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Recovery of Commercial Losses

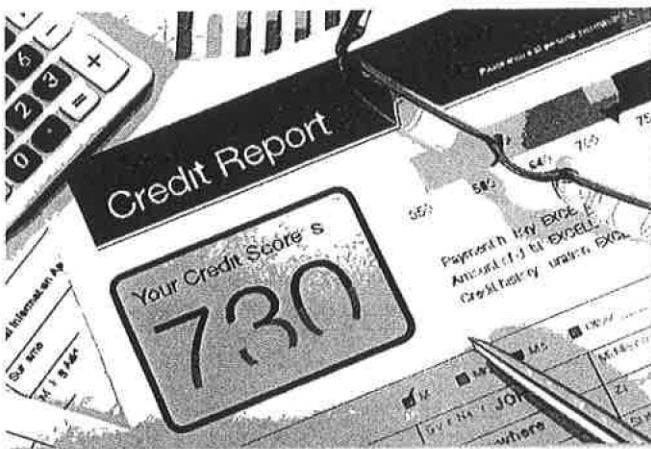


Prepared Remarks of
Richard Cordray
Director of the CFPB

Bridging the Gap
in the Data
Breach Realm

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Manuscripts should be forwarded to:
Richard M. Alderman
University of Houston Law Center
Krost Hall #210
4604 Calhoun Rd.
Houston, TX 77204-6060
alderman@uh.edu

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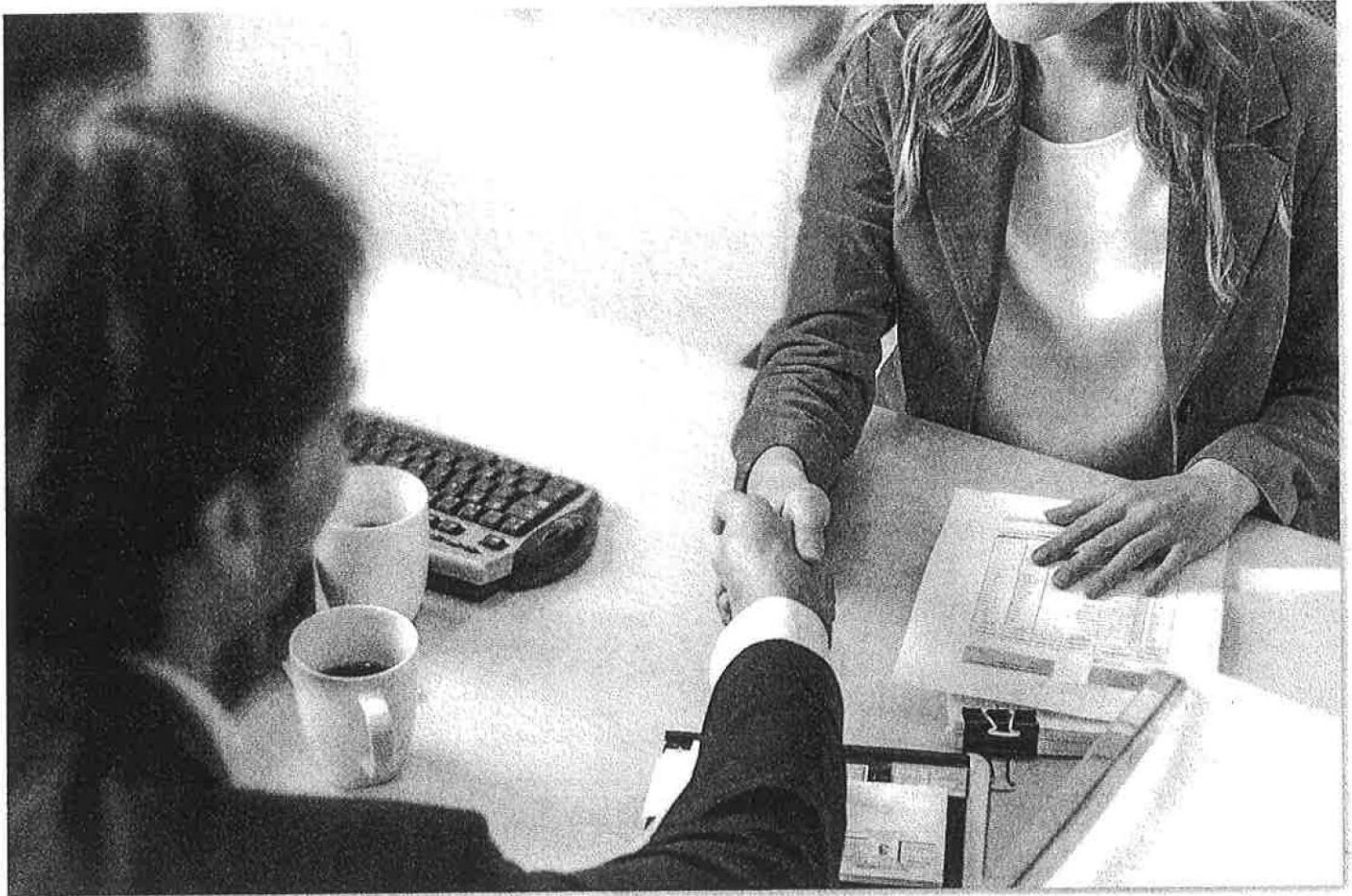
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Recovery of Commercial Losses Under the

Losses Under the



Fair Credit Reporting Act

By Scott J. Hyman*

Some FCRA plaintiffs attempt to recover for commercial or business losses deriving from allegedly inaccurate information.

I. Introduction

The number of claims filed under the Fair Credit Reporting Act ("FCRA")¹¹ against Furnishers² who provide consumer information to Consumer Reporting Agencies³ has increased as credit has become more available since the economic meltdown.⁴ As the number of FCRA claims increase, so do attempts to expand what the FCRA permits aggrieved consumers to recover as "actual damages".⁵

The FCRA is a "consumer" protection statute. Nevertheless, aggrieved consumers filing suit under the FCRA have attempted to expand recoverable damages to include losses unrelated to extensions of credit for personal, family, or household purposes.⁶ Specifically, some FCRA plaintiffs attempt to recover for commercial or business losses deriving from allegedly inaccurate information furnished to consumer reporting agencies about a particular consumer account.

Most courts have barred recovery under the FCRA for such commercial losses because of the FCRA's limited "consumer protection" protection purpose and how the consumer's credit data was "used" – i.e. by the potential commercial creditor. Some courts, on the other hand, have focused on the purpose for which the credit data originally was collected,⁷ not who used the data or how the data or consumer report eventually was used, to determine whether a person should be protected by the FCRA for their commercial losses.

This Article explores judicial treatment of recovery of commercial losses under the FCRA and the theoretical and statutory analyses underlying the outcomes of those decisions.

II. The FCRA's Limitation to Consumer Protection Only

A. Commercial Transactions Are Not Protected by the FCRA

The limitation hemming in the FCRA to "consumer" protection is found primarily in the FCRA's definition of "consumer report". The Act defines a "consumer report" as:

"[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for— (A) credit or insurance to be used primarily for personal, family, or household purposes.⁸

This text's limitation reflects Congress' intent: "Congress intended the FCRA to authorize a consumer reporting agency to issue a consumer report to determine 'an individual's eligibility for credit, insurance or employment' and, thus, "[r]eports used for 'business, commercial, or professional purposes' are not within the purview of the statute."⁹ Regulatory agencies tasked with interpreting the FCRA, such as the Federal Trade Commission, have recognized this same limitation, "interpret[ing] the FCRA to deny protection for credit reports requested for commercial purposes, writing that '[a] report on a consumer for credit or insurance in connection with a business operated by the consumer is not a consumer report and the [FCRA] does not apply to it."¹⁰

B. . . . Unless the Commercial Transaction is a Personal Guarantee of a Business Debt?

The FCRA does afford some protection, however, for some originally commercial activities, such as a commercial creditor's "permissible purpose" to obtain a "consumer report" when an individual personally guarantees a commercial transaction. The FTC Official Staff Commentary states that the FCRA's "credit transaction" provision must be read together with the FCRA's definition of "consumer report" – so that the credit transaction for which a potential creditor must have a permissible purpose to obtain a consumer report must involve credit "primarily for personal, family, and household purposes".¹¹ Accordingly, early FCRA decisions evaluating whether a potential creditor had a "permissible purpose" to obtain credit information from a consumer reporting agency held that the potential creditor's use of a report was not even subject to the FCRA if the consumer report was used for business credit, because the report was by definition not a "consumer" report.¹²

In July 2000, however, the FTC opined that a potential business credit grantor could not obtain a "consumer report" on an individual in a commercial transaction even if the individual might be responsible for the business debt. The FTC applied a simple syllogism: it was not permissible to access a "consumer report" on a "consumer" in a transaction that was "commercial" in nature. ("*Tatelbaum I*").¹³

Commercial lenders and their regulators acted immediately on the FTC's affront to good and proper underwriting of commercial transactions. The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Bank, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation all asked the FTC to reconsider its position set forth in *Tatelbaum I*, which the FTC understandably and promptly did. In June 2001, the FTC "revised" its opinion (i.e., backed off it) in a political compromise that opined that a commercial creditor has a permissible purpose to pull a consumer report on an individual in connection with a commercial credit transaction when the consumer is or will be personally liable on the debt. ("*Tatelbaum II*").¹⁴ Courts deferred to the FTC's new position, and no post *Tatelbaum II* decision has followed the *Tatelbaum I* opinion.¹⁵

C. . . . Unless the Data Originally Was Collected for Potential Use In Connection with a Transaction Involving Credit or Insurance for the Consumer's Personal, Family, or Household Purposes – Regardless of How the Data Actually Was Used?

Another line of cases in FCRA jurisprudence has held that it is not the 'ultimate use' of the data, but the purpose for which the credit data was collected, that controls whether the FCRA applies.¹⁶ "[M]ost of the cases that have considered this argument have accepted it, and the academic comment and the [FTC Official Staff] Commentary come to a similar conclusion".¹⁷ This jurisprudential conflict between the FCRA's general inapplicability to commercial transactions and courts not focusing on the consumer data's end use has caused confusion amongst the Courts as to whether the FCRA should permit recovery of commercial losses arising from furnishing inaccurate consumer data to a consumer reporting agency.¹⁸

III. Judicial Treatment of Claims under the FCRA for Recovery of Non-Consumer Losses

A. Prohibiting Recovery of Commercial Damages: Using a Credit Data for Non-Consumer Purposes Does Not Trigger the FCRA

The vast majority of courts¹⁹ and commentators²⁰ have concluded that the FCRA does not apply where a consumer report is used for commercial or non-consumer purposes. State credit reporting statutes, to the extent not preempted by the FCRA, are in accord and apply the same analysis as courts interpreting the FCRA.²¹

Judge Morrow's decision from the United States District Court for the Central District of California in *Grigoryan v. Experian Information Solutions, Inc.*,²² and Judge Hernandez' decision from the United States District for Oregon in *Boydston v. U.S. Bank National Association, N.D.*,²³ provide the typical framework and analysis. In *Grigoryan*, the plaintiff conceded that the only "economic damages he sought from inaccurately furnished consumer information to consumer reporting agency concerned real estate investment business . . . [and that] from 2009 to 2012, he was unable to take advantage of approximately ten to fifteen real estate purchase opportunities, resulting in an estimated loss of at least \$1,000,000 to \$1,500,000."²⁴ The Court held that "damages based on lost real estate purchase opportunities . . . are not recoverable under the FCRA or CCRAA, explaining that:

The [*Johnson*] court observed that "§ 1681b(a)(3)(F) does not state that all business and commercial transactions initiated by an individual fall under this section." *Id.* Thus, although the statute defines a "consumer" as an individual, "the terms are not necessarily interchangeable. In other words, a consumer must be an individual and cannot be a business or a group of people; however, it does not follow that every transaction initiated by an individual is a consumer transaction or that an individual is always acting in a consumer-capacity." *Id.* at 1125. . . In *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir.1991), the Ninth Circuit interpreted the language of § 1681b(3)(E)—the predecessor to § 1681b(a)(3)(F)177—narrowly. It noted that "Congress intended the FCRA to authorize a credit reporting agency to issue a consumer report to determine 'an individual's eligibility for credit, insurance or employment.'" *Id.* (citing 116 Cong. Rec. 36, 572 (1970) (Statement of Rep. Sullivan)). Thus, it held that "[r]eports used for 'business, commercial, or professional purposes' are not within the purview of the statute," and that such purposes do not give a third party a "business need" to obtain a consumer report. *Id.* . . . Even before the Ninth Circuit held that consumer credit reports "used for business, commercial, or professional purposes are not within the purview of the [FCRA]," *Mone*, 945 F.2d at 308, it held that reports used to extend credit to businesses were not consumer credit reports within the meaning of the CCRAA. See *Mende v. Dun & Bradstreet, Inc.*, 670 F.2d 129, 132 (9th Cir.1982). The Federal

Trade Commission, moreover, "has interpreted the FCRA to deny protection for credit reports requested for commercial purposes, writing that '[a] report on a consumer for credit or insurance in connection with a business operated by the consumer is not a consumer report and the [FCRA] does not apply to it.'"

The court, therefore, concluded that Grigoryan could not recover damages resulting from lost real estate investment ventures. The damages either were suffered by non-party, non-consumer limited liability companies, or reflected the use of a credit report for business or commercial purposes, which was outside the purview of the FCRA.²⁵

Similarly, in *Boydston*, the Court was faced with the question whether the Plaintiff's FCRA expert should be precluded from testifying about Plaintiff's commercial losses caused by allegedly erroneous information furnished to the consumer reporting agencies. The Plaintiff was an owner of a closely held corporation, Boyston Metal Works, Inc.²⁶ When Boydston Metal Works went bankrupt in 2009, the card issuer, Defendant U.S. Bank, attempted to collect the outstanding balance from Boydston personally. Boydston insisted that the debt arose from a business credit card for which he did not agree to be personally liable. U.S. Bank maintained that he was personally liable, and after Boydston rebuffed further attempts to collect the debt, U.S. Bank reported the outstanding balance on Mr. Boydston's consumer report.

Boydston was also the sole shareholder of another business, Miranda Homes that aimed to build "green" residential homes. Miranda Homes applied for credit to purchase an approximately \$12,000 forklift, but it was denied. The company attempting to sell Boydston the machine asked the lender to re-review the application with Boydston's personal credit-worthiness as an additional factor. But again, the lender denied the application, citing "derogatory information" on Boydston's consumer report. Boydston sued, and retained an expert who intended to testify at trial that if Miranda Homes had been able to obtain financing, Boydston would not have needed to loan an additional \$751,000 to the Company, and, therefore, Boydston's economic damages resulting from the denial of credit was \$751,000.²⁷

Judge Hernandez excluded the expert's testimony on the basis that FCRA affords no remedy for commercial losses. After surveying the myriad of decisions precluding recovery of commercial losses in an FCRA case, Judge Hernandez concluded:

the Court agrees with the conclusion that the FCRA does not apply where a consumer report is used for a business purpose. There can be no dispute that the use of Boydston's report in connection with Miranda Homes' attempt to finance a forklift was for a business, not a consumer, purpose. See 15 U.S.C. 1681a(d)(a) (defining "consumer report" as "[A]ny information . . . bearing on a consumer's credit worthiness . . . which is used or expected to be used . . . as a factor in establishing the consumer's eligibility for (A) credit . . . to be used primarily for personal, family, or household purposes."). Therefore, Boydston is excluded from presenting any

The vast majority of courts¹⁹ and commentators²⁰ have concluded that the FCRA does not apply where a consumer report is used for commercial or non-consumer purposes.

evidence, from Mr. Mettler or from any other source, about economic damages he suffered in connection with the forklift transaction.²⁸

Judge Hernandez rejected the Plaintiff's contention that the myriad of decisions favoring exclusion of commercial losses was no longer valid "because those cases relied on Federal Trade Commission ("FTC") guidance regarding the interpretation of the FCRA that the FTC has since withdrawn".²⁹ Judge Hernandez found that the decisions – like *Grigoryan* – relied on the text and legislative of the history of the FCRA, not just FTC guidance. Moreover, the FTC's comments in 2011 were entitled to no deference because such comments neither rose to the level of policy statement, agency manual, or enforcement guidelines, and, after all, the FTC is no longer the administrative agency charged with interpreting the FCRA anyway.³⁰

B. Recovering Commercial Damages: A Consumer Report is a Consumer Report

Consumer advocates concede that "[a] report on . . . an individual in a business capacity is not a consumer report and would not give rise to claims under the FCRA."³¹ They argue, however, that a consumer report used for business purposes is still a "consumer report" under the FCRA and, if the consumer suffers a loss from its misuse, business damages should be recoverable.³² In other words, "[u]nder the FCRA, 'whether a credit report is a consumer report does not depend solely upon the ultimate use to which the information contained therein is put, but instead, it is governed by the purpose for which the information was originally collected in whole or in part by the consumer reporting agency.'"³³

In *Breed v. Nationwide Insurance Company*,³⁴ Chief Judge Heyburn discussed this theory under the FCRA as "developing" and, accordingly, reconsidered his previous order that had precluded the Plaintiff from recovering for any commercial losses under the FCRA. Judge Heyburn found that a "more cautious approach in [the court's] interpretation of the FCRA claims" was required. Judge Heyburn perceived an analytical split as to whether the use of information by the potential creditor or the purpose for which the information was obtained by the credit collection agency controlled. Without controlling authority from the Court of Appeals for the Sixth Circuit,³⁵ Judge Heyburn held that "neither the Sixth Circuit's view nor the developing case law can be viewed as providing a definitive or reliable answer. A majority of the Circuits and the Sixth Circuit actually suggest that the expectations of the credit collection agency at the time it prepared the credit reports and at the time it collected the information contained in the reports should be considered, and no proof has been presented as to those prongs. To avoid injustice, the Court will not dismiss any claims at this time solely because they involve commercial transactions".³⁶

Other Courts have rejected the argument that the purpose of collecting the data, as opposed to the data's ultimate use, controls the inquiry of whether the FCRA applies.³⁷ For example, in *Bacharach v. SunTrust Mortgage, Inc.*,³⁸ the plaintiff argued that "a consumer report used for business purposes is still a consumer report and, thus, if a consumer suffers damage from its misuse, the damages caused are recoverable." Judge Fallon rejected the argument, stating that the Plaintiff "provide[d] little support for this argument". Judge Fallon noted that "it is generally held that losses resulting from the use of a credit report solely for a business or commercial transaction are not recoverable under the FCRA", citing statements on the House Floor during passage of the FCRA in 1970, support from a number of district courts across the country, and support from FTC interpretative staff letters. Judge Fallon thus rejected both arguments — that

the FCRA allowed recovery of commercial losses and that her business losses were actually consumer in nature.

"As admitted in her deposition, she was claiming damages related to her business of buying and flipping or buying and fixing real estate" . . . her damages more particularly relate to the "good income it would have provided us" as she intended to "rent it out and get the income". . . In sum, Ms. Bacharach's alleged damages were the result of her inability to buy additional commercial/rental properties, renovate existing properties, and build rental properties on her vacant lots. . . It is therefore beyond dispute that any credit reports she may have used to secure financing for such purchases or construction, even though nominally a consumer credit report, were for a "business purpose"; i.e. purchasing improving, and renting properties. It is therefore not deemed a consumer credit report for purposes of the FCRA."

The Court of Appeals for the Fifth Circuit affirmed, finding that commercial damages are excluded from the FCRA's purview.³⁹

"Numerous courts have concluded that the FCRA does not cover reports used or expected to be used only in connection with commercial business transactions." *Hall v. Phenix Investigations, Inc.*, ___ F.3d ___, 2016 WL 1238602, at *3 (5th Cir. Mar. 29, 2016) (unpublished) (collecting cases); see also *Ippolito v. WNS, Inc.*, 864 F.2d 440, 452 (7th Cir. 1988) ("In enacting the FCRA, Congress sought to regulate the dissemination of information used for consumer purposes, not business purposes."); *Matthews v. Worthen Bank & Tr. Co.*, 741 F.2d 217, 219 (8th Cir. 1984) (noting that the "[FCRA] was intended to apply only to reports which relate to the consumer's eligibility for personal credit or other commercial benefits as a consumer, and not to the consumer's business transactions" (citation omitted)). Moreover, courts have specifically held that real estate investment losses due to allegedly inaccurate credit information are not within the scope of the FCRA. See *Podell v. Citicorp Diners Club, Inc.*, 914 F.Supp. 1025, 1036 (S.D.N.Y. 1996), aff'd, 112 F.3d 98 (2d Cir. 1997). Bacharach's failed purchase of property at 2841 Magazine Street was an attempted commercial transaction and is therefore not within the scope of the FCRA. Bacharach, who testified that she was a real estate investor in the business of "buying and flipping or buying and fixing up real estate," also stated that she intended to purchase the property to "rent it out and get the rental income." Indeed, Bacharach seeks as damages the lost rental income she could have earned had she successfully purchased the property. The district court did not err in categorizing these real estate investment losses as a related to a failed "commercial business transaction[]" that falls outside the scope of the FCRA. See *Hall*, ___ F.3d at ___, 2016 WL 1238602 at *3.

Courts applying an analysis similar to that set forth in the District Court's decision and Fifth Circuit's affirmance in *Bacharach* appear correct for two reasons. First, they recognize that gathering or aggregation of credit information does not become a "consumer report" under the FCRA *ab initio* until the data is used for consumer purposes as defined by the FCRA. Metaphysically, data maintained by company aggregating the information does not become a "consumer report" under the FCRA until accessed, and compiled, for consumer purposes. Accessing consumer

Credit data information gathered by a credit data company is not a “consumer report” under the FCRA until the data is compiled into a “consumer report” and used for a consumer purpose.

information from a credit data company for commercial purposes never triggers the FCRA in the first instance⁴⁰ and, accordingly, the FCRA can afford no right to damages.

Second, even if it is correct that a consumer report is a “consumer report” under the FCRA regardless of the data’s ultimate use, liability for commercial losses still should only turn on the “misuse” of a “consumer report” by a business. A business that relies on consumer credit data to make decisions about commercial credit does not “misuse” a consumer report to subject itself to the FCRA – it merely relies on consumer credit data to determine eligibility for non-consumer credit. The consumer credit information relied upon by the business never becomes a “consumer report” under the FCRA. Accordingly, FCRA-based damages should not be recovered under those circumstances.

IV. Conclusion

Credit data information gathered by a credit data company is not a “consumer report” under the FCRA until the data is compiled into a “consumer report” and used for a consumer purpose. Where an individual applies for commercial credit or suffers a commercial loss due to inaccuracies contained in the data furnished to a consumer reporting agency, the FCRA is not triggered and does not afford protection against such commercial losses.

** Scott J. Hyman is a member of the Texas and California State Bars, is a Shareholder with Severson & Werson, P.C., is a Governing Member of the Conference on Consumer Finance Law, and specializes in representing automobile finance companies and consumer lenders. For the last 16 years, Mr. Hyman has authored The Fair Debt Collection Practices Act and, since 2013, has co-authored The Telephone Consumer Protection Act in DEBT COLLECTION PRACTICES IN CALIFORNIA (CEB 2016). Mr. Hyman authors Severson & Werson’s consumer finance weblog (www.calautofinance.com), to which he has posted summaries of over 2,000 consumer finance decisions over the last 10 years. Mr. Hyman holds a B.A. with honors from the Schreyer Honors College of The Pennsylvania State University, and a J.D. with distinction from the University of the Pacific, McGeorge School of Law.*

1 ¹ 15 U.S.C. § 1681 *et seq.*

2 15 U.S.C. § 1681s-2 (“Responsibilities of furnishers of information to consumer reporting agencies”).

3 15 U.S.C. § 1681a(f) (“The term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports”).

4 See generally <http://www.acainternational.org/news-fdcpa-lawsuits-decline-while-fcra-and-tecpa-filings-increase-31303.aspx>.

5 A plaintiff may recover actual, punitive, or statutory damages for willful violations, but may recover only actual damages for negligent violations. 15 U.S.C.A. § 1681n(a)(1); see also, Willey v. J.P. Morgan Chase, N.A., No. 09–CV–1397, 2009 WL 1938987, at *2 (S.D.N.Y. July 7, 2009) (“Successful plaintiffs may recover actual damages ... for negligent

violations and may recover actual damages, statutory damages, and punitive damages ... for willful violations.”).

6 15 U.S.C. §1681a(d)(1) (defining a “consumer report” as: “[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes”).

7 See generally Barron & Rosin, *FED. REG. REAL ESTATE & MORTGAGE LENDING, FAIR CREDIT REPORTING ACT* § 9:8 (4th ed. Supp. 2015) (comparing the FCRA’s consumer purpose against the “collected for” analysis in determining whether data is a “consumer report” under the FCRA); Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 COLUM. L. REV. 458, 474–476 (1976); Comment, *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, 1349–1359 (1987) (applying the “collected for” test generally to consumer reporting agencies and to users under more limited circumstances).

8 15 U.S.C. § 1681a(d)(1)

9 *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir.1991) *citing* 116 Cong. Rec. 36, 572 (1970) (Statement of Rep. Sullivan).

10 16 C.F.R. Pt. 600, App. § 603 cmt. (6)(B)).

11 FTC Official Staff Commentary, § 604 item 1A.

12 See, e.g. *Ippolito v. WNS, Inc.*, 864 F.2d 440, 454 (7th Cir. 1988) (“In short, even if the reports were “consumer reports” because Equifax may have originally collected or expected information in the report to be used for “consumer purposes”, WNS cannot be held liable for requesting consumer reports. The purpose for which the Special Service Reports on Plaintiffs were requested and the purposes for which WNS received reports in the past were both non-consumer purposes.”); *Matthews v. Worthen Bank & Trust Co.*, 741 F.2d 217, 219 (8th Cir. 1984) (“We find that this particular transaction was exempt from the FCRA because the credit report was used solely for a commercial transaction.”)

13 <https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-tatelbaum-07-26-00>.

14 <https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-tatelbaum-06-22-01>.

15 *Baker v. American Express Travel Related Services Co., Inc.*, No. CIVA0226JBC, 2002 WL 1205065 *2-3 (W.D. Ky. May 28, 2002). See also Weinberg, *FCRA Still Impacts Certain Commercial Leasing Transactions*, Monitor Daily, (May/June 2007).

16 See generally Barron & Rosin, *FED. REG. REAL ESTATE & MORTGAGE LENDING, FAIR CREDIT REPORTING ACT* § 9:8 (4th ed. Supp. 2015) (comparing the FCRA’s consumer purpose against the “collected for” analysis in determining whether data is a “consumer report” under the FCRA); Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 COLUM. L. REV. 458, 474–476 (1976); Comment, *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, 1349–1359 (1987) (applying the “collected for” test generally to consumer reporting agencies and to users under more limited circumstances).

17 *Hunt v. Experian Information Solutions*, No. 8:05cv58, 2006 WL 2528531, at *2 (D. Neb. Aug. 31, 2006); *Bakker v. McKinnon*, 152 F.3d 1007, 1012 (8th Cir.2002); *Phillips v. Grendahl*, 312 F.3d

357, 366 (8th Cir.2002); *St. Paul Guardian Insurance Co. v. Johnson*, 884 F.2d 881, 883 (5th Cir.1989); *Comeaux v. Brown & Williamson Tobacco Co.* 915 F.2d 1264, 1274 (9th Cir.1990); *Razor v. Retail Credit Co.*, 87 Wash. 2d 516 (1976); *Rice v. Montgomery Ward & Co., Inc.*, 450 F. Supp. 668, 671-672 (M.D. N.C. 1978); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980); *Boothe v. TRW Credit Data*, 523 F. Supp. 631, 634 (S.D. N.Y. 1981); *Maloney v. City of Chicago*, 678 F. Supp. 703, 707, (N.D. Ill. 1987); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 453, 12 Fed. R. Serv. 3d 514 (7th Cir. 1988); *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884-885 (5th Cir. 1989); *Gomon v. TRW, Inc.*, 28 Cal. App. 4th 1161 (4th Dist. 1994); *Korodki v. Attorney Services Corp. Inc.*, 931 F. Supp. 1269, 1274-1275 (D. Md. 1996), *judgment aff'd*, 131 F.3d 135 (4th Cir. 1997). *Yang v. Government Employees Ins. Co.*, 146 F.3d 1320 (11th Cir. 1998); *Bakker v. McKinnon*, 152 F.3d 1007, 1012 (8th Cir. 1998). *See also* *Doyle v. Chilton Corporation*, 289 Ark. 258, 263-64 (Ark. 186).

18 Accordingly, at least one commentator argues that "it is not clear whether FCRA covers a report issued by consumer reporting agency in the context of a loan that is secured by a mortgage and made for a business purpose." *Barron & Rosin, FED. REG. REAL ESTATE & MORTGAGE LENDING, FAIR CREDIT REPORTING ACT § 9:8* (4th ed. Supp. 2015) ("Although the information must relate to an individual consumer for there to be any possibility of coverage, a consumer may be involved in the transaction in a number of different ways. For example, a consumer may be involved because the consumer is seeking a business loan for investment property; a sole proprietorship may be seeking a business loan and the report may be on the individual owner; a partnership may be seeking the loan and the report may be on one or more of the individual partners; or a corporation may be seeking the loan and the report may cover, in whole or in part, an individual stockholder or a key employee. . . . The Commentary rejects FCRA coverage of business credit or insurance for an individual based on this expansive reading of the business transaction permissible use language. Rather, it interprets the business transaction purpose language to mean "a business transaction with a consumer primarily for personal, family, or household purposes."). 19 *See, e.g., Matthews v. Worthen & Trust Co.*, 741 F.2d 217, 219 (8th Cir.1984) ("We find that this particular transaction was exempt from the FCRA because the credit report was used solely for a commercial transaction"); *Boydston v. U.S. Bank National Association*, N.D., et. al., 3:11-cv-00429-HZ, 2016 WL 2736104, at *4 (D. Or. May 11, 2016) ("Here, by contrast, Miranda Homes was already operating, and Boydston sought financing for a forklift to be used in that ongoing enterprise. Boydston's report, while "nominally a consumer credit report," was obviously used for a business purpose, i.e., purchasing equipment for Miranda Homes, and thus it was not covered by the FCRA protections"); *Peterson v. American Express*, No. CV1402056PHXGMS, 2016 WL 1158881, at *7 (D. Ariz. March 23, 2016) ("Peterson alleged that because the CRAs failed to remove the AMEX account from his credit file, his resulting lower credit score prohibited frost him from participating in various business opportunities . . . because the CRAs' alleged violation affected Peterson's efforts to engage in business transactions, the injury fails to satisfy the damages element of Peterson's FCRA claim"); *Toler v. PHH Mortg. Corp.*, No. 126032, 2014 WL 6891951, at *3 (W.D. Ark. Nov. 5, 2014). The FCRA does not protect business entities or extend coverage to a consumer's business transactions. . . .the Tolers are prohibited from seeking business damages as a matter of law"); *Wisdom v. Wells Fargo Bank*, No. CV102400PHX6MS Jan. 20, 2012 WL 170900 (D. Az. 2012) (FCRA plaintiff could not recover business losses by his separate company for which he used his credit to finance the purchase of second-hand office equipment for resale); *Stich v. BAC Home Loans Servicing, LP*, No. CV 1001106 CMA MEH, 2011 WL 1135456, *4 (D. Colo. Mar. 29, 2011) ("Where an individual's credit information is used to obtain credit for business purposes, as opposed to personal purposes, courts have determined that the credit report does not fall within the realm of the FCRA, which was implemented to protect consumers"); *George v.*

Equifax Mortgage Servs., No. 06CV971 DLI LB, 2010 WL 3937308, *2 (E.D.N.Y. Oct. 5, 2010) ("It is well established that the FCRA does not apply to business or commercial transactions, even when a consumer's credit report impact[s] such transactions.... Accordingly, Plaintiff's claim for damages due to lost business opportunities is not actionable under the FCRA"); *Lucchesi v. Experian Info. Solutions, Inc.*, 226 F.R.D. 172, 174 (S.D.N.Y.2005) ("But even assuming that it, like the April 5 report, was a report about the Plaintiff, it too was issued in connection with a business operated by the consumer, and thus cannot form the basis of liability under the FCRA"); *Thompson v. Equifax Credit Information Services, Inc.*, No. 00D1468S, 2002 WL 34367325, at *3 (M.D. Ala. March 6, 2002) ("Defendant seeks to exclude all evidence of Plaintiff's alleged business damages. Credit reports issued for business purposes are not covered by the Fair Credit Reporting Act ("FCRA"), and, thus, evidence relating thereto is irrelevant to damages claimed by Plaintiff pursuant to the FCRA. Such evidence, however, is admissible on the issue of damages on Plaintiff's state law claims for negligence and defamation"); *Frost v. Experian*, No. 98CIV2016-JGKJCP, 1999 WL 287373 (S.D. N.Y. May 6, 1999); *Natale v. TRW, Inc.*, No. C 97-3661, 1999 WL 179678, *3 (N.D. Cal. Mar. 30, 1999) Plaintiff responds that his businesses are sole proprietorships and thus his situation is distinguishable from the cases cited by defendants. The form of ownership, however, is immaterial; the FTC and the case law hold that the FCRA does not apply to transactions related primarily to businesses operated by the consumer"); *Yeager v. TRW, Inc.*, 961 F.Supp. 161, 162 (E.D.Tex.1997) ("FCRA does not apply to business transactions even those involving consumers and their credit information"); *Podell v. Citicorp Diners Club, Inc.*, 914 F.Supp. 1025, 1036 (S.D.N.Y.1996) ("... this sort of loss is not cognizable under the FCRA.... [I]t is generally held that a plaintiff may not recover under the FCRA for losses resulting from the use of the credit report solely for a commercial transaction"), *aff'd*, 112 F.3d 98 (2d Cir.1997); *Hussain v. Carteret Sav. Bank, F.A.*, 704 F.Supp. 567, 569 (D.N.J. 1989) ("The Court finds that the type of transactions alleged by plaintiff to have been interfered with by the mistaken credit information were straight business real estate deals. Plaintiff's bald allegation that certain of the properties involved were partially for plaintiff's personal use is not supported by any convincing tangible evidence; *Boothe v. TRW Credit Data*, 523 F.Supp. 631 (S.D.N.Y. 1981); *Cook v. Equifax Information Systems, Inc.*, No. CIVAHAR92927, 1992 WL 356119 * 3-4 (D. Md. Nov. 20, 1992) ("credit reports used to acquire commercial or business credit are not afforded the protection of the FCRA"); *Wrigley v. Dun & Bradstreet, Inc.*, 375 F.Supp. 969, 970-971 (N.D.Ga.1974) ("The court is constrained to the view that both the legislative history of the Act and the official administrative interpretation of the statutory terminology involved compel the conclusion that the Act does not extend coverage to a consumer's business transactions"); *Sizemore v. Bambi Leasing Corp.*, 360 F.Supp. 252, 254 (N.D.Ga.1973) (FCRA inapplicable to individual denied credit to lease truck for commercial use); *Fernandez v. Retail Credit Co.*, 349 F.Supp. 652, 655 (E.D. La. 1972) (report relating to corporate president's application for life insurance was not a consumer report where corporation was the sole beneficiary and insurance was necessary for the business to secure a loan).

20 *Pitcher, Commercial Defamation Caused by Erroneous Credit Report Issued by Credit Reporting Agency*, 9 AM. JUR. PROOF OF FACTS 2D § 1 (1976 and 2016 Supp.) ("It does not appear that the FCRA applies to a situation wherein an erroneous credit report causes the termination of a potential business relationship or amounts to some other form of damage caused by commercial defamation. The key word in this context is "business". The FCRA applies only to consumer reports."); *Scorza, Consumer versus Business Damages*, FIN. PRIV. L. GD., EXTRA ISSUE No. 152 (May 30, 2008) 2008 WL 10945581 ("The FCRA is designed to protect consumers in their individual capacities; it does not apply to credit reports used for business, commercial, or professional purposes."); *Note, Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 COLUM. L. REV. 458, 473, n. 95 (1976).

21 The CCRAA expressly excludes from its definition of a consumer credit report “[a]ny consumer credit report furnished for use in connection with a transaction which consists of an extension of credit to be used solely for a commercial purpose.” Civ. Code §1785.3(c); *Mende v. Dun & Bradstreet, Inc.*, 670 F.2d 129, 132 (9th Cir.1982). (reports used to extend credit to businesses were not consumer credit reports under the CCRAA); *McClain v. Octagon Plaza, LLC*, 159 Cal.App.4th 784, 800-801 (2008) (“Only “[c]onsumer credit reporting” is subject to the CCRAA”). See also A.R.S. section 44-1691-98 (Arizona statutes do not apply to commercial loans or loan applications by individuals designated as being for a commercial purpose). But, if state common law claims survive preemption, business losses may be admissible solely as to those common law claims. *Thompson v. Equifax Credit Information Services, Inc.*, No. 00D1468S, 2002 WL 34367325, at *3 (M.D. Ala. March 6, 2002) (“Defendant seeks to exclude all evidence of Plaintiff’s alleged business damages. Credit reports issued for business purposes are not covered by the Fair Credit Reporting Act (“FCRA”), and, thus, evidence relating thereto is irrelevant to damages claimed by Plaintiff pursuant to the FCRA. Such evidence, however, is admissible on the issue of damages on Plaintiff’s state law claims for negligence and defamation”).

22 *Grigoryan v. Experian Information Solutions, Inc.*, 84 F.Supp.3d 1044, 1084 (C.D. Cal. 2014).

23 *Boydston v. U.S. Bank National Association, N.D., et. al.*, 3:11-cv-00429-HZ, 2016 WL 2736104, at *4 (D. Or. May 11, 2016)

24 *Id.*, at 1078-79.

25 *Id.*, at 1080-1082.

26 *Boydston v. U.S. Bank Nat. Ass’n ND*, 3:11-cv-00429-AC 2013 WL 5524693, at *1 (D. Or. June 6, 2013).

27 *Id.* at *2.

28 *Id.* at *4.

29 *Id.* citing Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (July 2011) (“40 Years Report”), available at: <http://www.ftc.gov/os/2011/07/110720fcrapreport.pdf>.

30 *Id.*

31 NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING, §11.11.2.2.5 and 2011 Supp.

32 *Id.* citing *Gorman v. Wolfpoff & Abramson, LLP*, 584 F.3d 1147, 1174 (9th Cir. 2009); *Commix v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1274 (9th Cir. 1990). *Breed v. Nationwide Ins. Co.*, No. 3:05CV547H, 2007 WL 1231558 at *2 (W.D. Ky. Apr. 24, 2007); *Dennis v. BEH-1, L.L.C.*, 520 F.3d 1066, 1069 (9th Cir. 2008); *Pourfard v. Equifax Info. Services, L.L.C.*, No. 07854AA, 2010 WL 55446 at *5 (D. Or. Jan. 7 2010).

33 See footnote 16 and 17 and authorities cited therein.

34 *Breed v. Nationwide Insurance Company*, No. 3:05CV547H, 2007 WL 1231558 (W.D. Ky. April 24, 2007).

35 The Court rejected application of the unreported decision in *Cheatham v. McCormick*, No. 95-6558, 1996 WL 662887 at *2 (6th Cir. Nov. 12, 1996). In *Cheatham*, the Sixth Circuit noted that

Our sister circuits have rebuffed efforts, based on expansive interpretations of § 1681b, to extend the Act beyond its original purpose of consumer protection. See *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir.1991) (“Reports used for business, commercial, or professional purposes are not within the purview of the statute”); *Ippolito*, 864 F.2d at 452 (“In enacting the FCRA, Congress sought to regulate the dissemination of information used for consumer purposes, not business purposes”); *id.* at 451 (“Evaluating prospective franchisees ... does not fall within the definition of the term ‘consumer report’”); *Matthews v. Worthen Bank & Trust Co.*, 741 F.2d 217 (8th Cir.1984) (holding that a credit report on a prospective lessee of commercial real estate was not subject to the Act). We see no reason to question the understanding of the Act reflected in these opinions. Whatever the motivation behind the report

at issue in the case at bar, it had no connection to a consumer transaction. Mr. Cheatham may have legally cognizable claims against the defendants for defamation or invasion of privacy, but he has none for violation of the Fair Credit Reporting Act. His remedy, if he has one, lies in the state courts.”

Cheatham v. McCormick, 1996 WL 662887, at *3-4 (6th Cir. Nov. 12, 1996).

36 *Id.* at *2.

37 *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 (9th Cir. 2008) is not inconsistent. There, the FCRA Plaintiff “hoped to start a business and . . . have a clean credit history when he sought financing for the venture”. The consumer’s losses, however, were his own, the business did not exist, and he was not suing for losses that it sustained. See also *Wisdom v. Wells Fargo Bank*, 2012 WL 170900 (D. Az. Jan. 20, 2012) (accord).

38 2015 WL 6442493 (E.D. La. Oct. 23, 2015) appeal filed November 16, 2015. In her appeal, *Bacharach* conceded that the FCRA does not apply to commercial losses. She asserted, however, that certain investment losses were, in fact, consumer losses protected by the FCRA.

The district court was correct in its conclusion that only consumer and not business interests be affected and suffer damage. It string-cited cases which articulate and repeat that principle. It is also conceded that *Bacharach* is a real estate investor and that damage to her real estate investment business is not “consumer” within the meaning of the FCRA. However, 2838 Camp Street, one of the properties financed by SunTrust, is her home and 2841 Magazine Street is contiguous to and at the rear of her property at 2838 Camp Street. As discussed above, *Bacharach* attempted to purchase 2841 Magazine Street to extend her yard and to secure her peaceable possession by controlling the use of 2841 Magazine Street and to make sure that her lessees were compatible, none of which has happened. Moreover, and as correctly stated by the district court in its opinion granting reconsideration, “Due to the fact that these errors appeared on her credit report, *Bacharach* states that she was unable to obtain financing to repair her home when it was damaged by Hurricane Isaac.”

Ms. Bacharach argued that, at a minimum, the jury should have decided whether the losses attributable to her adjacent investment property should be recoverable as consumer losses protected by the FCRA.

While failure to acquire 2841 Magazine Street may be, as argued by the district court (and is not commercial despite the rent that would be received), the inability to finance Isaac repairs on one’s home is unequivocally consumer and not commercial. Since at least one transaction was consumer beyond questions, summary judgment on this issue was error, and the case should have gone to trial, letting the jury pick and choose between consumer and commercial transactions.

39 *Bacharach v. Suntrust Mortgage, Incorporated*, 2016 WL 3568059, at *1-2 (5th Cir. 2016).

40 *Grigoryan v. Experian Information Solutions, Inc.*, 84 F.Supp.3d 1044, 1083 (C.D. Cal. 2014) (“It is therefore beyond dispute that any credit report he may have used to secure financing for such purchases, even though nominally a consumer credit report, was for a “business purpose,” i.e., purchasing, improving, and reselling homes. It is therefore not deemed a consumer credit report for purposes of the FCRA or CCRAA”).