punitive damages. The first approach is that wealth of the defendant can be a factor in determining the amount of punitive damages in order not to exceed the “level necessary to properly punish and deter”.<sup>1745</sup> The other approach is that there is no relation between the wealth of the defendant and the punitive damages claim. The punitive damages claim can proceed without introduction of defendant’s wealth.<sup>1746</sup> The U.S. Supreme Court finally held that “the wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award.”<sup>1747</sup> Defendant’s conduct out of the state jurisdiction should not be taken into account when measuring punitive damages but can be used to determine the level of reprehensibility.<sup>1748</sup>

### 7.5.1. Measurement of Punitive Damages

The main criticism of awarding punitive damages is that there is no standard to guide the jury in measuring the punitive damage.<sup>1749</sup> Because the measurement of punitive damages is left to the jury, the outcome of the amount is erratic and unpredictable as one study shows.<sup>1750</sup> Moreover, “many people have complained that punitive awards have a ‘lottery-like’ character”<sup>1751</sup> and are subject to arbitrariness.<sup>1752</sup> However, the U.S. Supreme Court provides guidance as to what a jury may or may not consider as will be explained.

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<sup>1740</sup> BLATT ET AL, *supra* note 1739, at 88; MCCORMICK, *supra* note 1410, at 278. States that do not allow recovery of punitive damages are: Michigan, Nebraska, New Hampshire, and Washington. However, Michigan allows punitive damages if they are compensatory in nature. New Hampshire allows enhancing the compensatory damages in case of aggravating circumstances.

<sup>1741</sup> *Id.*

<sup>1742</sup> *Id.*

<sup>1743</sup> *Id.* at 89.

<sup>1744</sup> *Id.* at 88-89.

<sup>1745</sup> *Adams v. Murakami*, 813 P.2d 1348, 1351 (1991) (“A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant’s financial condition.”).

<sup>1746</sup> *Vossler v. Richards Mfg. Co.*, 143 Cal. App. 3d 952, 961 (1983) (“*Neal* did not hold that a punitive damages claim would fall if plaintiff did not introduce evidence of defendant’s wealth.” (Emphasis in original).

<sup>1747</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003).

<sup>1748</sup> Hines, *supra* note 1737, at 795; Evanson, *supra* note 1428, at 12.

<sup>1749</sup> MCCORMICK, *supra* note 1410, at 296.

<sup>1750</sup> Cass et al., *supra* note 1706, at 2 (“Our principal conclusions, stated briefly, are that people’s moral judgments are remarkably widely shared, but that people have a great deal of difficulty in mapping their moral judgments onto an unbounded scale of dollars. Erratic, unpredictable, and arbitrary awards, possibly even meaningless awards, are a potential product of this difficulty.”).

<sup>1751</sup> *Id.* at 5.

<sup>1752</sup> Evanson, *supra* note 1428, at 6.

### 7.5.1.1. Factors in Measuring Punitive Damages

Commentators identify the characteristics that influence jury determination of the amount of punitive damages as follows. First, the severity of harm inflicted upon the plaintiff is an important factor in increasing or decreasing the amount of punitive damages.<sup>1753</sup> Second, defendant's conduct plays an important role. Punitive damages are most likely to be awarded if the defendant's act is intentional, fraudulent, or gross negligence.<sup>1754</sup> Third, although it is legally impermissible, defendant's wealth is taken into consideration in determining the amount of punitive damages.<sup>1755</sup> Fourth, the remedial purpose of the FCRA is a key consideration.<sup>1756</sup>

### 7.5.1.2. A Suggested Solution to Measure Punitive Damages

A jury is a representative of the community; therefore, the jury's function is to obtain the community's "judgment about the egregiousness of the wrong and the appropriate degree of response."<sup>1757</sup> Nevertheless, translating judgment into dollars does not reflect the whole community.<sup>1758</sup> Moreover, the jury lacks the necessary tools to enable them to translate intent into dollars.<sup>1759</sup> In addition, sometimes the jury focuses on irrelevant factors and ignores relevant factors.<sup>1760</sup>

One study proposes that if the problem with punitive damages is predictability, then a solution to measure predictably can be provided. First, the jury, as a representative of the community, should be asked to produce a punishment ranking or rating for the case at issue on a scale from 0-6 or 0-10.<sup>1761</sup> Second, the judge instructs the jury to rank the punishment of the defendant's act on a scale explaining to them that their ranking will be translated into a dollar amount.<sup>1762</sup> Third, the judge translates the ranking into a dollar amount based on a schedule created by legislators.<sup>1763</sup> This method is similar to the Sentencing Guidelines which, arguably, solved the arbitrariness problem in criminal sentencing.<sup>1764</sup>

### 7.5.1.3. Factors in Determining Excessiveness

To avoid an excessive punitive damages award, the U.S. Supreme Court identifies three guideposts. Excessiveness results in substantive and procedural due process violations. The issue of excessiveness suggests not only the lack of procedural fair notice, but also

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<sup>1753</sup> Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 119 (2002) ("Research in social psychology has demonstrated that the degree of harm caused by the wrongdoer is related to punishment reactions more generally.").

<sup>1754</sup> *Id.* at 121 ("... archival research shows that punitive damages are more likely to be awarded in cases involving intentional torts, fraudulent conduct, and extreme deviations from the standard of care.").

<sup>1755</sup> *Id.* ("Several experimental studies have also found positive relationships between the wealth of the defendant and the punitive damages awarded.")

<sup>1756</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 496.

<sup>1757</sup> Cass et al., *supra* note 1706, at 57.

<sup>1758</sup> *Id.* at 58.

<sup>1759</sup> *Id.*

<sup>1760</sup> *Id.* at 59.

<sup>1761</sup> *Id.* at 62.

<sup>1762</sup> *Id.*

<sup>1763</sup> *Id.* at 97 ("A judge would produce a dollar award by seeing where the case at hand fits in the grid and perhaps by making adjustments if the details of the case strongly call for them.").

<sup>1764</sup> Cass et al., *supra* note 1706, at 100 ("Before the enactment of the Sentencing Guidelines, there were serious problems of arbitrary and unpredictable sentences, leading to dissimilar treatment of the similarly situated. It is reasonable to think that some of these problems resulted from the difficulty of mapping normative judgments onto a scale of years.")

substantive limitations against excessiveness.<sup>1765</sup> Although the U.S. Supreme Court mentions the fair notice requirement, it starts each guidepost with the substantive reasonableness issue.<sup>1766</sup>

The U.S. Supreme Court adopted a new standard to define the meaning of “excessiveness”. It has become known as the “*BMW standard*”.<sup>1767</sup> In *BMW of North Am., Inc. v. Gore*, the U.S. Supreme Court identified three guideposts to determine the excessiveness; the reprehensibility of the defendant’s conduct, the relationship between the compensatory damages and the punitive damages award, and the comparable civil or criminal penalties for the defendant’s conduct.<sup>1768</sup> The U.S. Supreme Court elaborates on these guideposts in *State Farm* and provides more guidance.

#### 7.5.1.3.1. **Reprehensibility of Conduct**

Reprehensibility is the most important factor in determining punitive damages. Moreover, reprehensibility serves as a factor in knowing whether the defendant has fair notice.<sup>1769</sup> In determining reprehensibility, the U.S. Supreme Court recognized a continuum of reprehensible conduct. The court sees violent crime as more reprehensible than nonviolent, trickery more reprehensible than negligence, conduct causing physical harm more reprehensible than conduct causing purely economic harm, repeated conduct more reprehensible than an isolated incident.<sup>1770</sup> In *State Farm*, the U.S. Supreme Court provides additional explanation by stating that the reasonableness of award can be determined by looking to the relationship between the award and the reprehensible conduct.<sup>1771</sup> Thus, the Court makes this guidepost both procedural “notice” and substantive “reasonableness of the award”.<sup>1772</sup>

#### 7.5.1.3.2. **Ratio to Compensatory Damages**

The ratio guidepost is vague and led to conflicting interpretations by lower courts.<sup>1773</sup> One commentator believes the ratio guidepost could be part of the reprehensibility guidepost which bears on reasonableness.<sup>1774</sup> Alternatively, the ratio may only be a sign which requires the court to review the case but it does not result necessarily in an excessive award.<sup>1775</sup>

The ratio issue before the *BMW standard* is that a 4:1 ratio is not excessive.<sup>1776</sup> In a subsequent case, the Court found the line of excessiveness could be drawn to be no more than 10:1.<sup>1777</sup> In *BMW*, the court held that any ratio more than 10:1 is suspect.<sup>1778</sup> The Court

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<sup>1765</sup> Evanson, *supra* note 1428, at 6.

<sup>1766</sup> *Id.* at 21.

<sup>1767</sup> *BMW*, 517 U.S.

<sup>1768</sup> Scheuerman, *supra* note 502, at 119.

<sup>1769</sup> Evanson, *supra* note 1428, at 10.

<sup>1770</sup> Scheuerman, *supra* note 502, at 120.

<sup>1771</sup> Evanson, *supra* note 1428, at 11.

<sup>1772</sup> *Id.*

<sup>1773</sup> *Id.* at 14.

<sup>1774</sup> *Id.* at 15.

<sup>1775</sup> *Id.*

<sup>1776</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (“While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.”).

<sup>1777</sup> *BMW*, 517 U.S. at 581 (“Thus, in upholding the \$10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.”).



also suggested that low compensatory damages support higher punitive damages when the injury is hard to detect or the damages are difficult to measure.<sup>1779</sup>

In another subsequent case, *State Farm*, the U.S. Supreme Court provided different ratios: 1:1, 4:1, and rarely 9:1.<sup>1780</sup> In most cases, the ratio should not exceed a 4:1 ratio.<sup>1781</sup> Then, the court differentiated between substantial compensatory damages and non-substantial compensatory damages.<sup>1782</sup> In the case of substantial compensatory damages, the ratio should not be more than 1:1.<sup>1783</sup> However, the Court provided no guidance in regard to substantiality of compensatory damages; however, it is clear from the decision that \$1 million is substantial.<sup>1784</sup> In the case of non-substantial compensatory damages, a ratio of more than a single digit is not excessive.<sup>1785</sup>

### 7.5.1.3.3. Comparability to Criminal or Civil Penalties

The final guidepost is comparability of the amount of punitive damages to the criminal or civil penalties of comparable misconduct.<sup>1786</sup> The purposes of this notice are: to provide defendant with notice of potential punitive damages, to indicate that this may result in a large award, and to indicate the legislators' intent in deterring similar conduct.<sup>1787</sup> This guidepost is important, however, some courts belittle or ignore it.<sup>1788</sup> Other courts interpret this guidepost as a "notice" requirement of the existence or range of punitive damages awarded for comparable misconduct.<sup>1789</sup> For instance, the U.S. Supreme Court found that a similar sanction to *BMW* conduct was within \$2,000-\$10,000 range.<sup>1790</sup> Thus, awarding \$2 million is excessive in comparison to the state's sanction of \$2,000.<sup>1791</sup>

However, the U.S. Supreme Court held later in *State Farm* that criminality of a defendant's act has little if no relevance to the measurement of punitive damages because they are not a substitute of the criminal law.<sup>1792</sup>

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<sup>1778</sup> *Id.* at 583 ("When the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'"; *Campbell*, 538 U.S. at 410 ("... in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.")).

<sup>1779</sup> *BMW*, 517 U.S. at 582 ("Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.")).

<sup>1780</sup> Hines, *supra* note 1737, at 793.

<sup>1781</sup> *Id.*

<sup>1782</sup> *Campbell*, 538 U.S. at 410 ("... when compensatory damages are substantial, then an even lesser ratio can reach the outermost limit of the due process guarantee.")).

<sup>1783</sup> *Id.* at 411 ("Applying *Gore's* guideposts to the facts here, especially in light of the substantial compensatory damages award, likely would justify a punitive damages award at or near the compensatory damages amount.")).

<sup>1784</sup> Hines, *supra* note 1737, at 794.

<sup>1785</sup> *BMW*, 517 U.S. at 582 ("Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.")).

<sup>1786</sup> *Id.* at 560-61 ("Gore's punitive damages award is not saved by the third relevant indicium of excessiveness—the difference between it and the civil or criminal sanctions that could be imposed for comparable misconduct ... because \$2 million is substantially greater than Alabama's applicable \$2,000 fine and the penalties imposed in other States for similar malfeasance...").

<sup>1787</sup> Evanson, *supra* note 1428, at 18-19.

<sup>1788</sup> *Id.* at 17.

<sup>1789</sup> *Id.* at 18.

<sup>1790</sup> *BMW*, 517 U.S. at 560-561

<sup>1791</sup> *Id.*

<sup>1792</sup> Hines, *supra* note 1737, at 796.

#### 7.5.1.4. Punitive Damages under the FCRA

Under the FCRA, “Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer of ... such amount of punitive damages as the court may allow.”<sup>1793</sup> In general, courts split over whether any form of damages is a prerequisite to awarding punitive damages.<sup>1794</sup>

One analyst of the FCRA concluded that the scope of punitive damages in the act is unsurpassed. Unlike similar acts, the FCRA did not impose a cap on damages nor provide guidance, standards or factors for determining the basis of imposition of punitive damages. For example, the Fair Debt Collection Practices Act (FDCPA)<sup>1795</sup> does not explicitly provide for punitive damages but rather uses “additional damages” which are not to exceed \$1000. The FDCPA spells out factors to be considered in awarding ‘additional damages’ such as intent, frequency of violation, nature of the violation, or number of affected people.<sup>1796</sup> Another example is the ECOA. The ECOA explicitly provides for punitive damages, and factors to be considered are actual damages, persistence of failure to comply, resources of the creditors, the number of people affected, and the intention of the creditor. Moreover, the punitive damages under the ECOA cannot be greater than \$10,000.<sup>1797</sup>

##### 7.5.1.4.1. Willfulness Standard

In the fourth chapter, I explained what constitutes “willfulness” according to the U.S. Supreme Court in the decisions for *Safeco Insurance Co of America v. Burr*<sup>1798</sup> and *Edo v. GEICO Casualty Co.*<sup>1799</sup> The U.S. Supreme Court held that conscious disregard of the law constitutes willfulness because of the way the term is used in other statutory contexts.<sup>1800</sup> The court defined recklessness as “a risk of violating the law substantially greater than the risk associated with a reading that was merely careless”.<sup>1801</sup>

##### 7.5.1.4.2. Prerequisite of Actual Damages

The U.S. Supreme Court held that punitive damages can be awarded even without showing actual damages provided that a willful violation is proved.<sup>1802</sup> In addition, the structure of the FCRA lists punitive damages separate from other types which imply that none of them is prerequisite to the other.<sup>1803</sup>

##### 7.5.1.4.3. Examples

There are lots of cases awarding punitive damages under the FCRA. One court upheld an award of \$80,000 in punitive damages because of willful violations which included reporting inaccurate information.<sup>1804</sup> Another court awarded \$300,000 in punitive damages

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<sup>1793</sup> 15 U.S.C. § 1681n(a)(2).

<sup>1794</sup> FISCHER, *supra* note 1232, at 702.

<sup>1795</sup> 15 U.S.C. §1692.

<sup>1796</sup> Burns, *supra* note 442, at 88.

<sup>1797</sup> 15 U.S.C. §1691.

<sup>1798</sup> *Safeco Ins. Co. of Am.*, 127 S. Ct. 2201 (2007).

<sup>1799</sup> *Edo v. Geico Cas. Co.*, 426 F.3d 1020, 1040 (9th Cir. 2005).

<sup>1800</sup> McClure, *supra* note 408, at 281.

<sup>1801</sup> *Id.* at 288.

<sup>1802</sup> *TRW Inc. v. Andrews*, 534 U.S. 19, 35 (2001) (“Punitive damages, which Andrews sought in this case, could presumably be awarded at the moment of TRW’s alleged wrongdoing, even if “actual damages” did not accrue at that time.”); Anenson, *supra* note 441, at 458; Burns, *supra* note 442, at 83.

<sup>1803</sup> NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 495.

<sup>1804</sup> *Saunders*, 469 F. Supp. 2d at 357.

because of defendant's failure to comply with the FCRA. However, this amount was remitted to \$50,000 because of excessiveness.<sup>1805</sup> A third court awarded \$10,000 in punitive damages for unauthorized access of credit report.<sup>1806</sup>

### 7.5.2. Punitive Damages under Islamic Law

Punishing defendants for their acts by affecting their wealth can be divided into two types: fines that be given to either the public treasury or a charity, and the destruction of properties used in the crimes. The imposition of fines given to others is a debated issue among Islamic schools.<sup>1807</sup> All approaches rely on textual evidence from the *Holy Quran* and traditions of the Prophet (pbuh).<sup>1808</sup>

#### 7.5.2.1. Prohibition of Monetary Punishment Approach

The first approach prevents deprivation of property because of crimes for any reason. This approach relies heavily on textual evidence from *Holy Quran* and *Sunnah* which prohibits taking the property of people without consent or consideration. For instance, Allah says,

*“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.”*<sup>1809</sup>

This approach agrees that monetary punishment was permissible at a point of time but claims that it was repealed later.<sup>1810</sup> This approach posits that monetary punishment motivates oppressive rulers to deprive people of property without a legitimate reason.<sup>1811</sup> Moreover, monetary punishment discriminates between the financially able and unable people. First, financially able people will not be affected by fines while financially unable people will be affected. Second, when the monetary punishment is an alternative to prison, for example, the poor will be affected more than the rich. A financially able person will pay the fine and go free. However, a financially unable person will be imprisoned because of the lack of financial resources.<sup>1812</sup>

#### 7.5.2.2. Allowing Monetary Punishment Approach

The second approach allows discretionary monetary punishment. Thus, the judge cannot impose monetary punishment in the case of *Sharia* fixed punishment crimes, “*Hudud*”.<sup>1813</sup> This approach relies on different textual evidence some of which are:

- The Prophet said, in the context of collecting *Zakat*,<sup>1814</sup> “He who pays *Zakat* with the intention of getting reward will be rewarded. If anyone evades *Zakat*, we shall take

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<sup>1805</sup> *Collins*, 410 F. Supp., at 934.

<sup>1806</sup> *Yohay*, 827 F.2d, at 972.

<sup>1807</sup> MAJID ABU RUQAYYAH ET AL., *ISSUES IN COMPARATIVE JURISPRUDENCE*, 255 (Alnafaes House, 1997) (1987).

<sup>1808</sup> *Id.*

<sup>1809</sup> *Holy Quran* 4:29.

<sup>1810</sup> BHALA, *supra* note 7, at 299 (for further discussion of “Repeal” theory).

<sup>1811</sup> ABU RUQAYYAH ET AL, *supra* note 1807, at 259.

<sup>1812</sup> *Id.*

<sup>1813</sup> BHALA, *supra* note 7, at 1173-74 (The fixed punishment crimes are: apostasy, unlawful sexual intercourse, false accusation of unlawful sexual intercourse, consuming alcohol, theft, and highway robbery. Malik school adds rebellion against the government as the seventh crime.).

<sup>1814</sup> *Id.* at 367 (*Zakat* is almsgiving which is a percentage of specific types of wealth taken from the rich and given to poor people.).

half the property from him as a due from the dues of our Lord, the Exalted.”<sup>1815</sup> In this tradition, the Prophet imposes monetary punishment for evasion of *Zakat* which reaches half of the evader’s wealth.<sup>1816</sup> This tradition implies “bad faith” is a basis for monetary punishment.

- The Prophet said “If a needy person takes some with his mouth and does not take a supply away in his garment, there is nothing on him, but he who carries any of it is to be fined twice the value and punished.”<sup>1817</sup> In this tradition, the Prophet imposes a monetary punishment of “twice value” of the stolen food to be paid to the owner of the property. This tradition implies “bad faith” is a basis for monetary punishment.
- One companion of the Prophet narrated, “We belonged to the family of Muqarrin during the lifetime of Allah's Messenger and had only one slave-girl and one of us slapped her. This news reached Allah's Apostle and he said: Set her free.”<sup>1818</sup> The Prophet punished the person who slapped his slave by setting her free as a form of monetary punishment, because slaves have monetary value.
- The Prophet said “whoever finds a person hunting in Madina<sup>1819</sup> Sanctuary, he has the right to take his belongings”.<sup>1820</sup> In this tradition, the Prophet allows a hunter in Madina Sanctuary to be deprived of his belongings as a form of monetary punishment.
- The Prophet said “the fine of hidden camels is its value and an additional one”.<sup>1821</sup> In this tradition, the Prophet imposes a monetary punishment, twice the value of the goods, upon people who find lost camels and hide them to convert them to their ownership.
- At the time of the second Caliph, slaves of a man stole a camel, slaughtered it, and ate it. The Caliph did not punish the slaves because he discovered their master was not feeding them properly. However, the Caliph fined the master twice the value of the camel.<sup>1822</sup> This incident implies that gross negligence may be a basis for monetary punishment.
- At the time of the second Caliph, the Caliph disgorged half of the wealth of some of his governors because they mishandled the public treasury.<sup>1823</sup> This incident implies that embezzlement may be a basis for monetary punishment.
- At the time of the second Caliph, the Caliph doubled the blood-money on a person who, out of arrogance, intentionally hits a slave of another person.<sup>1824</sup>
- Logically, if a person would be punished by death for a serious crime, punishing him monetarily should be permissible, as life is more valuable than money.<sup>1825</sup>

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<sup>1815</sup> ABU-DAWUD BIN AL-AASH'ATH, *SUNAN ABU-DAWUD*, at Book 9/1570 (trans. Ahmad Hasan). Available at <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/abudawud/009.sat.html>

<sup>1816</sup> Scholars have different interpretations of the meaning of this tradition. One approach is that half means literally half of the wealth of the evader. Another approach is that the wealth of the evader to be divided into two halves and the Zakat collector has the right to choose the Zakat portion from either half.

<sup>1817</sup> *ABU-DAWUD*, *supra* note 1815, at Book 38/4377.

<sup>1818</sup> MUSLIM BIN AL-HAJJAJ, *supra* note 3, at 15/4081.

<sup>1819</sup> The City of the Prophet Muhammad (pbuh).

<sup>1820</sup> AHMED IBN HANBAL, *ALMUSNAD*, (Sha'ib Alarnaoot et al. ed., The Message House) (1<sup>st</sup> edition, 2001) tradition No. 1460 at 64.

<sup>1821</sup> *ABU-DAWUD*, *supra* note 1815, at Book 139/1718.

<sup>1822</sup> ABU RUQAYYAH ET AL, *supra* note 1807, at 260.

<sup>1823</sup> *Id.* at 261.

<sup>1824</sup> Abdulrahman Alsuhaïm, *Monetary Punishment*, 21 available at <http://iefpedia.com/arab/?p=17748>

<sup>1825</sup> *Id.* at 16.

### 7.5.2.3. Approaches' Assessment

One can infer that both approaches agree on permissibility of monetary punishment at a certain point of time.<sup>1826</sup> However, the first approach claims it is repealed. Their claim of repeal cannot be taken for granted as three conditions must be met before determination of the repeal. First, there must be other text contrary to the allegedly repealed text on the same level of authentication and clarity. Second, the two types of text must be irreconcilable. Third, the repealing text must come after the repealed text in time.<sup>1827</sup> One of the great scholars, *Ibn Al qayyim*, said “*claim of repeal of monetary punishment is an invalid claim and without evidence.*”<sup>1828</sup> To refute the claim of repeal of monetary punishment, the scholars applied the abovementioned conditions and concluded that no repeal took place. First, there are allegedly repealing texts and they are authentic. Second, both groups of texts are not in fact contradicting each other to the extent that repeal must be determined. Each group of them can be applied to different cases. Third, which is the former or later text is unknown in this case. It is possible that each one of them is the repealing text; therefore, no repeal is possible.<sup>1829</sup>

The second approach, which allows monetary punishment, is the strongest and most applicable approach. However, it must be clear that this approach allows monetary punishment in the case of intentional misconduct in action or omission. Similarly, monetary punishment is allowed in the case of negligence.<sup>1830</sup>

### 7.5.2.4. Application of Punitive Damages

As in the common law system, punitive damages which give the plaintiff the right to receive the monetary punishment is not clearly recognized under Islamic law. To my knowledge, there is no academic writing regarding this issue; therefore, I will try to apply the evidence that the second approach presents to the punitive damages application to examine whether punitive damages are permissible.

#### 7.5.2.4.1. Type of Conduct

One can see clearly from the evidence that all punitive monetary awards have been imposed because of misconduct. Punitive awards been imposed for evasion of taxes, theft, intentional battery, defiling Sanctuary of the Holy Land, mistreatment of slaves that caused them to steal, hiding the camels of other people, and the mishandling of public money. However, some of these punitive awards went to the victims while others went to the public treasury.

#### 7.5.2.4.2. Extent of Punishment

The maximum limit that a tradition imposes is disgorgement of half of the wealth of a person in the case of a refusal to pay *Zakat*, and disgorgement of half of the wealth of people who mishandle the public treasury without ability to determine how much they embezzled or received illegally. Other traditions impose a lesser amount, such as double the value of stolen fruits, double the value of the stolen camel, double the value of the hidden camel, the value

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<sup>1826</sup> *Id.* at 5.

<sup>1827</sup> *Id.* at 9.

<sup>1828</sup> *Id.*

<sup>1829</sup> *Id.* at 19

<sup>1830</sup> *Id.* at 25.

of a slave (which equaled at that time 212.5 gram of gold), and an unknown amount that a person is carrying when caught hunting in Sanctuary of a Holy land.

I believe punitive damages are already applied under Islamic law on the basis of the previous examples. However, the issue is whether it is possible to analogize new cases to the cases that I mentioned. When applying *Qiyas* “analogy” as a source of Islamic law, I believe that punitive damages can be imposed and money can be given to the plaintiff in the following cases:

- Intentional misconduct which causes bodily harm;
- Intentional or negligent mistreating of servants, workers, and the like;
- Bad faith, such as hiding the property of others or a conversion of another’s property.
- A criminal act, such as theft or embezzlement. However, no punitive damages can be imposed for the fixed punishment crimes in Islam.<sup>1831</sup>

## 7.6. Cost of Action and Reasonable Attorney’s Fees

Under the traditional American rule, each party to the litigation pays the attorney fees and cost of litigation.<sup>1832</sup> There are exceptions to this rule in which the losing party pays the attorney fees and costs, such as statutory authorization,<sup>1833</sup> contractual agreement,<sup>1834</sup> common fund,<sup>1835</sup> third party tort,<sup>1836</sup> and bad faith claims.<sup>1837</sup>

The relevant exception here is statutory authorization, as the FCRA provides attorney fees and costs for the party who brings a successful action. One of the purposes of awarding attorney fees under statutory authorization is to encourage litigation in order to enforce the statute by private attorney general.<sup>1838</sup>

### 7.6.1. Costs

The prevailing party may recover the costs of the action. Although some courts disallow some of them, costs include copying, faxing, long distance telephone calls, computerized legal research, parking, subpoena, dockets, transcripts, mileage, clerk overtime, investigation, publication of notice,<sup>1839</sup> expert witnesses, and experts’ travel expenses.<sup>1840</sup>

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<sup>1831</sup> See p. 198; p. 236 and note 1813. Imposing punitive damages in case of theft means the theft that does not amount to the fixed punishment.

<sup>1832</sup> FISCHER, *supra* note 1232, at 773.

<sup>1833</sup> MCCORMICK, *supra* note 1410, at 242.

<sup>1834</sup> FISCHER, *supra* note 1232, at 776; MCCORMICK, *supra* note 1410, at 253. (This applies in case a contract requires reimbursement or when the contract’s terms provide attorney fees to the non-breaching party. However, when the terms are very one-sided, such as providing attorney fees to the landlord but not to tenant, some courts will apply this term to all parties. Thus, if the landlord breaches the contract, the attorney fees of tenant are recoverable).

<sup>1835</sup> FISCHER, *supra* note 1232, at 777; MCCORMICK, *supra* note 1410, at 237 (Common fund means when a party employs an attorney and creates a fund to pay attorney fees in which a third party benefits indirectly. For example, when a shareholder brings a successful derivative action for the corporation benefits, the corporation has to pay its fair share of attorney fees if the shareholder shows that the corporation benefits from that action.).

<sup>1836</sup> FISCHER, *supra* note 1232, at 779-80; MCCORMICK, *supra* note 1410, at 247 (This exception is too narrow, as it applies when attorney fees are a result of wrongdoing, but not to prove the wrongdoing. For instance, when a defendant interferes with the plaintiff’s contractual rights with a third party, that causes litigation with the third party to the contract, the attorney fees are recoverable).

<sup>1837</sup> FISCHER, *supra* note 1232, at 774; Richard J. Rubin, *The Award of Attorneys’ Fees under the Federal Consumer Credit Protection Act*, 99 BANKING L.J. 512, 515 (1982).

<sup>1838</sup> FISCHER, *supra* note 1232, at 775.

<sup>1839</sup> *Ciccarone v. B.J. Marchese, Inc.*, No. 03-1660, 2004 WL 2966932 at \*10, E.D. Pa. Dec. 22, 2004.

Some costs are not recoverable because they are included in attorney fees, such as postage, local telephone calls, or supplies.<sup>1841</sup> These costs may be reduced by a percentage in line with a reduction in attorney fees.<sup>1842</sup> For instance, when attorney fees are reduced 20%, the costs may be reduced 20% as well.

### 7.6.2. Prevailing Party

In general, attorney fees and costs are awarded to the “prevailing party”. The prevailing party may be the plaintiff or defendant.<sup>1843</sup> However, under some statutes, attorney fees will not be awarded to the defendant because such an award would discourage plaintiffs from enforcing their rights.<sup>1844</sup>

The broadest construction of “prevailing party” is that it is the party who “succeed[s] on any significant issue in the litigation which achieves some of the benefit [they] sought in bringing the suit.”<sup>1845</sup> The effect of such construction is that litigation is encouraged, not discouraged.<sup>1846</sup>

The test in determining the prevailing party is the “material alteration of the legal relationship of the parties”<sup>1847</sup> Prevailing does not have to be through formal relief - such as obtaining judgment - in order to recover attorney fees.<sup>1848</sup> Settlement of the dispute or a consent decree is considered prevailing.<sup>1849</sup> In addition, if litigation is a facilitator in achieving the goal of the litigation, which is the change of defendant’s conduct, the plaintiff may be the prevailing party in terms of awarding attorney fees.<sup>1850</sup> Moreover, prevailing can be achieved by obtaining nominal damages in some circumstances. For instance, the U.S. Supreme Court stated, “We therefore hold that a plaintiff who wins nominal damages is a prevailing party under § 1988. When a court awards nominal damages, it neither enters judgment for defendant on the merits nor declares the defendant’s legal immunity to suit.”<sup>1851</sup> However, it must be made clear, “a technical victory may be so insignificant ... as to be insufficient to support prevailing party status.”<sup>1852</sup> An example of technical victory is, “the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated” in some unspecified way.”<sup>1853</sup>

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<sup>1840</sup> *Id.* at 11 (“Expenses of experts are recoverable, especially where they are indispensable.”).

<sup>1841</sup> *Id.* (“Postage expenses are disallowed as ordinary overhead is included in the attorney’s hourly rate. Expenses for supplies are disallowed for the same reason.”).

<sup>1842</sup> *Thompson v. Equifax Credit Info. Servs., Inc.*, 2003 WL 1579757, at \*7 (2003).

<sup>1843</sup> FISCHER, *supra* note 1232, at 782.

<sup>1844</sup> *Id.* at 782-83. There is an exception for filing in bad faith.

<sup>1845</sup> *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 782 (1989).

<sup>1846</sup> FISCHER, *supra* note 1232, at 783.

<sup>1847</sup> *Farrar v. Hobby*, 506 U.S. 103, 111 and 113 (1992).

<sup>1848</sup> FISCHER, *supra* note 1232, at 784.

<sup>1849</sup> *Farrar*, 506 U.S. at 111 and 113 (“Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement.”).

<sup>1850</sup> *Wilderness Soc’y v. Babbitt*, 5 F.3d 383, 386-87 (9th Cir. 1993) (“The lawsuit, according to the Wilderness Society, was the catalyst causing the Service to cease grazing on the Refuge and to agree to prepare an EIS and a written compatibility determination. The district court clearly erred in finding that the Wilderness Society lawsuit was not a material or catalytic factor in the Service’s decision.”); Fischer, *supra* note 1232, at 784 (The litigation becomes a catalyst when the defendant changes his conduct in the direction desired by litigation.).

<sup>1851</sup> *Farrar*, 506 U.S. at 111 and 113.

<sup>1852</sup> *Id.*

<sup>1853</sup> *Id.* at 114.

### 7.6.2.1. Is “Successful Action” different from Prevailing Party?

Awarding attorney fees and costs to the “prevailing party” is a well-established rule. The FCRA and the FDCPA both use the term “successful action”.<sup>1854</sup> Some statutes use the term “prevailing parties” or “substantially prevail”. Courts faced with the new term of the FCRA and the FDCPA differ on its meaning. Both, the FCRA and the FDCPA provide for plaintiffs who bring a *successful action* to receive reasonable attorney fees. Courts split over the meaning of “successful action” in case that the plaintiff proves violation of the FCRA or the FDCPA but does not prove injury results from the violation.<sup>1855</sup>

Prior to *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,<sup>1856</sup> courts differed on the meaning of “successful action”. However, most courts deal with this term on its face and consider proving the violation as sufficient to award reasonable attorney fees.<sup>1857</sup>

In *Buckhannon*, the U.S. Supreme Court held that the plaintiff who does not prove any damages is not the “prevailing party”. To be a “prevailing party”, a party must receive formal judicial relief that creates a material alteration of the legal relationship of the parties. Even nominal damages create such an alteration.<sup>1858</sup> At least one court after that landmark case applied the same rule to different statutes that have the same or similar language “prevailing party”. However, the court did caution that such application should not be the same if the text or legislative history is different.<sup>1859</sup>

#### 7.6.2.1.1. Successful Action is different from Prevailing Party Approach

Under this approach, the courts define “successful action” as any action that results in finding the defendant violated the act. Therefore, courts award reasonable attorney fees even if there are only nominal damages or no damages at all. The reason is that courts believe they are achieving Congress’s intent by encouraging the enforcement of the act by consumers.<sup>1860</sup> Courts add too that the structure of the FCRA and the FDCPA<sup>1861</sup> show three independent liabilities: actual damages, statutory damages, and reasonable attorney fees. As a result, the court may award any of the liabilities independent of the others.<sup>1862</sup>

This approach may be adopted with more flexibility. An award of attorney fees may depend on three factors; the difference between the amount of reward and the wanted recovery; the importance of the legal issues; and the public interest served by the litigation. Thus, if it concluded that deterring harmful practice is one of the important considerations, the court may grant an award even in absence of actual damage so long so this serves the deterrence purpose.<sup>1863</sup>

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<sup>1854</sup> 15 U.S.C. § 1681n (a)(3) (provides “Any person who willfully fails to comply with any requirement imposed ... is liable to that consumer in an amount equal to the sum of ... in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.”).

<sup>1855</sup> Williams, *supra* note 497, at 315.

<sup>1856</sup> *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

<sup>1857</sup> Williams, *supra* note 497, at 316.

<sup>1858</sup> *Id.* at 319.

<sup>1859</sup> *Id.* at 320.

<sup>1860</sup> *Id.*

<sup>1861</sup> 15 U.S.C. § 1681u; U.S.C § 1692k.

<sup>1862</sup> Williams, *supra* note 497, at 317.

<sup>1863</sup> *Id.*



#### 7.6.2.1.2. Successful Action is the same as Prevailing Party Approach

Another approach differs from the foregoing and relies on the plain language of the FCRA. Courts taking this approach argue that in order to award the reasonable attorney fees, a plaintiff must prove actual damages. The FCRA states that there must be “a successful action to enforce liability”, therefore; when the plaintiff does not prove the actual damages he is not entitled to any relief. Thus, no reasonable attorney fees are awarded as it is contingent on the enforcement of liability, which is the “successful action”. Moreover, Congress probably does not mean to award such fees in the absence of injury.<sup>1864</sup>

Although the FCRA does not use the same language “prevailing party” but rather uses “successful action” and has different legislative history, at least one court extended the same rule and applied the meaning of “prevailing party” to “successful action”. Therefore, a plaintiff must receive at least nominal damages in order to be entitled to reasonable attorney fees.<sup>1865</sup>

#### 7.6.2.1.3. Discussion of the Second Approach

A commentator argues in favor of the first approach. He tries to refute court reasoning through the plain language of the text of the FCRA and the FDCPA on one hand, and on the other, the legislative history of the acts. He contends that there is ambiguity in the acts, therefore, interpretation by reliance on the plain language is questionable especially the term is not a term of art.<sup>1866</sup>

He tries to identify the meaning by examining possible construction of the plain language. First, by examining the syntax of the use of the term, he concludes that “successful” cannot be interpreted to define the word “liability”. If Congress wanted to define the word “successful”, Congress would have included a phrase that answers the question: “what type of success is required?” such as “a successful action *in enforcing liability*”. The phrase “a successful action to enforce liability” means a different interpretation, which should be the answer to the question: “what type of action is required?”<sup>1867</sup>

The author reasons that the rules of grammar support such an interpretation. The phrase “to enforce liability” is an infinitive one. Infinitive phrases usually express purposes, thus, the natural interpretation will be “reasonable attorney fees are available for a successful action brought for the purpose of enforcing liability”.<sup>1868</sup>

In addition, “successful” modifies the word “action” not “liability”. It should be read that an action must meet two conditions to qualify for reasonable attorney fees. First, it must be brought to enforce liability; second, it must be successful.<sup>1869</sup> The fees are authorized when the *action* is successful, not the *party*.<sup>1870</sup> In certain cases, an action may be successful even if the plaintiff is not the prevailing party.

The author examines the legislative histories of both the FCRA and the FDCPA. It seems clear that Congress intends to encourage lawsuits to enforce liability, provides special provisions to deal with bad faith lawsuits,<sup>1871</sup> and to be pro-consumer. The standard of

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<sup>1864</sup> *Id.*

<sup>1865</sup> *Id.*

<sup>1866</sup> *Id.* at 322.

<sup>1867</sup> *Id.* at 323.

<sup>1868</sup> *Id.*

<sup>1869</sup> *Id.* at 324.

<sup>1870</sup> *Id.* at 325.

<sup>1871</sup> 15 U.S.C. § 1681n (a)(c), (o-b).

negligence was lowered from gross to mere negligence and the cap on punitive damages was removed, to encourage consumers to sue the CRA.<sup>1872</sup> Deciding otherwise would result in consumers refraining from bringing suits especially in cases where the damages are difficult to prove, and the cost of the litigation is too high for the emotional or reputational harms. Therefore, one can conclude that affected consumers should not be denied reasonable attorney fees if they prove there were violations but were not able to prove damages.<sup>1873</sup>

Lastly, courts can overcome frivolous cases in two ways. First, the FCRA provides reasonable attorney fees for defendants in bad faith suits. Second, if the plaintiff is awarded the fees, the court has wide discretion to adjust the attorney fees to be reasonable. For example, the degree of success should be taken into consideration when awarding attorney fees. Reasonableness can mean reducing the fees if necessary to assure fairness or can mean awarding very low fees if the violation is technical to discourage consumers from bringing this type of case.<sup>1874</sup>

#### 7.6.2.1.4. Chosen Approach

I believe the first approach is the right one. I see no difference between the “prevailing party” and a “successful action”. The party who brings a successful action is the prevailing party. It is unlikely that Congress intended to award attorney fees just for proving a violation of the FCRA occurred. The goal, enforcing the FCRA, can be achieved through reporting to the agency in charge of enforcement if there is no damages, without awarding consumer attorney fees. One can use the same argument to say why the Congress does not say “in the case of any successful action to prove a violation”. The possibility of grammatical or linguistic mistakes is greater than the possibility of substantive errors.

Finally, differentiating between a “successful action” and a “successful party” is unconvincing. How does an action succeed, but not the party?

I understand the commentator’s goal in demanding the award of attorney fees to the party who proves the violation; however, the argument can be that “proving violation” entitles the party to nominal damages, which in turn, makes him the prevailing party who can recover attorney fees.

#### 7.6.3. Measurement of Attorney Fees

When calculating attorney fees under the FCRA, the following should be taken into consideration:

- Attorney fees are calculated according to the same standard of the Civil Rights Attorney’s Fees Awards Act (CRAFAA), as the CRAFAA is applicable to all statutory authorization of attorney fees;<sup>1875</sup>
- It is irrelevant whether the attorney is hired by a non-profit organization, private law firm, or public interest law firm;<sup>1876</sup>

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<sup>1872</sup> Williams, *supra* note 497, at 329.

<sup>1873</sup> *Id.* at 327.

<sup>1874</sup> *Id.* at 331.

<sup>1875</sup> *Bryant v. TRW, Inc.* 689 F.2d 72, 80 (6th Cir. 1982) (“... we believe that the policies informing the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. s 1988, which led this court in Northcross to “conclude that a fee calculated in terms of hours of service provided is the fairest and most manageable approach ... apply with equal force to the FCRA.”).

<sup>1876</sup> *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (“In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel[s] ... are employed by ... a privately funded non-profit public interest law firm.”).

- Attorney fees do not need to be proportionate to recovered damages.<sup>1877</sup> For instance, when the value of time spent is \$20,000 but the recovered damages are \$10,000, the attorney fees do not have to be reduced to match the recovered amount;
- Attorney fees are not available to a consumer who represents himself in the claim.<sup>1878</sup> Similarly, attorney's fees are not available for an attorney who represents himself.<sup>1879</sup> However, the attorney is entitled to recover any costs associated with pro se representation.<sup>1880</sup> I believe he can recover an amount equal to attorney fees if he proves the time he spent working on the lawsuit was time he would have spent on other work in his law firm;
- The FCRA entitles a defendant to recover attorney fees if he proves the other party filed the claim in bad faith or for the purpose of harassment;<sup>1881</sup>
- Defending counterclaims are not to be deducted from time spent because defending counterclaims is not to establish liability.<sup>1882</sup>

### 7.6.3.1. Lodestar Method

The current standard is to adopt the "lodestar" approach, which is reasonable time spent, multiplied by the local market rate for a similar service and similar legal skills.<sup>1883</sup> The lodestar approach produces reasonable rates unless the party proves that unusual circumstances justify adjustment of the fees up or down.<sup>1884</sup> When calculating the fees, the court must consider the reasonableness of the hourly rate and of time spent.<sup>1885</sup>

The lodestar method has been applied in two different ways; *Johnson* and *Lindy II*.<sup>1886</sup> Under the *Johnson* method, the court should consider twelve factors which will be explained later. Under the *Lindy II*<sup>1887</sup> method, the court need not determine the twelve factors but

<sup>1877</sup> *Yohay*, 827 F.2d at 974 ("Proportionality of attorney's fees to the amount recovered is not required in every action brought pursuant to the FCRA. Since there will rarely be extensive damages in an FCRA action, requiring that attorney's fees be proportionate to the amount recovered would discourage vigorous enforcement of the Act.").

<sup>1878</sup> *Trikas*, 351 F. Supp. 2d, at 45 ("Attorney's fees are likewise unavailable to Plaintiff because he has represented himself in this action.").

<sup>1879</sup> *Hawthorne v. Citicorp Data Sys.*, 216 F. Supp. 2d 45, 50-51 (E.D. N.Y. 2002) ("Numerous cases, including decisions of the U.S. Supreme Court and this Circuit have repeatedly held that pro se litigants, even those who are attorneys, are not entitled to attorney's fees for litigating a case on their own behalf.").

<sup>1880</sup> *Id.* at 51 ("Plaintiff is, however, entitled to recover any actual costs he incurred in prosecuting the case.").

<sup>1881</sup> 15 U.S.C. § 1681o(b); 15 U.S.C. § 1681n(c).

<sup>1882</sup> *Rubin*, *supra* note 1837, at 524.

<sup>1883</sup> *Hawthorne*, 216 F. Supp. 2d at 51 ("The statute and legislative history establish that "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community."); NATIONAL CONSUMER LAW CENTER, *supra* note 17, at 504.

<sup>1884</sup> *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 728 and 730 (1987) ("As in that case, payment for the time and effort involved-the lodestar-is presumed to be the reasonable fee authorized by the statute, and enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts." and "We deem it desirable and an appropriate application of the statute to hold that if the trial court specifically finds that there was a real risk-of-not-prevailing issue in the case, an upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than one-third of the lodestar."); *Blum*, 465 U.S. at 888 ("Adjustments to that fee then may be made as necessary in the particular case.").

<sup>1885</sup> *Ursic v. Bethlehem Mines*, 719 F.2d 670, 676 (3d Cir. 1983) ("This formulation suggests a twin inquiry into reasonableness: a reasonable hourly rate and a determination of whether it was reasonable to expend the number of hours in a particular case.").

<sup>1886</sup> *Rubin*, *supra* note 1837, at 518.

<sup>1887</sup> *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976).

rather only the time spent and the hourly rate.<sup>1888</sup> However, one commentator believes the contradiction between *Johnson* and *Lindy II* is illusory in practice, as the court applies the *Lindy II* method to create the initial figure, then it applies the *Johnson* method to reduce or increase the attorney's fees because of other factors.<sup>1889</sup>

### 7.6.3.2. Contingency Method

The other standard method is a contingency fee arrangement, in which a client pays his attorney if the result of the case is as agreed.<sup>1890</sup> One type of contingency agreement gives the attorney a specific percentage of any recovery, either by judgment or by settlement.<sup>1891</sup> Another type is "reverse contingent fees" in which the attorney gets a specific percentage of the amount the client saves because of the legal service.<sup>1892</sup>

This standard is associated with the risk of non-payment if the attorney loses the case. Attorneys have to disclose to the court the agreement if he is considering court awarded fees.<sup>1893</sup> Non-disclosure of a contingency fee agreement and receiving the court's award results in a disgorgement of contingency fees.<sup>1894</sup> Nonetheless, courts calculate attorney fees based on the lodestar method even with existence of a contingency fee agreement.<sup>1895</sup>

### 7.6.3.3. Reasonableness of Fees

Attorney fees must be reasonable to be recovered.<sup>1896</sup> Courts consider different factors in determining the reasonableness of attorney fees. Not all of them are necessarily applicable. These factors are largely duplicative of the Professional Rules of Conduct of the American Bar Association.<sup>1897</sup> However, the prevailing party has the burden to prove he is entitled to the award of attorney fees.<sup>1898</sup>

#### 7.6.3.3.1.1. Time and labor required to litigate the case<sup>1899</sup>

The court should consider how much time the case requires and whether the case needs all of the labor participating.<sup>1900</sup> For instance, if the case is an easy one, there is no need to spend a lot of time working on it. Similarly, there is no need to assign the case to more of

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<sup>1888</sup> Rubin, *supra* note 1837, at 519.

<sup>1889</sup> *Id.* at 520.

<sup>1890</sup> *Burlington v. Dague*, 505 U.S. 557, 560-61 (1992) ("Fees for legal services in litigation may be either 'certain' or 'contingent' (or some hybrid of the two). A fee is certain if it is payable without regard to the outcome of the suit; it is contingent if the obligation to pay depends on a particular result's being obtained.").

<sup>1891</sup> AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5(a)(1) (6<sup>th</sup> edition) at 80.

<sup>1892</sup> *Id.*

<sup>1893</sup> *Id.* at 76.

<sup>1894</sup> *Id.*

<sup>1895</sup> *Bryant*, 689 F.2d at 80 ("The fees were calculated on the basis of an hourly rate, but defendant contends that the purpose of the FCRA's allowance for attorney's fees could be as efficaciously achieved by calculating fees on the basis of a contingent fee. We reject this contention ...").

<sup>1896</sup> MCCORMICK, *supra* note 1410, at 254.

<sup>1897</sup> FISCHER, *supra* note 1232, at 787.

<sup>1898</sup> *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974).

<sup>1899</sup> ABA, *supra* note 1891, Rule 1.5(a)(1); Rubin *supra* note 1837, at 518.

<sup>1900</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary ...").

attorneys than are needed.<sup>1901</sup> If the participation of more than one lawyer is warranted, the court should be careful of the possibility of work duplication.<sup>1902</sup>

#### 7.6.3.3.1.2. **Novelty and Difficulty of the Case**<sup>1903</sup>

Some cases present novel or difficult issues, which require more time and effort.<sup>1904</sup> In contrast, if the rule of law is settled and the judicial view on the issue is known, spending more time is unreasonable. In addition, when the case is difficult and the possibility of winning is low, it is reasonable to ask for a large percentage of the amount if the agreement is contingent and vice versa. Nevertheless, the court should not consider the “risk of non-payment” as an enhancing factor of lodestar rate.<sup>1905</sup>

#### 7.6.3.3.1.3. **Skills to Perform the Legal Service Properly**<sup>1906</sup>

Some legal issues are clear so they do not warrant the involvement of a specialist or well-experienced and high-paid attorney. Some issues do not require a lawyer at all, but rather clerical work.<sup>1907</sup> It is unreasonable to involve a well-experienced and high-paid attorney in an easy and non-complicated matter. In contrast, it is reasonable to assign a difficult and new issue to one or more experienced attorneys.

#### 7.6.3.3.1.4. **Preclusion of other employment because of the assignment**<sup>1908</sup>

If an attorney reasonably rejects new employment opportunities because of a conflict of interest, such facts should be taken into consideration in calculating the fees.<sup>1909</sup> For instance, if the case is a big case that exhausts the working capacity of the law firm, which in turn, requires the law firm to reject new works, the employment lost because of this case should be taken into consideration when calculating the fees.

In my opinion, such a factor should play a role in calculating the fees only if the rejection of new employment increases the rate of the current case as a practice in the market. However, if rejection plays no role in the changing the market rate, then it should not be considered.

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<sup>1901</sup> *Id.* at 434 (“The district court also should exclude from this initial fee calculation hours that were not “reasonably expended.”).

<sup>1902</sup> *Johnson*, 488 F.2d at 717 (“If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized.”).

<sup>1903</sup> ABA, *supra* note 1891; Rubin *supra* note 1837, at 518.

<sup>1904</sup> *Id.* at 718 (“Cases of first impression generally require more time and effort on the attorney's part... he should not be penalized for undertaking a case which may ‘make new law’. Instead, he should be appropriately compensated for accepting the challenge.”).

<sup>1905</sup> *Pennsylvania*, 483 U.S. at 723 (“But a careful reading of *Johnson* shows that the contingency factor was meant to focus judicial scrutiny solely on the existence of any contract for attorney's fees which may have been executed between the party and his attorney. The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case.”).

<sup>1906</sup> ABA, *supra* note 1891, Rule 1.5(a)(1); Rubin *supra* note 1837, at 518.

<sup>1907</sup> *Id.* (“It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.”).

<sup>1908</sup> ABA, *supra* note 1891, Rule 1.5(a)(2); Rubin, *supra* note 1837, at 518-19.

<sup>1909</sup> *Johnson*, 488 F.2d at 718.

#### 7.6.3.3.1.5. Fees Customarily Charged in the Locality for Similar Legal Services<sup>1910</sup>

In my opinion, fees customarily charged is the most important factor. However, such fees should be calculated according to the rate in a similar locality. Different locations entail different rates because of different office leasing costs, quality of services, and the like.

#### 7.6.3.3.1.6. The Amount Involved and the Results Obtained<sup>1911</sup>

When the attorney fees are contingent, the amount is an important factor. Also, the result of the case should be considered in calculating fees. For instance, when the plaintiff demands a large amount of money, the contingent fees will be higher. When the plaintiff wins all of his claims it is not similar to winning some.<sup>1912</sup> The court should exclude hours spent on lost claims. However, when all claims are related and the result is excellent, the attorney should recover the whole fee regardless of his failure to win every issue.<sup>1913</sup> When the success is partial or limited, there is no formula to be followed<sup>1914</sup> but the court should reduce the fees at its discretion.<sup>1915</sup> For instance, a court reduced the attorney fees because part of the time spent was against another defendant other than the one in the case.<sup>1916</sup> Under the FCRA, a court reduced attorney fees from more than \$126,000 to \$25,000 because the plaintiff only obtained \$1,000 in comparison to the \$30,000 of damages he sought.<sup>1917</sup>

#### 7.6.3.3.1.7. Time Limitations<sup>1918</sup>

Time limitations imposed by the client or by the circumstances should be taken into consideration. Rush services prices are higher than regular services. Priority work which entails the delay of other works is higher than regular work.<sup>1919</sup> These limitations can be imposed by a client who asks the attorney to provide him with a quick turnaround time, or by the circumstances of the case such as short notice for a temporary restraining order or the like.

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<sup>1910</sup> ABA, *supra* note 1891, Rule 1.5(a)(3); *Johnson*, 488 F.2d at 718; Rubin *supra* note 1837, at 519.

<sup>1911</sup> ABA, *supra* note 1891, Rule 1.5(a)(4); Rubin *supra* note 1837, at 519.

<sup>1912</sup> *Hensley*, 461 U.S. at 434 (“This factor [result obtained] is particularly crucial where a plaintiff is deemed ‘prevailing’ even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?”).

<sup>1913</sup> *Id.* at 435 (“Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee ... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.”).

<sup>1914</sup> *Id.* at 436-37 (“There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.”).

<sup>1915</sup> *Id.* at 440.

<sup>1916</sup> *Hall v. Harleysville Ins. Co.*, 943 F. Supp. 536, 542 (E.D. Pa. 1996) (“We further deduct those hours ‘exclusively devoted’ to litigating claims against other defendants...”).

<sup>1917</sup> *Sheffer v. Experian Information Solutions, Inc.*, 290 F. Supp. 2d 538, 551 (E.D. Pa. 2003) (“Furthermore, the \$1,000.00 judgment Mr. Sheffer derived from this lawsuit is significantly less than the \$30,000.00 amount Sears’ offered in settlement. It would be inappropriate and unreasonable to award Plaintiff for such a modest result by granting the fees Plaintiff seeks.”)

<sup>1918</sup> ABA, *supra* note 1891, Rule 1.5(a)(5); Rubin, *supra* note 1837, at 519.

<sup>1919</sup> *Johnson*, 488 F.2d at 718 (“Priority work that delays the lawyer’s other legal work is entitled to some premium.”).

#### 7.6.3.3.1.8. **Nature and Length of the Professional Relationship**<sup>1920</sup>

The nature and length of the professional relationship with the client is a factor in determining the reasonableness of fees.<sup>1921</sup> First time clients are charged more than loyal and old clients. Similarly, a relationship with an individual client is not similar to a relationship with a large corporation. Moreover, the volume of assigned work affects the rate as weekly assignments of works will be cheaper than monthly or quarterly assignments.

#### 7.6.3.3.1.9. **Experience, Reputation, and Ability**<sup>1922</sup>

Experience, reputation, and ability of the lawyers involved in the case are important factors.<sup>1923</sup> Therefore, rates are calculated based on experience, reputation, and ability of the lawyer. For instance, in 1992 in the District of Columbia, a lawyer with twenty years of experience charges a rate of \$285 per hour while a lawyer with three years of experience charges a rate of \$125 per hour. A lawyer's reputation in professionalism, ethics, and skills vary from one lawyer to another.<sup>1924</sup> In addition, specialization of a demanded area of law may entitle an attorney to a higher rate.<sup>1925</sup> Although an attorney may be an expert in one field, he may be treated as a new attorney if he handles a case in another legal field for the first time.<sup>1926</sup>

#### 7.6.3.3.1.10. **Fixed or Contingent Fees**<sup>1927</sup>

Attorneys use different pricing options depending on location, time, and clients. Thus, knowledge of the attorney's expected amount helps in determining reasonable fees.<sup>1928</sup> For instance, they can use a flat rate in which the amount is determined in advance. Alternatively, they can use hourly rate in which the amount is determined by working hours. They can also use success bounce. Every fee arrangement should be considered in determining the reasonableness of the fees. However, the risk of losing the case cannot justify an increase in the attorney's lodestar.<sup>1929</sup>

#### 7.6.3.3.1.11. **Undesirability of the Case**<sup>1930</sup>

Some cases such as civil rights cases are undesirable because of the hardship it creates on the attorney. The attorney may face economic hardships because of taking such cases.<sup>1931</sup> Thus, such undesirability should be reflected in the rate the attorney receives.

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<sup>1920</sup> ABA, *supra* note 1891, Rule 1.5(a)(6); Rubin, *supra* note 1837, at 519.

<sup>1921</sup> *Johnson*, 488 F.2d, at 719.

<sup>1922</sup> ABA, *supra* note 1891, Rule 1.5(a)(7); Rubin, *supra* note 1837, at 519.

<sup>1923</sup> *Johnson*, 488 F.2d, at 718-19 (“Most fee scales reflect an experience differential with the more experienced attorneys receiving larger compensation.”).

<sup>1924</sup> See [http://www.justice.gov/usao/dc/divisions/civil\\_laffey\\_matrix\\_1.html](http://www.justice.gov/usao/dc/divisions/civil_laffey_matrix_1.html)

<sup>1925</sup> *Johnson*, 488 F.2d, at 719.

<sup>1926</sup> *Thompson*, 2003 WL 1579757, at \*6 (“Thompson states in her affidavit that this was her first FCRA case. Given her level of experience, therefore, the court finds that the rate she has claimed exceeds a reasonable rate and that her hours should be compensated at a rate commensurate with a relatively new, rather than experienced lawyer.”).

<sup>1927</sup> ABA, *supra* note 1891, Rule 1.5(a)(8); Rubin, *supra* note 1837, at 519.

<sup>1928</sup> *Johnson*, 488 F.2d at 718.

<sup>1929</sup> *Pennsylvania*, 483 U.S. at 723.

<sup>1930</sup> *Johnson*, 488 F.2d at 719; Rubin, *supra* note 1837, at 519.

<sup>1931</sup> *Johnson*, 488 F.2d at 719.

#### 7.6.3.3.1.12. **Similar Awards**<sup>1932</sup>

Courts should consider attorney fee awards in similar cases. However, courts have discretion to adjust the fees in light of different circumstances.

#### 7.6.3.4. **Unreasonable Practices**

The following practices are considered unreasonable, thus, an attorney should be paid only what he deserves.

##### 7.6.3.4.1. **Double Billing**

Some attorneys double bill their clients for phantom work.<sup>1933</sup> Others give discounts and make up for them by inflating client bills.<sup>1934</sup>

##### 7.6.3.4.2. **Not Working**

Charging clients for doing nothing is unreasonable. For instance, an attorney receives \$750 from his clients to do certain works but fails to prove his work.<sup>1935</sup> Similarly, charging clients too much for very little work is unreasonable.<sup>1936</sup>

##### 7.6.3.4.3. **Bad Quality Work**

Sometimes the fees are reasonable if the work performed is professional. However, the fees are unreasonable when the performance is bad.<sup>1937</sup>

##### 7.6.3.4.4. **Remedial Work**

When an attorney is not familiar with a new issue because of his inexperience, he does not have the right to charge his client for time spent in remedying his inexperience.<sup>1938</sup>

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<sup>1932</sup> *Johnson*, 488 F.2d at 719; *Rubin*, *supra* note 1837, at 519.

<sup>1933</sup> *State v. Espinoza*, 35 P.3d 552, 557 (Colo. 2001) (“In an effort to justify the unreasonable professional fee, Espinoza inflated entries on her billing statement, charged for phantom time expenditures and engaged in conduct intended to mislead and deceive her client into believing that more professional time had been devoted to the case than actually had been expended.”).

<sup>1934</sup> *Att’y GRIEVANCE Comm’n OF Md. v. HESS*, 352 Md. 438, 443, 722 A.2d 905, 908 (1999) (“In an attempt to cause the client to pay his bills, [Hess] resorted to what he himself has termed ‘rough justice,’ and in 1985 he began increasing the amounts on several pre-bills by 15%, then discounting those bills by 15%.”).

<sup>1935</sup> *State ex rel. Okla. Bar Ass’n v. Sheridan*, 84 P.3d 710, 717 (2003) (“Respondent charged the Singleton’s \$750 to represent them. Respondent says that he went to the property, did a title examination, and drafted a petition. However, he could produce no tangible evidence of any work.”).

<sup>1936</sup> *Budget Rent-A-Car Sys., Inc. v. Consol. Equity LLC*, 428 F.3d 717, 718 (7th Cir. 2005) (The attorney charged \$4,626.50 and \$4,354 for drafting four-pages. “It is inconceivable that this is the going market price for such exiguous submissions.”).

<sup>1937</sup> ABA, *supra* note 1891, at 72.

<sup>1938</sup> *In re Guardianship of Hallauer*, 44 Wash. App. 795, 800, 723 P.2d 1161, 1166 (Wash. Ct. App. 1986) (“There is no reason or excuse for charging a client, particularly a guardianship estate under the protection and supervision of the court, for one’s own inefficiencies.”).



## 7.6.4. Attorney Fees under Islamic Law

### 7.6.4.1. Characterization of Attorneyship

Under Islamic Law, a contract to retain an attorney is characterized as either a lease contract for services or *Ja'alah* contract, which is a conditional lease contract for services.

Attorneyship is a lease contract for services when the payment is not conditioned on the success of performance. For instance, an attorney agrees to represent a client in a case in exchange for a specific amount of money.<sup>1939</sup> Similarly, a lease contract is implied when the contract contains conditions similar to those of a lease contract for services, such as the plaintiff has to pay a certain amount for drafting each brief.<sup>1940</sup>

Attorneyship can be a conditional lease contract for services when the parties agree in a contract that the fees are only available upon success.<sup>1941</sup> Similarly, it is an implied conditional lease contract for services when the contract contains conditions similar to a conditional lease contract for services such as mentioning that the attorney is entitled to fees only if he succeeds.<sup>1942</sup>

### 7.6.4.2. Contingency Fees

Scholars are split over whether a contract to obtain an amount in exchange for having a portion of that amount is valid. The first approach is that such fee agreements are invalid because of uncertainty; thus the attorney is not entitled to the contingency fees but rather he is entitled to the fair market rate.<sup>1943</sup> The second approach is that such agreement is valid because the Prophet dealt with the Jews of Khaybar based on a conditional contract even with possible uncertainty.<sup>1944</sup> The second approach is the strongest approach even though it is the minority view.<sup>1945</sup>

### 7.6.4.3. Attorney's Fees in Invalid Contracts

If the contract between the attorney and the client is found to be invalid for any reason, the scholars are in dispute regarding what the attorney fees are. The first approach is that the attorney is entitled to a fair market rate of similar service if the fees are not included in the invalid contract. However, if the fees are mentioned in the contract, the attorney is entitled to fair market rate that does not exceed the agreed upon rate because they agreed in advance to reduce the fees.<sup>1946</sup> The second approach is that the attorney is entitled to the fair market value regardless of the agreed upon fees because the contract is unenforceable.<sup>1947</sup>

### 7.6.4.4. Uncertain Attorney Fees

If the attorney and client agree on a task but without specifying the cost, scholars have different views regarding this issue.<sup>1948</sup> The first approach is that the attorney is entitled to the fair market rate as the fair indicator of the value of the service. Moreover, the client

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<sup>1939</sup> BANDAR ALYAHIA, *ATTORNEYSHIP IN ISLAMIC JURISPRUDENCE*, 480. (Tadmoria House) (2007).

<sup>1940</sup> *Id.* at 480-81.

<sup>1941</sup> *Id.* at 489.

<sup>1942</sup> *Id.* at 489.

<sup>1943</sup> *Id.* at 498.

<sup>1944</sup> MUSLIM BIN AL-HAJJAJ, *supra* note 3, at 10/3762 (“The Prophet (pbuh) returned to the Jews the date-palms of Khaybar and its land on the condition that they should work upon them with their own wealth (seeds, implements), and give half of the yield to the Muslims.”).

<sup>1945</sup> ALYAHIA, *supra* note 1939, at 498.

<sup>1946</sup> *Id.* 504-05.

<sup>1947</sup> *Id.*

<sup>1948</sup> Bear in mind this debate took place centuries before the attorneyship took its current shape.

receives the service and should pay for it.<sup>1949</sup> The second approach is that the attorney is entitled to the fair market rate if he holds himself in the market as an attorney; therefore, if a law professor agrees with a person to draft a contract for him, he is not entitled to fees.<sup>1950</sup> The third approach is that he is entitled to the fair market rate if his course of dealing indicates that he does not provide such a service for free.<sup>1951</sup> The fourth approach is that if the client asks for the service first, the attorney is entitled to the fair market rate but not vice versa.<sup>1952</sup> The fifth approach is that he is not entitled to any fees because the client does not offer any fees which indicate that the attorney is acting for free.<sup>1953</sup>

The strongest and most fair approach is the first one. However, the second and third approaches produce similar results as we are discussing an attorney's contract without specific fees. The fourth approach is not on point for the argument, as we are not discussing tasks performed before client asks for them. The fifth approach is a weak one as attorney holding himself in the market to be so, and incurring expenses is a clear indicator that he is not acting for free.

The Saudi Code of Law Practice provides<sup>1954</sup> that attorney fees are to be determined by contract or by the court's order if there is no contract or when the contract is disputed or invalid.<sup>1955</sup> Such a determination should take into consideration efforts expended by the attorney and the result.<sup>1956</sup> The Implementing Regulation of the Code of Law Practice provides that the fees are to be assessed by court appointed experts.<sup>1957</sup> In one case, the General Court in Riyadh held that a 9% contingency fee was reasonable based on the opinion of experts appointed by the judge.<sup>1958</sup>

#### 7.6.4.5. A Comparative Assessment

Both legal systems provide that attorney fees must be reasonable. Reasonableness is to be determined solely by the trier of fact under both systems, with great weight given to expert opinion under the Saudi system. In addition to fair market rate, which is established by Islamic law, the Saudi system provides two factors, which are efforts expended and the result achieved. However, the American system provides twelve factors under the *Johnson* method to measure reasonable attorney fees.

In my opinion, the most important factor is fair market rate. The other factors are reflected in fair market rate. For instance, when a court asks an expert to measure attorney fees, the expert will provide the fair market rate first, and then adjust the rate upward or downward depending on the other factors such as experiences, difficulty of the case, undesirability, and the like. These factors are reflected in the rate because no attorney will provide an estimate without knowing all of factors that affect the rate.

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<sup>1949</sup> ALYAHIA, *supra* note 1939, at 508-09.

<sup>1950</sup> *Id.* at 508.

<sup>1951</sup> *Id.*

<sup>1952</sup> *Id.* at 507.

<sup>1953</sup> *Id.*

<sup>1954</sup> Code of Law Practice, issued by a Royal Decree No. (M/38) (2001).

<sup>1955</sup> Code of Law Practice, article 26 (Provides, "The lawyer's fees and method of payment shall be determined by agreement with his client. If there was no such agreement, or if the agreement was disputed or void, such fees shall be assessed by the court that has adjudicated that case, pursuant to a request by either the lawyer or the client, consistent with the effort expended by the lawyer and the benefit obtained by the client. This rule shall also apply to any subsidiary claim ensuing from the original case.").

<sup>1956</sup> Code of Law Practice, article 26.

<sup>1957</sup> Implementing Regulation of Code of Law Practice (Issued by a resolution of the Minister of Justice, 2003), Article 26/3.

<sup>1958</sup> ALYAHIA, *supra* note 1939, at 864.

## 7.7. Time of Credit Reporting Damages Remedies Measurement

The measurement of credit reporting damages with respect to time is an important element to measure the remedies correctly. In an interesting case, outside the credit reporting damages context, a different time measurement (date of breach or date of trial) resulted in a judgment of more than \$10 million.<sup>1959</sup>

The general rule in evaluating the damages of a contract and tort actions is the date of the breach or injury.<sup>1960</sup> I did not find a specific rule for credit reporting damages; however, I believe that credit reporting damages are no different from other types of torts. The U.S. Supreme Court ruled that “Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking.”<sup>1961</sup> In another case, the U.S. Supreme Court held that “‘Just compensation’,” we have held, means in most cases the fair market value of the property on the date it is appropriated.”<sup>1962</sup> Similarly, the Court held that “... the witnesses should have been asked to state the fair market value of the lands as of the date of taking ...”<sup>1963</sup>

However, in tort cases, the time of injury may be before the time of the tortious act or after the tortious act. One commentator provides an interesting example. He says when a defendant causes virus in the plaintiff’s computers until the defendant activates it later, the damage may predate the act or postdate it. The damage may be before the tortious act when the plaintiff knows the intent and spends money to vaccinate his computers. In contrast, the damages may be after the activation of the virus but not immediately.<sup>1964</sup>

### 7.7.1. Fluctuating of Property’s Value

Sometimes property, the subject of the dispute, fluctuates in value either because of its nature or because of changes in the market.<sup>1965</sup> Mere change in the market does not require applying fluctuation rule. The change must be a result of instability or ups and downs of the market. If the value change is in a unidirectional movement, then the date of the breach or the date of judgment applies.<sup>1966</sup> The general rule is that the choice of time depends on the reprehensibility of the defendant’s act. The more reprehensible the act, the more freedom is given to the jury to choose the applicable date.<sup>1967</sup> One approach is to award the plaintiff the highest value between the date of loss and the date of knowledge of the breach and ability to secure a substitute.<sup>1968</sup> Another approach is to award the plaintiff the highest value between the date of breach and date of judgment.<sup>1969</sup> The third approach disregards the change in value and measure the property according to the original market value.<sup>1970</sup>

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<sup>1959</sup> Peter Macaulay, *Date Damages Assessed Makes \$10 million Difference, Damages Assessed at Date of Trial: BCSC*, available at [http://www.pmacaulay-assoc.com/pdf/BCSC\\_Damages\\_Red\\_Back\\_PM&A.pdf](http://www.pmacaulay-assoc.com/pdf/BCSC_Damages_Red_Back_PM&A.pdf) (The court applied the date of breach as the date of damages. Had the court applied the date of judgment, the amount would be zero.).

<sup>1960</sup> FISCHER, *supra* note 1232, at 36.

<sup>1961</sup> *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

<sup>1962</sup> *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

<sup>1963</sup> *United States v. Miller*, 317 U.S. 369, 373 (1943).

<sup>1964</sup> FISCHER, *supra* note 1232, at 36.

<sup>1965</sup> *Id.* at 39.

<sup>1966</sup> *Id.* at 40.

<sup>1967</sup> *Id.* at 39.

<sup>1968</sup> FISCHER, *supra* note 1232, at 41; MCCORMICK, *supra* note 1410, at 184.

<sup>1969</sup> FISCHER, *supra* note 1232, at 41; MCCORMICK, *supra* note 1410, at 183.

<sup>1970</sup> MCCORMICK, *supra* note 1410, at 183.

## 7.7.2. Time of Measurement under Islamic Law

### 7.7.2.1. Time of Remedies in Personal Injury Cases

Valuation of the human body and emotional distress under Islamic law is mentioned under the emotional distress measurement.<sup>1971</sup> However, since the compensation is pre-determined, the trier of fact only needs to determine the type and extent of the injury and determine the value of the compensation. If the chosen method to compensate is the “camel value” method, which is the applicable method in Saudi Arabia, the trier of fact needs to determine the value of the camels in the market and multiple it by 100 camels. In practice, this method is applied periodically to determine the value of blood-money in general but it is not applied on a case-by-case basis. For instance, the value of blood-money in 1955 was \$4,000, and then it was increased periodically until in 1981 it became \$26,666.<sup>1972</sup> Few months ago, the Saudi Supreme Court increased the blood-money valuation to be 300,000 Saudi Riyal (\$80,000) for wrongful death and 400,000 Saudi Riyal (\$106,000) for international murder.<sup>1973</sup> The Saudi Supreme Court is in charge of the valuation of the blood-money value by determining the fair market value of 100 camels in the market.<sup>1974</sup> The judge need not determine the value of 100 camels in every case. Personal injuries other than death are treated similarly; however, the determination of personal injury is not to be made until the injury is stabilized.<sup>1975</sup> Determination of the extent of the injury before it stabilizes leads to either an unstable judicial system by entering a new judgment if the status becomes worse or the injured person gets less than what he in fact deserves if no new judgment is entered.

### 7.7.2.2. Time of Remedies in Property Cases

#### 7.7.2.2.1. Non-Fungible Property

##### 7.7.2.2.1.1. Owner’s Possession

If the non-fungible property is damaged by the defendant while the property is in the plaintiff’s possession, damages are measured from the date the damage occurred.<sup>1976</sup>

##### 7.7.2.2.1.2. Unlawful Possession

However, if the property is damaged during unlawful possession of the defendant, such as stolen property, scholars have different opinions regarding the time of valuation.<sup>1977</sup>

- The first approach is that damages are measured from the time of unlawful possession, because the defendant is required to pay the value of the property at the time of usurpation.<sup>1978</sup>
- The second approach is that the measurement is the highest value from the date of usurpation until the date of damage.<sup>1979</sup> The reason is that the usurper is required to

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<sup>1971</sup> See p. 226-27; and note 1716 at 226.

<sup>1972</sup> Alkhamees, *supra* note 1716, at 480.

<sup>1973</sup> High Council of Judicial Resolution No. 192/T dated 10/9/1432 A.H.

<sup>1974</sup> *Id.* at 481.

<sup>1975</sup> ABU SAQ, *supra* note 1271, at 357.

<sup>1976</sup> ABU SAQ, *supra* note 1271, at 274; ALMARZOQI, *supra* note 9, at 499; AL-ZUHAYLI, *supra* note 1271, at 98; SIRAJ, *supra* note 1293, at 533; AL ZARQA, *supra* note 1291, at 119.

<sup>1977</sup> ABU SAQ, *supra* note 1271, at 284; AL-ZUHAYLI, *supra* note 1271, at 98-100.

<sup>1978</sup> ABU SAQ, *supra* note 1271, at 279; ALDABO, *supra* note 1401, at 112; AL ZARQA, *supra* note 1291, at 119.

<sup>1979</sup> ABU SAQ, *supra* note 1271, at 280; ALDABO, *supra* note 1401, at 112; AL ZARQA, *supra* note 1291, at 119.

pay the value of the property every time from the time of usurpation until the damage; therefore, he is required to pay the highest value.<sup>1980</sup>

- The third approach is that the measurement is from the time of damage unless the increase in the price is for an intrinsic feature.<sup>1981</sup> For instance, when a defendant usurps a cow worth \$1,000 in 2008, the value increases to \$1,500 because of fatness, and decreases to \$800 because of skinniness. The defendant is required to pay \$1,500 because the increase is for an intrinsic feature of the cow and not because market fluctuation.

#### 7.7.2.2.2. Fungible Property

If the fungible property is damaged, there are four possible scenarios.

**First**, when the defendant usurps and damages property while a substitute is in the market but the defendant fails to deliver the substitute and it becomes unavailable.<sup>1982</sup>

Scholars are split over this issue into thirteen approaches as follows:

- Highest value from the time of usurpation until the date of damage;<sup>1983</sup>
- Highest value from the time of damage until the date of unavailability;<sup>1984</sup>
- Highest value from the time of usurpation until the date of unavailability;<sup>1985</sup>
- Highest value from the time of usurpation until the date of judgment;<sup>1986</sup>
- Highest value from the time of unavailability until the date of judgment;<sup>1987</sup>
- Highest value from the time of damage until the date of payment;<sup>1988</sup>
- Time of damage;<sup>1989</sup>
- Time of usurpation;<sup>1990</sup>
- Time of unavailability;<sup>1991</sup>
- Time of litigation;<sup>1992</sup>
- Time of judgment;<sup>1993</sup>
- If the property is unavailable in the whole country is the time of unavailability. If it is unavailable only in plaintiff's place, it is the time of judgment;<sup>1994</sup> or time of demand of property.<sup>1995</sup>

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<sup>1980</sup> ABU SAQ, *supra* note 1271, at 280.

<sup>1981</sup> ABU SAQ, *supra* note 1271, at 281; ALDABO, *supra* note 1401, at 112.

<sup>1982</sup> ABU SAQ, *supra* note 1271, at 284; ALDABO, *supra* note 1401, at 110.

<sup>1983</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110.

<sup>1984</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110.

<sup>1985</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110; SIRAJ, *supra* note 1293, at 533; AL ZARQA, *supra* note 1291, at 119.

<sup>1986</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110.

<sup>1987</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110.

<sup>1988</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110.

<sup>1989</sup> ALMARZOQI, *supra* note 9, at 500; ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110; SIRAJ, *supra* note 1293, at 533.

<sup>1990</sup> SIRAJ, *supra* note 1293, at 533; AL ZARQA, *supra* note 1291, at 118.

<sup>1991</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110; SIRAJ, *supra* note 1293, at 533; AL ZARQA, *supra* note 1291, at 118.

<sup>1992</sup> SIRAJ, *supra* note 1293, at 533.

<sup>1993</sup> AL ZARQA, *supra* note 1291, at 118.

<sup>1994</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110.

<sup>1995</sup> ABU SAQ, *supra* note 1271, at 285; ALDABO, *supra* note 1401, at 110.

**Second**, when the defendant usurps and damages a property that has no substitute in the market, there are six approaches as follows:

- Highest value from the time of usurpation until the date of damage;<sup>1996</sup>
- Time of damage;<sup>1997</sup>
- Highest value from the time of damage until the date of payment;<sup>1998</sup>
- Highest value from the time of damage until the date of demand of property; and<sup>1999</sup>
- If the property is unavailable in the whole country, it is the time of unavailability, but if it is unavailable only in plaintiff's place, it is the time of judgment.<sup>2000</sup>

**Third**, when the defendant damages the property without usurping it and a substitute is in the market but the defendant fails to deliver the substitute until it becomes unavailable, there are seven approaches as follows:

- Highest value from the time of damage until the date of unavailability;<sup>2001</sup>
- Time of damage;<sup>2002</sup>
- Highest value from the time of damage until the date of payment;<sup>2003</sup>
- Highest value from the time of unavailability until the date of judgment;<sup>2004</sup>
- Time of unavailability;<sup>2005</sup>
- Time of judgment; and<sup>2006</sup>
- If the property is unavailable in the whole country, it is the time of unavailability, but if it is unavailable only in plaintiff's place, then it is the time of judgment.<sup>2007</sup>

**Fourth**, when defendant damages the property without usurping it while a substitute is not in the market. There are four approaches as follows:

- Highest value from the time of damage until the date of judgment;<sup>2008</sup>
- Time of damage;<sup>2009</sup>
- Time of judgment; and<sup>2010</sup>
- If the property is unavailable in the whole country, it is the time of unavailability, but if it is unavailable only in plaintiff's place, then it is the time of judgment.<sup>2011</sup>

One commentator examines these approaches and concludes four of the approaches can be applied to damages resulting from negligence.

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<sup>1996</sup> ABU SAQ, *supra* note 1271, at 286.

<sup>1997</sup> *Id.*

<sup>1998</sup> *Id.*

<sup>1999</sup> *Id.*

<sup>2000</sup> *Id.*

<sup>2001</sup> *Id.* at 287.

<sup>2002</sup> *Id.*

<sup>2003</sup> *Id.*

<sup>2004</sup> *Id.*

<sup>2005</sup> *Id.*

<sup>2006</sup> *Id.*

<sup>2007</sup> *Id.*

<sup>2008</sup> *Id.*

<sup>2009</sup> *Id.*

<sup>2010</sup> *Id.*

<sup>2011</sup> *Id.*

### **7.7.2.3. Approaches' Assessment**

Nevertheless, these approaches are in fact regarding the value of usurped property; therefore, this application should be read carefully as scholars treat usurper with punitive intent. Usurpation can be equated with intentional damages but cannot be equated with damages resulted from negligence. However, if courts apply these approaches, all of them are well reasoned. Though, I believe that one can apply them in different situations. For instance, one can apply the "highest value" approach as punishment when the damage is intentional. Similarly, one can apply the "time of damages" approach when the time between the trial and damages is short and no fluctuation in the price is expected. However, to place the plaintiff in his rightful position, one can apply the "date of judgment" approach when the price is significantly higher than the date of damages. The "time of unavailability" approach can be applied when the property is unique and there is difficulty in measuring the value of the property. The time of unavailability can be used as a benchmark to measure its value.

## Eighth Chapter: **Conclusion and Recommendations**

My objective in this chapter is to present the most significant findings and recommend reforms in the USA and Saudi Arabia legal systems in regard to credit reporting laws.

### **8.1. Most Important Findings and Reformative Recommendations**

#### **General Findings:**

##### **First: Originality vs. Import:**

I found that the FCRA is originally derived from within the American culture. However, the CIL is mainly imported from foreign laws. Importing laws and implanting them in a different culture may be beneficial in some cases, but in other cases the imported laws may be incompatible with the culture.

##### **Second: Comprehensive v. Incomprehensive:**

The FCRA covers a wide variety of issues that are not covered by the CIL such as medical information, identity theft, fraud and active duty alerts, truncation of digits, affiliate sharing and others.

##### **Third: Complication v. Simplification:**

The FCRA's sections are more complicated than the CIL's. The FCRA contains more details that may make it difficult for lay consumers to understand it. For example, section 1681g, which is about disclosures to consumers, is about ten pages in length.

##### **Fourth: Lobbying and Compromise v. Governmental work:**

The FCRA is a result of lobbying efforts by the credit reporting industry on one hand and the consumer protection groups on the other hand. The result of this compromise is indicated in following examples:

##### 1) Reinsertion of Deleted Information:

The CRAs are given the power to reinsert deleted information at their discretion (after following a reasonable procedure to avoid inclusion of outdated information), while the CIL does not give such power. The FCRA's approach balances the interest of the credit reporting industry in the flow of information, and the interest of consumers in maintaining reasonable procedures to avoid a reappearance of deleted information.

##### 2) Determining Frivolousness or Irrelevancy:

Under the FCRA, the CRAs are given the power to determine any dispute as frivolous or irrelevant and terminate the investigation. Giving the CRAs the power saves CRAs time and efforts. Meanwhile, consumers may stop CRAs' abuse through litigation.

##### 3) Immunity When Furnishing Negative Information:

Providing furnishers with immunity if they furnish negative information is in the best interest of the credit reporting industry and the consumers. The FCRA balances the flow of information without fear of liability with the interest of consumers in general. If furnishers are liable, they will withhold information which will affect the industry, and in turn affect consumers' access to credit.



**Positive Side Effects:**

Governmental work has its own positive side effects. The CIL balances the interests of consumers and credit reporting industry better than the FCRA in some cases as in the following examples.

**1) Outdated Accounts:**

The FCRA limits the time within which outdated account information will be removed from the record. However, the CIL does not provide for removal unless consumer is bankrupt. The CIL protects creditors in case of non-bankruptcy cases; meanwhile, it protects bankrupt consumers by limiting the time within which the information will be removed.

**2) Failure to Indicate Voluntarily Closed Account:**

Under the FCRA, furnishers are immune if they fail to indicate that an account voluntarily was closed, although the failure may adversely affect consumers. However, under the CIL, furnishers are not immune for such failure.

**3) Failure to Include a Statement of Dispute:**

Under the FCRA, a CRA may determine a dispute as frivolous and does not require that the CRA include a statement of dispute. However, the CIL requires CRAs to include statement of dispute in any case.

**Fifth: Broad CRAs' Authority v. Limited Authority:**

The FCRA grants CRAs the authority to use their discretion in contrast to the CIL as in the case of determining disputes as frivolous or irrelevant and reinsertion of deleted information.

**Sixth: Ambiguity v. Clarity:**

Some of the FCRA's sections are ambiguous in contrast to relatively clear sections of the CIL. For example, the preemption issue is not clear under the FCRA. Similarly, the existence of a private right of action under section 1681(m) is an ambiguous issue.

**Recommendations:**

The first issue that I had to tackle was definitional. Both the FCRA and the CIL have deficiencies in defining some terms as follow.

**Definition of Credit Information**

I suggest that credit information in the FCRA be defined "*Information related to consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.*"

**Definition of a Credit Report**

I suggest that the CIL should recognize two kinds of report: a regular credit report and an investigative report. In addition, the definition of a credit report should recognize that a report may be communicated orally, as well as in writing. One who communicates a credit report orally should be accountable the same as one whose report is written. Finally, the CIL should enumerate the legitimate purposes.

**Definition of Credit Reporting Agency**

The definitions of CRA in the CIL and FCRA differ in an important way. I suggest revising the CIL to include "any person" instead of only "licensed CRAs."

The CIL then would apply to any person who engages in the activities governed by the CIL.

#### Definition of Consumer

I suggest that both the FCRA and the CIL define “consumer” in a precise way. The FCRA should define consumer as “*an individual who is the subject of a credit report.*” The term “consumer” under the CIL should be defined as an “*individual or business entity about whom the credit report is issued*”. My suggestion is not intended to change the scope of “consumer” under both acts. Under the CIL, requiring “engaging in a credit transaction to be a consumer” would exclude categories of people from the protection.

#### **Credit Reporting Breaches**

Credit reporting breaches can be defined as “*violation of a legal duty that is imposed by the credit reporting act.*” Breaches can be categorized as CRAs breaches and other breaches. Other breaches can be done by users, furnishers, governmental entities, or CRAs. I have made some suggestions regarding the following breaches:

#### **CRAs Breaches**

##### Providing outdated information

##### Outdated Bankruptcies

I believe that removing bankruptcy information because of the passage of time is not a good solution. Lenders have the right to know about their consumers’ past and act accordingly. Equating consumers who never bankrupted with those who bankrupted is not fair to the lenders or the consumers who never entered bankruptcy.

##### Outdated Tax

In my opinion, information related to a tax lien should stay indefinitely in the consumers’ report until it is paid. Tax is a source of public funding and everyone in the community has an interest in collecting late taxes. Passage of time is not sufficient to remove unpaid tax unless the consumer is unable.

##### Outdated Accounts for Collection or Charged off

I think the CIL approach in keeping the information indefinitely until the dispute between the creditor and the debtor is resolved is better than the FCRA for two reasons. First, it incentivizes consumers to pay instead of declaring intentional or semi-intentional defaults. Second, it takes into consideration the interest of bankrupt consumers by specifying a time limit for removal of their credit reports, and it takes into consideration the interest of creditors to keep the information on consumers who are arguably able but unwilling to pay.

##### Exemption from Prohibition of Reporting Obsolete Information

An exemption from a prohibition of reporting obsolete information in some circumstances is consistent with my opinion that some obsolete information should be kept indefinitely.

*Failure to Follow Reasonable Procedure to Avoid Inclusion of Outdated Information*

I see no benefit in making failure to follow a reasonable procedure to avoid inclusion of outdated information a separate violation from the inclusion itself. Inclusion of outdated information by itself is actionable even if the CRA follows a reasonable procedure to avoid inclusion of outdated information.

*Inclusion of Medical Information or Medical Furnisher*

In case of medical information disclosure, I believe that, under the CIL, even if the information is credit-related, no clear standard is provided to limit the scope of information. A clear standard is needed to clarify when borders are being crossed.

*Failure of Indication of Closure of Account by Consumer*

The CIL requires furnishers of information to notify CRAs of any voluntarily closed account by consumers and provides a right of action. I believe that imposing liability upon furnishers for failure to report a closed account is the best approach. However, liability should not be imposed for mere failure to report a closed account but rather for failure to indicate that the account was closed voluntarily. The flow of information will not be affected by such an imposition and such an approach protects the interest of consumers.

*Failure to Maintain Fraud or Active Duty Alerts*

The CIL does not mention any rule regarding fraud or active duty alerts. There is no doubt that the CIL is lacking an important provision. In the technology age, identity theft is growing massively. The CIL should be revised to add such an important requirement.

*Failure to Block Information Resulting from Identity Theft*

Because of the importance of identity theft, the CIL should be revised to add sections similar to the FCRA regarding blocking information resulted from alleged identity theft. Blocking the information until the verification is completed is easier than requiring consumers to pursue CRAs to correct inaccurate information.

*Failure to Provide Free Copies of Credit Report or File as Prescribed*

The FCRA sets sixty days to request the free credit report, while the CIL does not impose such a limit on time. The CIL seems more pro-consumer concerning this issue. However, the FCRA is more pro-consumer by requiring that the free credit report be provided within three days, while the CIL does not set a time limit for providing the free credit report.

Unlike the FCRA, the CIL does not provide consumers a right to obtain a credit report free of charge once every twelve months. The CIL should provide such a right as it enables consumers to monitor their credit report and find inaccurate information. Monitoring of inaccurate information by the interested persons is in the interest of the credit reporting industry.

It seems that the FCRA is more pro-consumer because it requires CRAs to provide free credit reports to consumers who are seeking employment or receiving public welfare assistance once a year. The CIL has no similar provision. The CIL should follow the FCRA approach in providing a free copy to those who are the most likely to be affected by the credit reporting industry, the impoverished consumers.

Interestingly, the CIL provides to consumers the right to obtain a free copy after opening their file for the first time. I think this approach is preferable as this alerts consumers that their files are open and derogatory information is subject to be posted.

The CIL does not include provisions related to an affiliated debt collection agency's notification of a CRA regarding a consumer's rating. However, I see no point in differentiating between notifications that come from an affiliate or notifications that come from a non-affiliate to CRAs. Both should be treated equally if one takes into consideration the purpose of protecting consumers.

#### *Failure to Include a Statement of Dispute*

I think the CIL's approach in not giving the CRAs the power to determine any dispute to be frivolous or irrelevant and requiring CRAs to include statement of dispute is more favorable to consumers. Lenders, on the other hand, have the ability to distinguish frivolous or irrelevant disputes from serious ones.

#### *Failure to Disclose the Required Information under FCRA §1681g*

I think the CIL rule in requesting all of the information in the file without singling out every item is less complex than the FCRA. However, at least the following items should be added to the CIL to achieve the goals of credit reporting laws: a source of information, a summary of rights, a summary of rights of identity theft victims, and contact information for government agencies that are responsible for enforcing the laws.

#### *Failure to Adhere to the Conditions and Forms when Disclosing*

The CIL is silent about the forms of disclosure, thus, any form of disclosure meets the legal requirements. I suggest that a provision should be added to clarify the form of disclosure that will satisfy the purpose of the disclosure. The purpose of the disclosure is understanding the content of the credit report. At least, the CIL may require the form of disclosure to meet the consumer's request.

#### *CRAs' Failure to Conduct Reasonable Reinvestigation of Disputed Information*

CRAs are required to conduct a reasonable reinvestigation of disputed information to avoid liability. Unlike the CIL, the FCRA allows CRAs to avoid investigation by deleting the disputed information upon receipt of a consumer's dispute. The CIL is not clear whether or not CRAs can delete negative accurate information if there is no dispute at all. The FCRA has no comparable clause prohibiting deleting negative accurate information. The CIL's approach tends to protect the interest of users of credit reports so they become aware of any negative information of the consumers and can consider it when extending credit.

#### *Reinsertion of Deleted Information*

I believe that when the law requires each reinsertion to be approved by the Credit Reporting Dispute Resolution Committee (CRDRC), it overburdens the Committee with work that can be performed by CRAs. Complicating the reinsertion process is likely to impede the credit reporting industry as a whole. The FCRA seems to balance industry's interests in the flow of information, by way of reinsertion, and consumers' interest in requiring the maintenance of reasonable procedures to prevent reappearance of deleted information.

## **Other Breaches**

### *Acquiring Credit Information for no Permissible Purposes*

I suggest that the CIL be revised to enumerate permissible purposes and to allow obtaining a credit report without the consumer's approval so long as the purpose is permissible.

### *Failure to Truncate Expiration Date or Credit Card and Debit Card Digits*

#### Location of printing

Through reading the plain language of the FCRA, one can clearly conclude that transactions, other than on-site, are not within the definition. The purpose of protecting consumers from identity theft will be frustrated if transactions, other than on-site, are not within the definition. The risk of identity theft through phone or online transactions is greater than through on-site transactions; thus, the rule should apply.

#### Definition of printing

A literal construction of "printing" ignores the current practices such as printing from Microsoft Word to PDF files. When construing "print" liberally, one may achieve the purpose of the FCRA to protect consumers from identity theft, which is especially likely in connection with Internet transactions.

The CIL includes no rule regarding the truncation of expiration dates or digits of debit or credit cards. The CIL should be revised to add the protection. Limited usage of credit cards does not decrease the chances of identity theft. In addition, most Saudi banks are already complying with the requirement to truncate digits.

### *Establishment or Extension of Credit During Alerts Period*

Since identity theft is an increasing practice worldwide, I believe the CIL should include provisions to prevent establishment or extension of credit during initial or extended alert periods without reasonable verification.

### *Failure of Disclosure or Providing Consumer's Summary of Rights*

Providing a summary of consumers' rights under the CIL is only required when a consumer disputes information. My suggestion goes even beyond the scope of the FCRA and the CIL. I suggest requiring CRAs and users to provide a summary of rights, through any means, to a consumer whenever the consumer contacts them for any cause unless the summary previously has been given to the consumer in response to the same concern.

### *Furnishing False Information with Malice or Willful Intent*

The FCRA preempts state laws to the extent that those laws are inconsistent with the FCRA. However, the FCRA allows claims in "the nature of" defamation, invasion of privacy, or negligence if malice or willfulness is proven. Three approaches were introduced to solve the issue of preemption: the temporal approach, statutory approach, and total approach. A clarification of the preemption conflict is needed.

As to the standard of malice, a consumer needs to prove malice, actual malice, or willfulness. Under the CIL, no proof of malice is required to recover. In addition, knowledge of inaccuracy is equivalent to the willfulness requirement.

#### *Furnishers' Failure to Conduct Reasonable Investigation of Disputed Information*

Under the CIL, there is no duty upon a CRA to notify the disputed information furnisher of the modification or deletion of inaccurate information. This is a loophole in the CIL that needs to be closed. If the source of the disputed information is not notified of the modification or the disputed information is not deleted, it is likely that the same inaccurate information is going to be reported to the CRA.

Unlike the FCRA, however, the CIL allows consumers to bring actions against furnishers if a notice of dispute is provided, so long as the information is inaccurate. In addition, furnishers cannot provide disputed information to CRAs without notifying CRAs that the information is disputed. The CIL does not mention the reasonableness of procedure. I suggest adding a reasonableness standard even though the court will consider reasonableness of procedure as an essential element.

#### *Failure to Provide Required Notices and Notifications under the Act*

Under the FCRA and the CIL, CRAs, users, and furnishers of information must provide certain notices and notifications in particular circumstances to restrict the flow of erroneous or inaccurate information.

##### *Notice of Discrepancy of Address*

I think discrepancy in an address is a clear sign of the possibility of identity theft; therefore, a notice requirement should be added to the CIL.

##### *Notice of Reinsertion of Deleted Information*

I believe the CIL should be revised to require providing a notice to the consumer upon reinsertion of deleted information because even after obtaining the resolution from the committee, there is no notice requirement.

##### *Notice of Frivolous or Irrelevant Information*

Frivolousness and irrelevancy should be defined in the FCRA. There is no clear answer whether another notice, "notice of result of investigation", is required along with the notice of frivolous or irrelevant information.

No provision exists under the CIL regarding frivolous or irrelevant disputes. Under the CIL's approach, consumers may abuse the tool by disputing their information whenever they want without limitations. However, no cure is available to treat this issue such as penalizing this practice or giving the CRA the right to refuse to conduct an investigation. Under the FCRA's approach, which is better, the CRAs may abuse the tool by determining frivolousness or irrelevance of the dispute, however, such abuse can be cured by litigation. Moreover, investigation consumes time and effort. Thus, if no limit is provided, valuable time may be wasted.

##### *Notice of an Adverse Action Either Information is from CRAs or Third Parties*

I believe that when less credit is provided, an adverse action against the consumer is taken, therefore, an adverse action notice is required. I believe the U.S. Supreme Court's

holding of increase is correct. However, the baseline should be determined according to fair market value of similar services to similar consumers.

I believe that the U.S. Supreme Court holding that mere consultation of a credit report does not give rise to the adverse action notice requirement is not convincing. Holding such places the burden upon consumers to prove that the user does not “merely consult” the report but actually relied in whole or in part on the credit report. The presumption should be that the user relies on the credit report in whole or in part, unless the user proves that he does not.

I prefer the CIL approach with the broad “adverse action” definition, and by requiring users to provide notice of adverse action in any case which avoids complicating the Act by detailing cases in which adverse action notice is required.

#### Existence of Private Right of Action

Existence of a private right of action because of non-compliance with an adverse action notice is debated. However, I believe that a private right of action exists.

#### Notice to Consumer of Furnishing Negative Information

The CIL seems more pro-consumer than the FCRA in providing to consumers a private right of action in case of furnishers’ failure to provide notice to a consumer either before or after the first time they furnish negative information to a CRA. However, I believe the FCRA strikes a balance between the interest of the industry at large in the flow of information without fear of liability, and the interest of consumers. The interest of consumers may not be affected by failure to provide such notice if the negative information is eventually going to appear in the credit report anyway. On the other hand, furnishers may withhold consumers’ negative information from CRAs fearing the liability, and such withholding may affect the industry. I believe the resolution of this issue should be based on comprehensive surveys and studies, not mere speculations.

#### Notice of Prescreening

Under the CIL, the prescreening list is not recognized. I believe that prescreening practice is mostly in the interest of consumers. Consumers sometimes underestimate their creditworthiness, therefore, when they are included in a prescreening list, they become aware that they have potential to obtain credit. A prescreening purpose should be added to the CIL along with a notice requirement.

#### Notice of Affiliate Sharing for Marketing

Under the CIL, affiliate sharing is not recognized at all. I believe affiliate provisions in general should be added to the CIL. Specifically, affiliate sharing for marketing purposes should be governed by the CIL, because it is a flourishing practice.

#### *Second: Notifications*

##### Notification of Deletion or Modification of Disputed Information

Requiring the CRA to provide notification of deleted unverifiable or inaccurate information to other CRAs is better. The requirement would save time that otherwise would be wasted by other CRAs in correcting information. I suggest adding the feature of the CIL to the FCRA.

#### Notification of Public Record Information Provided to Users

No provision in the CIL requires notifying consumers about the reporting of adverse public record information for employment purposes. Thus, if one considers employment purposes permissible, no violation can be established if a CRA fails to provide notification to the consumer. If employment purposes are impermissible, the CRA violates the CIL by supplying credit information.

#### Notification of Identity Theft-related Information

Under the CIL, no rule governs notification to furnishers regarding information believed to be a result of identity theft. I suggest including a rule in the CIL that would govern notification in order to combat identity theft.

#### Notification of Block Information Decline or Rescind

The CIL does not mention blocking information that resulted from alleged identity theft. I suggest including a provision in the CIL regarding blocking of information in order to combat identity theft

#### Notification of Inactive Account Reactivation

The CIL does not recognize notification of inactive account reactivation; therefore, no notification is required. This notification is an example of the kind of provision that needs to be added to the CIL.

### **Credit Reporting Breaches under Islamic Law**

In sum, I conclude that credit reporting breaches under Islamic law can be classified into three categories as follows.

#### **First: Permanent Prohibited Breaches**

These breaches are prohibited even if the law does not prohibit them such as:

1. Acquiring credit information for no permissible purposes by misleading the CRA;
2. Inclusion of medical information; and
3. Notification of inactive account reactivation.

#### **Second: Interest-Based Prohibited Breaches**

Interest-Based means that such breaches are not originally prohibited under Islamic law; however, legislators are allowed to prohibit such acts in the interest of consumers and industry. Examples of such breaches are:

1. Acquiring credit information for no permissible purpose;
2. Supplying credit information to users with no permissible purpose;
3. Failure to truncate expiration date or credit and debit card digits. Arguments made in favor of exempting online transactions fail to fit into Islamic law because acts similar to the prohibited one in its consequences and that share the same operative cause should be treated the same.
4. Failure to disclose information required under §1681g;
5. Failure to adhere to the conditions and forms when disclosing;
6. Failure to disclose or provide to consumers with a summary of rights;
7. Notice of discrepancy of address;



8. Notice of frivolous or irrelevant information;
9. Notice of reinvestigation results;
10. Notice of an adverse action from CRAs or third parties;
11. Notice of prescreening;
12. Notice of affiliate sharing for marketing;
13. Notice of governmental agencies' request;
14. Notification of public record information;
15. Failure to block information resulting from identity theft; and
16. Decline to block or rescinding block notice.

### **Third: Possibly Debated Issues**

There are issues that can be argued both ways. A resolution of an issue can conform to or contradict Islamic law depending on the choice of argument. Examples of these issues are as follows.

1. **Providing Outdated Information:** Requiring removal of such information after passage of time is an issue. If the information is derived from public resources and that has no relevance to private rights, then removal of such information is allowed because there is no private right involved and the interests of consumers outweigh the interest of the public. However, if information is related to private rights, paid debts can be removed, too, because removal is not going to harm creditors and it helps debtors. Nevertheless, unpaid debts may not be removed without creditors' approval as removal prejudices the rights of creditors.
2. **Failure to Provide Free Copies of Credit Report or File as Prescribed:** Requiring a CRA to provide free credit reports is problematic. A "credit report" is the property of the CRA which should not be taken free of charge. No one may argue consumer's ownership of the credit report. The information in the credit report resulted from the effort of the CRA. The strongest argument to the contrary is that agreeing to practice this business implies consent to provide free copies as the law requires.
3. **Characterization of Investigative Report:** Obtaining information from a person acquainted with the consumer for a legitimate reason and for a valid interest is lawful and it is characterized as receipt of advice. An advisee and an advisor both are immune from liability in case of truthful advice that does not exceed the scope of questions.

### **Credit Reporting Damage**

#### **Definition of Credit Reporting Damage**

The FCRA does not define credit reporting damages. However, I defined credit reporting damages as "*loss or injury sustained by a consumer as a result of failure to comply with the FCRA*".

#### **Types of Credit Reporting Damage**

Based on my reading of the cases, I found that credit reporting damages (direct and indirect) include the following:

1. **Out-of-Pocket Expenses:** Higher down payment as a result of a violation is a type of out-of-pocket expense. Compensating plaintiff for a higher down payment as out-of-pocket expenses is problematic. The plaintiff is not going to pay more than the total amount of the

goods by the end of the transaction. Allowing the plaintiff to recover a down payment, which he ought to pay eventually, would be a windfall for the plaintiff. However, if one considers the profits that the down payment would have generated but for the violation, recovery would be possible.

Payment of a security deposit as a result of a violation is a type of out-of-pocket expenses. Characterizing paying a security deposit as out-of-pocket expenses is not convincing. Even though the plaintiff has to pay, say \$500, as a security deposit, the plaintiff gets the \$500 as a windfall because he is going to get the \$500 after passage of certain time or after the termination of the contract. However, if one considers the profits that the security deposit would have generated but for the violation, recovery would be possible.

Out-of-pocket expenses also include spending time to resolve and correct errors; purchasing copies of a consumer's credit reports; copying, faxing, or mailing of documentary evidence; medical expenses; liquidating assets prematurely; loss of income by taking days off; traveling to CRAs' locations; late fees paid; cost associated with inability to finish construction; and pre-litigation fees.

**2. Loss of Credit Expectancy:** concerns "the ability to obtain and maintain credit after the wrongful act ... damages creditworthiness". Damages are recoverable if they result from complete or partial denial and if causation is established.

**3. Loss of Credit Capacity:** includes a decrease of credit limit and an increase of rate or premium. Loss of credit capacity takes several different forms such as increase in an insurance premium, increase in interest rate, having less advantageous terms, or decrease in existing credit limit.

**4. Loss of Job Opportunity:** If a consumer loses his job or is unable to find employment because of a violation of the FCRA, then he is entitled to recover damages resulting from the violation.

**5. Lost Opportunity:** When a consumer loses an opportunity he would have obtained but for the violation of the FCRA, the consumer is entitled to recover damages resulting from the violation.

**6. Lost Profits:** Lost profits may be recoverable if they are reasonably certain in regard to the occurrence and the extent and the damages are caused by a violation of the FCRA.

**7. Lost Benefits:** when a license or benefit is denied to a consumer because of a violation, the consumer is entitled to recover damages.

**8. Emotional Distress:** Emotional distress can result because of denial of credit or insurance, pecuniary loss, dissemination of inaccurate information, embarrassment before creditors, discovering shocking information in the credit report, taking a long time to correct inaccurate information, or unlawful access to his credit report.

Courts are split in requiring publication of the inaccurate information to third parties as a prerequisite to recover emotional distress damages. I believe proof of publication only should be required when the consumer alleges that other people knew about the inaccuracy of his credit report.

**9. Indirect Credit Reporting Damage:** Indirect damage is damage that flow naturally but indirectly from the violation. From the types of damage discussed, one can conclude that indirect damage is recoverable, so long so it is foreseeable and reasonably flows indirectly from the violation, and the consumer makes a reasonable effort to mitigate damage. Most out-of-pocket expenses, loss of profit, and loss of opportunities, are indirect damage.

**10. Mitigation of Damage:** The plaintiff must "make reasonable efforts to lessen damages". Mitigation of damage is not an applicable doctrine in credit reporting damage under one

approach. One commentator believes that mitigation of damage should not apply because “requiring mitigation would interfere with fulfillment of the statutory purpose behind the provision.” The rebuttal is that the defendant is responsible only for the damage he caused. He is not responsible for additional damage caused by plaintiff’s refrainment from mitigating damage.

## **11. Recovering Damages under Islamic Law**

Islamic scholars provide conditions for recoverability of damage. First, the protected right or interest must be certain to be achieved but for the negligence. If there is no harm at all, then there is no remedy even though the defendant breaches a duty. Second, damage to the protected interest must be real harm. Harm is not considered real in three cases; when the plaintiff receives a benefit that equals or exceeds the harm inflicted; when harm is certain to happen regardless of defendant’s negligence; and the result of the defendant’s act must not be the same intended result of the plaintiff. This rule does not apply if the intended result is the same but the time or the manner of achievement matters. Third, interest must be protected, valuable, and measurable. Some properties are not protected *per se* under Islamic law such as alcohol and pork. Similarly, destruction that results from self-defense is not protected. The interest must have monetary value that can be measured or assessed in the market.

## **12. Emotional Distress under Islamic Law**

Islamic scholars differ in regard to the recoverability of moral damage which encompasses emotional distress as follows. The first approach is that moral damages cannot be recovered in a monetary form. The second approach is that moral damages are recoverable. The second approach is the strongest, although courts in Saudi Arabia do follow the first approach. Since evidence in support of the second approach is convincing and based on authentic sources, courts should switch to the second approach.

## **Burden of Proof and Causation**

### **First: Burden of Proof**

Through my comparison, I observed the followings

- 1- In general, under the FCRA, the CIL, or Islamic law, the burden of proof of violation and damage rests on the plaintiff. The defendant’s action presumably does not deviate from the ideal situation. The plaintiff usually claims something contrary to the ideal situation; thus, he must prove the deviation.
- 2- The burden is shifted to the defendant in case of common contractors under Islamic law under one approach; however, under American law, when the burden is to be shifted is only clear under sections 1681d(c) and 1681m(c), of the FCRA. Under section 1681e(b), courts split on the consumer’s required level of proof in order to shift the burden to CRAs. Under the first approach, a consumer needs only prove the CRA reported inaccurate information in his credit report, then the burden shifts to the CRA. The second approach is similar, but the burden of proof is not shifted to the CRAs. Rather the case is presented to the finder of fact, who in turn, may infer failure to follow reasonable procedure. Under the third approach, the consumer needs to prove both the inaccuracy of the information and provide minimal evidence of unreasonableness from which the trier of fact may infer unreasonable procedure of the CRA. Relaxing the

burden of proof because of USA PATRIOT Act is groundless. Loss of privacy is unrelated to easing the burden of proof

- 3- Self-serving testimony is not accepted under Islamic law. The plaintiff is not considered to be a witness in his case. Regardless of the dispute among Islamic schools on the recognition of “emotional distress” recoverability, self-serving testimony cannot serve as basis for recovering damages. Under American law, self-serving testimony can be accepted in emotional distress cases if it is accompanied with a reasonably detailed explanation of the circumstances of the injury unless the defendant’s act is an inherently degrading action

## **Second: Causation**

In the context of credit reporting damages, the plaintiff is required to prove the violation of the FCRA is the cause in fact of the damages. I observed the followings:

- 1- There are three standards can be used under American law to establish causation. First, under “But For” test, a consumer needs to show that the harm would not have occurred absent the violation of the FCRA. Second, when there is more than one cause that contributes to the damages, courts apply the “substantial factor” test to infer that violation was a substantial factor in producing damage. Third, the *res ipsa loquitur* rule may be used to establish causation.
- 2- Islamic and American systems relieve the defendant from liability in case of plaintiff intervening cause unless his action is the natural result of the defendant’s act.
- 3- Islamic and American systems relieve the defendant from liability in case of Act of God if it is unforeseeable.
- 4- In case of a third party intervening cause, American law relieves the defendant from liability unless the act of the third party is a natural result of the defendant act. However, under Islamic law, great weight is given to the proximity of the cause. If the act of the third party is the same as the defendant (both direct or both indirect), the person with the strongest cause is the liable. If the acts are the same or the strongest cause is unknown, both parties share liability. In case they are different, liability is attributed to the direct actor except in some cases such as when the direct actor is immune or when liability cannot be attributed to the actor because he is legally incapable.

## **Measurement of Credit Reporting Damages Remedies**

### **1- Nominal Damages**

In contrast to American law, Islamic law does not recognize nominal damages. Islamic law requires proof of damages for any kind of remedy. No remedy is provided for violation of a legal right without proving damages of any kind. However, a judge has discretion under Islamic law to punish the violator with a wide variety of punishments.

### **2- Statutory Damages**

#### **Measurement of Statutory Damages**

The FCRA provides the range of statutory damages, which is from \$100 to \$1,000; however, the FCRA does not provide any factors that influence choosing the lower or the higher limit. Thus, the amount is left to the trier of fact to determine.

Criteria have been provided to help in determining the amount of statutory damages. Nonetheless, the criteria are helpful in measuring the culpability of the defendant; however, I believe they do not provide guidance in measuring statutory damages. Since statutory damages are in lieu of actual damages, I believe that the range is to compensate the consumer with the higher of two damages: the actual and the statutory damages. For instance, when the actual damages are \$650, the consumer can either demand actual or statutory damages but not both. However, the consumer can provide evidence of his actual damages to be considered in calculating the statutory damages. However, if the damages are non-pecuniary, then the trier of fact should try to value the damages accordingly within the range.

### **Statutory Damages Excessiveness**

When combining aggregated statutory damages claims and class actions, the result is excessive and results in over-deterrence. Aggregated statutory damages should be treated as punitive damages in the case of excessiveness because they amount to a deprivation of property without due process of law. Three guideposts were identified to determine the excessiveness of the punitive damages and can be applied to statutory damages; the reprehensibility of the defendant's conduct, the relationship between the actual harm or potential harm to the plaintiff and the punitive damage award, and the comparable civil or criminal penalties for the defendant's conduct. Differentiating between punitive and statutory damages is groundless. Both punitive and statutory damages share difficulty in calculating and availability of low actual damages.

### **Statutory Damages under Islamic Law**

Under Islamic law, monetary remedies are only available when three elements are proven: violation, harm, and causation. Therefore, one could say "statutory damages" are not recognized under Islamic law. If there is no harm or damages, then the *prima facie* case is not established. Thus, no damages will be available. However, the wrongdoer usually will not go free. *Ta'zir* punishment can be imposed to deter him.

## **3- Actual Damages**

### **Measurement of Economic Losses**

Market value is the normal rule of measurement of damages in case of total destruction of personal or real property. However, in case of partial destruction, the basic test for measuring damages is the diminution in value. However, determining the value of property differs depending on the nature of the property.

#### **First: Market Value**

##### **Market Value of Personal Property**

Market value can be determined by knowing what a willing buyer would pay a willing seller for the property. Purchase cost, expert opinion, insurance cost, and similar sales serve as indicators of the market value.

In the case of total destruction of personal property, the measure is the fair market value. In the case of partial destruction of property, the measure is diminution of value, or cost of repair if less than the diminution of value. Another approach allows cost of repair if the cost of repair does not exceed pre-damage value. When cost of repair does not restore the property to its pre-damage value, the measure is both the cost of repair and any remaining diminution in value.

### **Market Value of Real Property**

Damage of real property is determined by diminution in value. However, the plaintiff is not precluded from demanding cost of repair as an alternative measurement of damages if the cost of repair does not exceed the pre-damage value. Another approach, allows the cost of repair even if the cost of repair exceeds diminution in value. Damages are considered temporary if the damaged property is repairable and permanent if not. The measurement of permanent damages is diminution in value. The measurement of temporary damages is cost of repair.

### **Value to the Owner**

When personal or real property has no market value or the market value is inadequate, the measurement is the value to the owner. The plaintiff must show why the value of his property is different from the market value. Sentimental value is not to be considered when measuring value to the owner as it is too difficult to be measured. However, I believe it is difficult to detach sentimental value from value to the owner. The property becomes more valuable to the owner because of its sentimental value to him.

### **Market Value of Services**

Market value can be used to measure services provided by the plaintiff. If the consumer is self-employed, one can analogize this issue to cases that involve loss of earning capacity because of bodily injury. However, this is a complicated issue because the money he receives does not reflect the value of the service in the market. The fair measurement is the cost of finding a replacement with the same qualifications.

In the case of person who is unemployed because of inability to find a job, one can draw an analogy to cases that involve loss of earning capacity because of bodily injury. If the person is unemployed because she is a homemaker, time spent in household service is the first element that must be established. Scholars are split on whether the measurement is the cost of a replacement or the cost of opportunity that the homemaker gives up because of being a homemaker.

### **Second: Replacement Cost**

If the market value is not easily obtainable, then replacement of the property is the measure of value. However, replacing the property with a similar property in similar condition is difficult. Therefore, the replacement cost must be reduced to reflect the depreciation of the value of the lost property.

### **Third: Capitalization of Earnings**

Capitalization provides a valuation of the property based on its earnings. Measured earnings can be based on current, past, or future earnings. Similar to the capitalization of earnings approach, is the "value of the interest" under Islamic law. Value of interest means the value of earning of a property or a person.

### **Fourth: Cost of Repair**

Cost of repair is different from replacement cost. Cost of repair means the cost to repair the damaged property while replacement cost indicates a total loss of the property. Repair of

property does not guarantee bringing the property to its prior condition and value. The issue becomes clearer when the cost of repair is greater than the diminution in value.

### **Measuring Loss of Credit**

Loss of credit can be measured in different ways depending on the facts and circumstances of any given case as follows. First, damages can be measured through a comparison of the pre-approved loan rate and the actual higher rate due to a violation. The difference between the pre-approved rate and the actual higher rate is the measurement of damages. Second, a comparison of consumer credit scores with and without inaccurate information is another way of measuring damages. Third, if the consumer is offered a rate higher than the rate he received from lenders or insurers before the violation, the damages are measured by the difference between the original rate and the increased rate. Fourth, if the consumer's credit limit is decreased because of the violation, the damages are the difference between the original and decreased limits.

### **Lost Job Measurement**

If a consumer misses a job opportunity, the measurement of damages is difficult. The fair ruling, in my opinion, is to allow the consumer to recover only for the period of unemployment by requiring the defendant to pay the same monthly income that the consumer should have received on an installment basis.

### **Lost Opportunity**

When a consumer loses an opportunity, he would have obtained but for the violation of the FCRA, the consumer is entitled to recover damages resulting from the violation.

### **Lost Profits Measurement**

In case of lost profits, the measurement of damages is the net profits measured by reasonable certainty. There are different approaches that experts use to measure lost profits depending on the facts and legal theories asserted. Under all approaches, lost profits should be discounted to present value. First, under "Before and After" approach, lost profits are measured by comparing the plaintiff's revenue before and after the occurrence of the wrongful act. The decrease in revenue after the occurrence of the wrongful act is the lost profits. Second, the "Yardstick" approach utilizes a "yardstick" as a basis to estimate what revenue the plaintiff's business would have earned but for the wrongful act of the defendant. Third, under the "Market Share" approach, an expert "compares the business's market share in a specific industry before and after the event giving rise to the damages and applies the change in market share to total market revenues to determine lost revenues". Fourth, under "Budget" approach, an expert will use the business' own budget or forecast prepared for a purpose other than litigation. Fifth, under "out-of-pocket" approach, an expert will calculate lost profits based on out-of-pocket costs incurred because of the wrongful act. Sixth, under "Decrease in Value" approach, an expert will value the plaintiff's business before and after the occurrence of the wrongful act. The measurement of damages is the decrease in the value of the business due to the wrongful act.

### **Lost Licenses or Benefits Measurement**

If the consumer loses a benefit he should have received but for the violation, the damage is the value of the benefit. The issue becomes more difficult when a consumer loses, or is

denied a license because of the violation. If the person loses a license, then I believe that the measurement should be the income he received before the denial for a similar period as the non-practicing period. If a license is denied to the consumer who has not had a prior licensed practice, I think it can be analogized to the measurement of lost profits of “start-up businesses”.

Different factors should be taken into consideration when measuring the lost profits of a new business: the plaintiff’s business plan, availability of capital, plaintiff’s prior experience, the obstacles to entry in the industry, the quality of available records, and the economy of the specific location. Damages can be measured from the expected date of practice had the license been granted until the granting of the license, looking at the income comparable practitioners receive.

## **Measurement of Actual Damages under Islamic Law**

### **Real and Personal Properties**

Islamic law provides four options to compensate for damaged or destroyed real and personal properties depending on the situation.

#### **Providing a Substitute**

Providing a substitute is fairer than requiring mere payment of value. Expending time, effort, and transportation to obtain a substitute property should be shifted to the person who caused the damage.

In case of fungible property, a defendant has to provide the plaintiff with a substitute property based on the dominant approach. If the defendant finds a more expensive substitute, then the defendant does not have to obtain a substitute but rather pay the value of similar properties.

#### **Payment of Monetary Value**

If there is no substitute for the damaged property or there is a substitute but it cannot be obtained, then the defendant has to pay the value of the damaged property. If the damaged property has no value at the time of the damage, then the measurement is the value that the property would have reached but for the violation. If the damage is so great that the purpose of the property is unattainable, then the measurement may be debated. Measurement is either the diminution in value or taking the full value of the property or only the diminution in value in every case. If the property’s parts are separable but loss of one of them renders the others useless, then the measurement may be debated. Measurement is either payment of the full value of the property and taking the useless parts by the defendant or payment of the value of the damaged part in addition to the diminution in value.

#### **Diminution in Value**

If the property is partially damaged, the measurement is the diminution in value. The diminution of value is measured in one of two ways. First, the diminution in value is the difference between the value of the property before and after the damage. Second, the defendant restores the property to its prior condition at his expense; then the measurement is the difference between the value of the property before and after the damage in addition to restoration expenses.

#### **Restoration**

The fourth option is to ask the defendant to restore the property to its prior condition, if possible. However, if the restoration does not return the property to its prior condition, he has to pay the diminution in value in addition to restoration. Value to the owner is not a



recognized concept under Islamic law but rather the fair market value even if the market value is inadequate.

### **Market Value of Services**

Scholars debate whether the value of the services of a person can be compensated. The first approach is that value of services is not recoverable because the services are not owned by any one. The second approach is the same, except when the services are owed to another person, in which case the value is recoverable. The third and prevailing approach is that value of one's services is recoverable regardless of his work status because his services can be measured. The measurement of services is the fair market value of similar services performed by a similar person with the same qualifications.

### **Out-of-Pocket Expenses**

If the consumer incurs expenses because of a violation, the consumer is entitled to recover those expenses, provided they are reasonable. Moreover, the consumer is entitled to recover any other associated damages. If the consumer has to pay a higher down payment, it is reasonable to allow recovery. One could argue a wrongdoer may be required to pay the consumer the extra down payment, but the consumer would pay the amount to the wrongdoer later on an installment basis. Similarly, when the consumer is required to pay a security deposit, the violator should pay the security deposit instead of the consumer, if practical. However, if the consumer pays the security deposit resulting in other associated damages, then the consumer is entitled to recover.

### **Measuring Loss of Credit**

#### **Increase of Interest Rate**

The measurement of an increase in the interest rate is the increase itself. Another view tends not to allow an award to the consumer but rather requires the CRA to correct the underlying errors, which in turn will decrease the interest rate of the consumer. However, this view does not take into consideration cases in which consumers conclude transactions without knowing of the interest rate they deserve. Similarly, this view does not consider when consumers need access to credit immediately without the ability to wait until their credit reports are corrected.

#### **Decrease in Credit Capacity**

One approach does not allow recovery if the damages to a consumer are merely a decrease in his credit capacity. However, if the decrease in credit capacity results in other damages, then the consumer is entitled to recover only the increase in interest. Another view allows recovery based on the theory of prevention of the existence of benefits. However, since the consumer is going to repay the loan, the damages are the increase in interest rate. Allowing recovery of the amount of the loan would result in a windfall for the consumer.

#### **Denial of Credit**

In general, if credit is denied to a consumer, then the consumer may not recover the amount that he intended to borrow as there is no apparent damage because of that denial. However, if the denial results in other damages, then the consumer is entitled to recover only the increase in interest. I believe that if the consumer finds no lender because of the

violation, it is reasonable to require the wrongdoer to lend him the same amount at the same terms and conditions.

### **Lost Jobs Measurement**

The measurement of damages is what the consumer would have received from the lost job. Moreover, the consumer is entitled to recover any damages that resulted from indebtedness because of losing the job. If the consumer finds a job, then he is entitled to receive the difference between the two jobs, if there is any. If the opportunity to obtain a job is not certain, then the consumer is entitled to recover the cost of finding a job but not the income of such a job.

### **Lost Opportunity**

The lost opportunity concept is not known by its name but rather by the nature of the concept. Under Islamic law, generally lost opportunity is not recoverable because a plaintiff has not lost anything but a chance. The chance by itself has no monetary value under Islamic law as there cannot be a market for chances. Even supposing a chance market could be established, it would be similar to gambling, which is prohibited in Islamic law. However, one can say that a lost opportunity is recoverable in some cases

### **Lost Profits Measurement**

Islamic schools debate the issue of lost profits in three contexts: usurpation, intentional delinquency in loans, and prevention of benefits from coming into existence.

#### **Usurpation of Property**

Scholars debate whether a usurper is liable for the lost profits of usurped property. The first approach tends not to award lost profits because a usurper is liable for the property in the case of destruction. Another approach holds the usurper liable for property's benefits even if the benefits do not exist, because the usurper prevents the owner from gaining the benefits. The measurement is the fair market value for the benefits that do not exist because the usurper prevented them from existing.

#### **Usurpation of Money**

When a person usurps money of another person, scholars have different opinions regarding lost profits. Their approaches range from denial of recovery to recovery of all of the profits.

#### **Delinquency in Loans**

Scholars agree creditors are not entitled to lost profits from insolvent debtors. However, scholars are split over awarding lost profits from solvent delinquent debtors. Their approaches range from allowing recovery with no prior agreement, recovery with prior agreement, or denial of recovery altogether.

#### **Prevention of Benefit from Coming into Existence**

When lost profits are certain or more likely to be realized but for the wrongful acts, they are recoverable according to the prevailing opinion. Damages include prevention of a benefit from coming into existence. Benefits that are certain to be realized or more likely to be realized are recoverable if they are forfeited because of wrongdoing.

### **Measurement of Lost Profits**

One suggestion to measure lost profits is to award the plaintiff the minimum reasonable profits that he would have earned if he had dealt in trade. Another suggestion is to measure lost profits by comparing them to similar profits the consumer realized during the same period. Lost profits for new businesses are unlikely to be recovered under Islamic law because of its speculative nature. Some methods used by U.S. courts are accepted in Islamic law while others are not. However, I believe the “Out-of-Pocket” and the “Decrease in Value” approaches are not related to lost profits. Costs incurred in the “out-of pocket” approach are part of the actual damages, not lost profits. The decrease in value is also part of actual damages, again not lost profits.

### **Lost License or Benefit Measurement**

Measurement of damages differs from one case to another. If the applicant is applying for a license for the first time, and but for the violation he would have obtained a license, then the applicant is entitled to recover similar income that he was supposed to earn had he been licensed. However, if the applicant is applying for a renewal, and he stopped practicing because of the denial, then he is entitled to recover the average amount he used to earn for the same period in the last years of his practice.

If the consumer is denied benefits because of the violation, the consumer is entitled to recover the value of such benefits. If the loss of benefits results naturally in other damages, the consumer is entitled to recover those damages.

### **Measurement of Non-Economic Losses**

Non-economic loss, which includes emotional distress, is difficult to measure because of subjectivity. Expert witnesses use different methods to measure emotional distress.

Since there is no way to accurately and objectively calculate the amount of pain or compensation and since pain and suffering differ from one person to another, I suggest the following steps to measure pain and suffering to attain compensation, justice, and fairness:

- 1- Presumption that human pain is equal.
- 2- Human lives are equal in value.
- 3- Levels of pain and suffering should be created to cover all possibilities such as severe, moderate, and mild pain. The National Association of Insurance (NAIC) Scale of Injury Severity could be used for this purpose.
- 4- Different degrees within each level should be created.
- 5- A maximum compensation limit should be set for every pain level. I believe the maximum compensation for pain and suffering can be set not to exceed the value of a life.
- 6- The Per Diem method is to be used in regard to the duration of pain.

My method is a combination of other methods, comprising elements that I deem to be good and excluding the ones I judge to be problematic.

## **4- Punitive Damages**

### **Measurement of Punitive Damages**

Because the measurement of punitive damages is left to the jury with no guidance, the outcome is erratic and unpredictable. Many commentators suggested solutions to solve

unpredictability issues, such as a grid similar to sentencing guidelines. Another issue is the excessiveness of punitive damages. The U.S. Supreme Court provided a guideline to determine excessiveness, which is known as the *BMW Standard*, and elaborated on these guideposts in *State Farm v. Campbell*. The U.S. Supreme Court said excessiveness should be determined with reference to: the reprehensibility of the defendant's conduct, the relationship between the compensatory damages and the punitive damages award (ratio), and the comparable civil or criminal penalties for the defendant's conduct.

### **Punitive Damages under the FCRA**

Punitive damages are available under the FCRA in case of a willful violation. Conscious disregard of the law constitutes willfulness. The U.S. Supreme Court held that punitive damages can be awarded even without showing actual damages provided that a willful violation is proved.

Under Islamic law, imposition of fines given to others is a debated issue among Islamic schools. Punitive damages are not clearly recognized under Islamic law. However, I believe punitive damages are already allowed under Islamic law. However, the issue is whether it is possible to analogize new cases to the mentioned cases. When applying *Qiyas* "analogy" as a source of Islamic law, I believe that punitive damages can be imposed and the money can be given to the plaintiff in the following cases:

- Intentional misconduct which causes bodily harm;
- Intentional or negligent mistreating of servants, workers, and the like;
- Bad faith, such as hiding the property of others or conversion of another's property.
- A criminal act, such as theft or embezzlement. However, no punitive damages can be imposed for the fixed punishment crimes in Islam.

### **5- Cost of Action and Reasonable Attorney's Fees**

The FCRA provides attorney fees and costs for the party who brings a successful action. The prevailing party may recover the costs of the action. Costs may be reduced by a percentage in line with a reduction in attorney fees.

#### **Prevailing Party**

Attorney fees and costs are awarded to the "prevailing party". The test in determining the prevailing party is the "material alteration of the legal relationship of the parties" such by obtaining nominal damages in some circumstances. I believe that in order to recover reasonable attorney fees a plaintiff must prove actual damages. I see no difference between the "prevailing party" and a "successful action". The party who brings a successful action is the prevailing party. It is unlikely that Congress intended to award attorney fees just for proving a violation of the FCRA occurred. However, to be pro-consumer, one may argue that "proving violation" entitles the party to nominal damages, which in turn, makes him the prevailing party who can recover attorney fees.

#### **Measurement of Attorney Fees**

Attorney fees are not available to an attorney who represents himself. I believe he can recover an amount equal to attorney fees if he proves the time he spent working on the lawsuit was time he would have spent on other work in his law firm.

The current standard is to adopt the "lodestar" approach, which is the reasonable time spent, multiplied by the local market rate for a similar service and similar legal skills. The

other standard method is a contingency fee arrangement. A consumer pays his attorney if the case results as agreed. The attorney receives a specific percentage of any recovery obtained or a specific percentage of the amount the client saves. Courts calculate attorney fees based on the lodestar method even with existence of a contingency fee agreement.

#### Reasonableness of Fees

Courts consider different factors in determining the reasonableness of attorney fees. Not all of them are necessarily applicable.

#### **7.5.1. Attorney fees under Islamic Law**

Under Islamic Law, a contract to retain an attorney is characterized as either a lease contract for services or *Ja'alah* contract, which is a conditional lease contract for services.

Scholars are split over contingency fees. The first approach is that such fee agreements are invalid because of uncertainty; thus the attorney is entitled to the fair market rate. The second approach is that such agreement is valid.

If the contract between the attorney and the client is found to be invalid for any reason, the scholars agree that he is entitled to the fair market value but disagree whether the fair market value can exceed the agreed upon amount or not.

If the attorney and client agree on a task but without specifying the cost, scholars have different views regarding this issue. However, the prevailing approach is that the attorney is entitled to the fair market rate as the fair indicator of the value of the service.

#### A Comparative Assessment

Both legal systems provide that attorney fees must be reasonable. In my opinion, the most important factor is fair market rate. The other factors are reflected in fair market rate.

### **6- Time of Credit Reporting Damages Remedies Measurement**

The general rule in evaluating the damages of a contract and tort actions is the date of the breach or injury. I did not find a specific rule for credit reporting damages; however, I believe that credit reporting damages are no different from other types of torts.

Both legal systems provide different time measurements in different scenarios mainly because of the intent to punish the defendant. For instance, under American law, the more reprehensible the act, the more freedom is given to the jury to choose as the applicable date. Under Islamic law, scholars also provide different time measurements in different scenarios such as in case of usurpation, unlawful possession, or intentional destruction of property.

However, applying different time measurements in cases other than usurpation should be read carefully as scholars treat a usurper with punitive intent. Usurpation can be equated with intentional damages but cannot be equated with negligence damages.

### **Final Remark**

Through my comparative study, it is clear that each legal system has its own style regarding credit reporting damages and remedies, although Saudi credit information law takes some provisions and rulings from different legal systems, including the FCRA.

I hope that the comparison method used has been useful in demonstrating similarities and differences between the two legal systems along with the Islamic law, and will provide the reader with clear understanding of the credit reporting damages and remedies under both systems.

Undoubtedly, one can better understand his own national law by comparing it to a foreign law. Comparison helps one see gaps in both laws and how they may be filled.

I am also confident that American readers will have a clearer picture in viewing Islamic law free from misconception and stereotyping. Islamic law - fourteen centuries ago - provided remedial solutions that other legal systems crystalized and accepted only recently.

I hope that my dissertation has achieved the main objectives and provided an adequate objective analysis. I am optimistic that my dissertation will serve as the cornerstone for examination of the credit reporting industry in Saudi Arabia as I will be, to my knowledge, the first legal specialist in this field in Saudi Arabia. I am enthusiastic that legislators in Saudi Arabia will take the suggestions provided in this dissertation into consideration. This dissertation is only my first step into this complicated field of “credit reporting” particularly and “consumer law” generally. Further studies and researches are expected to follow.

## Appendixes

### Appendix A<sup>2012</sup>

**Credit Information Law**  
**Royal Decree No. M/37**  
**5 Rajab 1429H / 8 July 2008**  
**Credit Information Law**

**Article 1: Definitions:**

The following words and phrases, wherever mentioned in this Law, shall have the meanings assigned to them, unless the context requires otherwise:

**Agency:** Saudi Arabian Monetary Agency.

**Credit information:** Information and data on consumers with respect to credit transactions thereof such as: loans, installment purchase, lease, credit sale and credit cards and their commitment to payment.

**Member:** Any government or private entity which is party to a credit information exchange contract with at least one credit information company.

**Consumer:** Any natural or corporate person engaging in credit transactions.

**Companies:** Credit information companies licensed to collect and maintain credit information on consumers and provide the same to members upon request.

**Credit record:** A report issued by companies containing consumer credit information.

**Public records:** Credit information records maintained by government entities such as records of funds and banks offering government loans, judicial authorities, government committees, bankruptcy and insolvency records and the like.

**Article 2:**

This Law aims at establishing general principles and controls necessary for collection, exchange and protection of consumer credit information.

**Article 3:**

This Law shall apply to companies, members and government and private entities maintaining credit information.

**Article 4:**

1. Government entities maintaining credit information shall provide the same to licensed companies pursuant to controls established by said entities to guard against monopoly of said information.

2. Companies shall collect, provide, exchange and protect credit information.

3. Companies shall prepare consumer credit records and exchange the same with members upon request.

4. Companies shall charge a fee for provision and exchange of credit information pursuant to controls set forth in the Implementing Regulations.

**Article 5:**

1. Each member shall exchange credit information in his possession with the company it has a contract with and shall be liable for the accuracy and updating of such information.

2. A member may obtain a copy of the consumer credit record from companies subject to the written consent of the consumer.

**Article 6:**

Members, companies and their staff shall maintain the confidentiality of consumer credit information, and they may not publish or use such information for any purpose other than those provided for in this Law or its Implementing Regulations, or in accordance with laws and instructions regulating the confidentiality of information in the Kingdom.

**Article 7:**

Credit information may be used as statistical figures, provided that such information does not reveal the consumer's identity.

**Article 8:**

1. Members and companies shall provide consumers with information on applicable procedures when applying for any credit transaction.

2. Companies shall set specific procedures for dealing with consumers' complaints and shall publish the same upon approval by the Agency.

**Article 9:**

1. A consumer credit record may not be established with companies for the first time except with the written consent of the consumer.

2. A member shall provide the consumer, upon his request, with grounds for declining his credit transactions.

3. A consumer whose credit transaction is declined may obtain a free copy of his credit record once only.

4. Subject to payment of relevant fees, a consumer may obtain a copy of his credit record at any time. Said consumer may obtain a free copy of his credit record once only upon establishment of the record.

5. A consumer may add information to his credit record indicating his personal point of view with respect to credit information provided therein.

6. A consumer who detects an error in his credit record may request the company to correct said error upon submission of relevant supporting documents.

7. A consumer, if an error in his credit record is not corrected or if he notices that his credit record is requested for an unlawful reason, may file a complaint with the committee set up pursuant to this Law to decide thereon.

**Article 10:**

1. Companies shall maintain credit information.

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<sup>2012</sup> There is no official English translation of the CIL. I obtained this translation from SIMAH.

2. Companies shall set up and maintain records containing all consumer credit record requests.
3. The Implementing Regulations shall specify the duration and controls for maintenance of information and ways of disposal thereof at the end of said period.

**Article 11:**

The Agency shall oversee and monitor the implementation of the provisions of this Law and may, in particular, undertake the following tasks:

1. Draft the Implementing Regulations of this Law.
2. Determine conditions to be met by companies seeking to provide credit information services as well as controls and procedures for licensing.
3. Issue, renew and amend licenses for credit information companies.
4. Set up mechanisms for overseeing and monitoring work of credit information companies.
5. Approve work procedures to be followed by members and credit information companies for the application of credit records.
6. Detect and investigate violations and prosecute violators before the committee.
7. Determine measures to be taken with respect to credit information in case of revocation of the license of the credit information company, or its dissolution, liquidation or bankruptcy.

**Article 12:**

The following acts shall be deemed in violation of the provisions of this Law:

1. Engaging in activities of credit information companies without obtaining a license from the Agency.
2. Companies' violation of license conditions and controls.
3. Disclosure, by any member, credit information company or any other entity subject to the provisions of this Law, or any of their employees, while in office or afterwards, of information gained in the course of their work which is deemed confidential under this Law, in cases other than those specified in this Law.
4. Use or exploitation of credit information for unlawful purposes or in violation of the provisions of this Law.
5. Delay of members or credit information companies in updating credit information on the dates specified in the Implementing Regulations, or failure to correct an error immediately upon detection.
6. Providing incorrect or forged data on consumers.
7. Failure of members bound by membership agreements to provide requested credit information, or delay in providing such information on dates specified in the Implementing Regulations.
8. Any other violation of the provisions of this Law or its Implementing Regulations.

**Article 13:**

Without prejudice to any harsher punishment provided for in another law, anyone violating the provisions of this Law or its Implementing Regulations shall be subject to one or more of the following punishments:

1. A fine not exceeding one million riyals; the maximum fine shall be doubled in case of repetition.
2. Temporary suspension of the license.
3. Revocation of the license.

**Article 14:**

Pursuant to a decision by the Minister of Finance, one or more committees shall be formed to review violations of the provisions of this Law, impose punishments and decide on disputes and disagreements arising between consumers and members and companies. Said committee shall comprise at least three members with expertise in this field, one of them at least shall be a legal counselor. Decisions of said committee shall be passed by majority vote and may be appealed before the Board of Grievances within sixty days from the date of notification thereof. Working mechanism of said committee and remunerations of its members shall be specified in the Implementing Regulations.

**Article 15:**

Anyone sustaining damage resulting from a violation provided for in this Law, after the issuance of a decision by the committee, may recourse to the competent judicial authority to claim compensation for damage sustained.

**Article 16:**

The Governor of the Agency shall issue the Implementing Regulations of this Law within one hundred and eighty days from the Law's date of promulgation and shall be published in the Official Gazette.

**Article 17:**

This Law shall be published in the Official Gazette and shall come into effect one hundred and eighty days from date of publication, and shall repeal any provisions conflicting therewith.



## Appendix B

### Saudi Credit Report Sample<sup>2013</sup>

Consumer Credit Report			
Inquiry Type	Review credit limit	Date	06/12/2005
Product Type	Credit Card	Inquiry No.	9514515
Account Type	Personal	Applicant's No.	1
Amount		Order No.	Test_PLN_123456
Account Status	Active	Membership Type	Full membership

Summary		Data	
History Report	2	Applicant Type	
Previous Inquiries	1	ID Type	
Loans accounts	0	ID Expiration Date	
Guaranteed Loans	1	Sure Name	
Defaulted Loans	2	Given Name	
First Account Date	21/11/1993	Middle Name	
Total Credit Limits		Grandfather Name	
Total Guaranteed		Full Name	
Total liabilities		Date of Birth	
Total Defaulted Loans	425272.22	Gender	
Current defaulted account	311935.22	Marital Status	
		Nationality	

Previous Inquires						
Name	Amount	Product Type	Inquiry No.	Inquiry Type	User	Inquiry Date

Loans, Accounts Details	
Lender	SAMB
Product Type	CRC
Account No.	
Credit Limit	20000.00
Credit Duration	
Installment	22985.22
Collateral	
Remaining Balance	30935.22
Last Payment	2215.00
Last Payment Date	29/02/2004

Defaulted Loans							
Settlement Date	Status	Remaining Balance	Original Amount	Charge-off Date	Account No.	Lender	Product Type
	Not Paid	30935.22	30935.22	13/03/2004		SAMB	CRC

<sup>2013</sup> [http://www.simah.com/News/Images/rte\\_SaompleEN.JPG](http://www.simah.com/News/Images/rte_SaompleEN.JPG) The English sample is not clear so I translated this sample from the Arabic version.

Guarantor: Defaulted Loans							
Settlement Date	Status	Remaining Balance	Original Amount	Charge-off Date	Account No.	Lender	Product Type
	Not Paid	30935.22	30935.22	13/03/2004		SAMB	CRC
General Notifications							
Script				Publication	Notice Type	Date	
1029383286				test	Negative	06/12/2005	
Notes							
Script				Note Type	User ID	Date	
				Dispute	ALIOSMAN	24/10/2005	
Addresses							
Date	Country	Zip Code	City	P.O. Box	Second Address	First Address	Address Type
31/10/2005	Saudi Arabia	31261	RIYADH	10412			بريد
Contact Information							
Ext.	Tel	Code	Area Code	Country	Phone Type		
Occupations							
Date	Track Term	Service Duration	Start Date	Job	Employer	Type	
1 /10/2 5				00101	KG .AZIZ CTY FR SCI	Current	
					6086 11442		
					PO Box 6086		
	Basic Salary				RIYAHD 11442		
	Total Salary				Saudi Arabia		
Disclaimer							

This information is collected from different sources and does not represent SIMAH



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