The Intersection of the Fair Credit Reporting Act and the Federal Consumer Bankruptcy Laws

By Scott J. Hyman, Donald H. Cram, III and Bernard J. Kornberg

Scott J. Hyman is the Member-in-Charge of Severson & Werson's Orange County office. He specializes in representing financial institutions in all aspects of consumer transactions, risk management, litigation, and compliance. Mr. Hyman is a member of the State Bars of California and Texas, graduated with honors from the Schreyer Honors College of The Pennsylvania State University, and graduated with distinction from The University of the Pacific, McGeorge School of Law. During his 25 years of practice, Mr. Hyman has authored or co-authored dozens of articles and publications on issues related to consumer finance, including, most recently: Eric J. Troutman, Scott J. Hyman & Divya S. Gupta, *Staying TCPA Cases Under the Primary Jurisdiction Doctrine*, 68 Consumer Fin. L.Q. Rep. 312 (2014); and Scott J. Hyman & Eric J. Troutman, *Certification of Class Actions Under the Telephone Consumer Protection Act and the Prohibition against "Fail-Safe" Classes*, 68 Consumer Fin. L.Q. Rep. 326 (2014). Mr. Hyman is the author of "Fair Debt Collection Practices Acts" in Debt Collection Practice in California (CEB) and the co-author of "Telephone Consumer Protection Act" in Debt Collection Practice in California (CEB). Since 2008, Mr. Hyman has been the administrator and lead author of Severson & Werson's California weblog on personal property finance (www.calautofinance.com), to which hundreds of industry professionals subscribe and which has summarized and categorized over 2,000 court decisions on subjects relevant to consumer finance.

Donald H. Cram, III is a member of the California and Texas State Bars, is a Shareholder in Severson & Werson's San Francisco office, received his J.D. from Southern Methodist University School of Law and holds a B.B.A. in Finance from Texas Christian University. As a member of Severson & Werson's Creditors' Rights and Bankruptcy practice group, Mr. Cram advises financial institutions as to practices, procedures and compliance with federal bankruptcy laws.

Bernard J. Kornberg is an Associate in Severson & Werson's San Francisco office. He has experience in representing lenders, other entities, and individuals in litigation in the areas of insolvency, regulatory compliance, real estate litigation, commercial contract disputes, large scale debt collection, and shareholder lawsuits. Mr. Kornberg is also an experienced appellate litigator and has argued cases in front of the Ninth Circuit Court of Appeals, Ninth Circuit Bankruptcy Appellate Panel, and the California Court of Appeal. Mr. Kornberg is the prevailing attorney of record in the published appellate opinions of *Turner v. Wells Fargo Bank NA*, *In re Goldstein*, and *Opperwall v. Bank of Am., N.A.*

In addition, Mr. Kornberg's practice includes acting as outside compliance counsel for early and mid-stage financial lending startups. In this role, Mr. Kornberg is responsible for drafting and reviewing contracts, disclosures, marketing materials, and practices and procedures relating to the sale of new and untested financial products for financial service startups to ensure compliance with RESPA, TILA, Gramm-Leach-Blilely, and other federal and state regulatory requirements.

Mr. Kornberg received his law degree from the University of Arizona James E. Rogers College of Law, *magna cum laude*, and is admitted to the Order of the Coif. Mr. Kornberg received his B.A. degree in both Political Science and English from the University of California, Berkeley.

I. Introduction

Since the economic downturn of 2008 – 2009, the number of consumer bankruptcy filings has steadily and significantly declined.[1] By contrast, the number of claims under the Fair Credit Reporting Act (FCRA),[2] filed by consumers against "Furnishers"[3] of consumer information to Consumer Reporting Agencies (CRAs),[4] has increased as credit has become more available.[5] Many of the credit reporting claims come from victims of the economic downturn who are passing or passed through bankruptcy, and assert that their debts were not reported properly as they passed through bankruptcy. These credit reporting claims often involve a complicated intersection between the FCRA and bankruptcy laws.

Although the legal theories underpinning the claims vary widely, the claims often focus on such things as: failing to report a discharge; reporting inaccurate negative information such as past due debt or a charge-off; failing to report a $0 balance on a discharged debt; reporting a post-discharge balance due; reporting a post-discharge account as remaining open;[6] failing to report payments received during a Chapter 13 plan; or failing to report voluntary or "pay-n-drive" payments received during or after a Chapter 7 case.[7]

Some commentators attribute the increase of such bankruptcy-focused FCRA claims to the BAPCPA amendments.[8] Other commentators attribute the increase in such claims to nefarious misconduct by Furnishers, such as laziness in credit reporting following receipt of a bankruptcy notice,[9] or ruthless efforts to hold bankrupt debtors responsible for discharged debts.[10] Others see the increase in claims as a ruse to clear past bad credit records resulting from the economic crisis, in order to take advantage of credit that has become more available since the upturn in the economy. Whatever the cause, Furnishers and courts need clear guidelines on their duties to report accurate information as consumer debtors' accounts pass through a bankruptcy case and are ultimately subject to the discharge.[11]

Unfortunately, however, the FCRA is not a model of clarity. Negotiating the complex interplay between the FCRA and bankruptcy law can be like navigating the dangerous waters between Scylla and Charybdis.[12] In navigating the straits between the FCRA and bankruptcy law, state and district court analyses are often complicated by judicial inexperience with either statutory scheme, inexperience with Furnishers' reporting and re-investigation obligations under the FCRA, and inexperience with the "zeros-and-ones" Tron-like world of the Metro-2 reporting guidelines contained in the CDIA's[13] Credit Reporting Resource Guide.[14] And, where one stands sometimes depends on where one sits: while an Article III Judge may focus on accuracy, compliance and/or liability, a bankruptcy court may view a case through the prism of the protection of the bankruptcy process.

This article examines how, from a credit reporting standpoint, courts and the credit reporting industry have treated consumer debt passing or having passed through bankruptcy, and the efforts to navigate the straits between the two complicated statutory schemes are sometimes ill-equipped to properly guide a Furnisher's reporting obligations.

II. Don't Get Crushed Between the Rocks

A. Furnishers' Accuracy Obligations under the Fair Credit Reporting Act

It is axiomatic that Furnishers must report accurate consumer information to the CRAs.[15] But, while the CRAs must

1. Overall filings in the United States Bankruptcy Courts fell over 40%, from 1,417,326 in 2011 to 835,197 in 2015. *See* http://www.uscourts.gov/statistics-reports/us-bankruptcy-courts-judicial-business-2015.

2. 15 U.S.C. §§ 1692 *et seq*.

3. 15 U.S.C. § 1681s-2 ("Responsibilities of furnishers of information to consumer reporting agencies").

4. 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").

5. *See generally* http://www.acainternational.org/news-fd-cpa-lawsuits-decline-while-fcra-and-tcpa-filings-increase-31303.aspx.

6. *See, e.g.*, Lawrence A. Young & Heather Heath McIntyrea, *The Impact of BAPCPA - An Overview*, 63 Consumer Fin. L.Q. Rep. 32 (2009).

7. *See infra* note 8. Although the BAPCPA amendments purported to eliminate "pay-n-drive" or the Chapter 7 ride-through, the issue still exists. *See, e.g.*, *In re* Dumont, 581 F.3d 1104, 1119 (9th Cir. 2009) ("At least where the debtor has not attempted
(Continued in next column)

7. *(Continued from previous column)*

to reaffirm, our decision in *Parker* has been superseded by BAPCPA. Accordingly, Ford did not violate the discharge injunction in repossessing Dumont's vehicle.").

8. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 (April 20, 2005) (amending U.S. Code Title 11 [the Bankruptcy Code], Title 18 and Title 28 (BAPCPA)).

9. *See generally* National Consumer Law Center, Fair Credit Reporting § 4.3.2.4.3 (2011) ("These creditors, upon receipt of a notice of bankruptcy, simply re-code their internal account record to reflect the discharge and to avoid violating the bankruptcy stay. This may result in the account never again being reported to the CRAs.").

10. *See* http://www.nytimes.com/2015/05/08/business/dealbook/bank-of-america-and-jpmorgan-chase-agree-to-erase-debts-from-credit-reports-after-bankruptcies.html?_r=0, (*Bank of America and JPMorgan Chase Agree to Erase Debts From Credit Reports After Bankruptcies,* N.Y. Times (May 7, 2015) ("The lawsuits accuse the banks of engineering what amounts to a subtle but ruthless debt collection tactic, effectively holding borrowers' credit reports hostage, refusing to fix the mistakes unless people pay money for debts that they do not actually owe.").

11. It can be noted that the bankruptcy discharge does not discharge the debt, only the debtor's personal liability for the debt. *See* 11 U.S.C. § 524. Therefore, the debt still exists and if unpaid is the basis for enforcement of any lien securing the debt. *See infra* note 62.

12. *See, e.g.*, https://en.wikipedia.org/wiki/-Between_Scylla_and_-Charybdis ("Scylla and Charybdis were mythical sea monsters noted by Homer; Greek mythology sited them on opposite sides of the Strait of Messina between Sicily and the Italian mainland….Odysseus was forced to choose which monster to confront while passing through the strait; he opted to pass by Scylla and lose only a few sailors, rather than risk the loss of his entire ship in the whirlpool.").

13. Shaw v. Experian Information Solutions, Inc., 49 F. Supp. 3d 702 (S.D.Cal. 2014) ("To promote the standardized reporting of consumer credit information, the Consumer Data Industry Association ('CDIA') publishes the *Credit Reporting Resource Guide* ('the Guide'), 'a comprehensive overview of the Metro-2 format' that 'also contains certain recommended credit reporting procedures for certain types of consumer credit reporting.'"); *accord*: Shaw v. Experian Information Solutions, Inc., 306 F.R.D. 293 (S.D.Cal. 2015); Grossman v. Barclays Bank Delaware, No. CIV.A. 12-6238 PGS, 2014 WL 647970 (D.N.J. Feb. 19, 2014) (The CDIA is "an international trade association that represents the consumer credit, mortgage reporting, employment and tenant screening, and collection services industries."); *In re* Juliao, No. 07-48694-WSD, 2011 WL 6812542 (Bankr.E.D.Mich. Nov. 29, 2011).

14. Toliver v. Experian Information Solutions, Inc., 973 F. Supp. 2d 707 (S.D.Tex. 2013) ("The Metro-2 code was developed by the CDIA, and detailed information about the code is available in the CDIA's Credit Reporting Resource Guide ('CRRG').").

15. *E.g.* Groff v. Wells Fargo Home Mortg., Inc., 108 F. Supp.3d 537 (E.D.Mich. 2015) ("The FCRA does not define the terms 'accurate' or 'complete,' but the Federal Trade Commission
(Continued on next page)

maintain reasonable procedures to ensure the maximum possible accuracy of the information they put into a consumer report, the legal standard the FCRA imposes on Furnishers is stated in the negative: "[N]o information may be furnished if the person knows or consciously avoids knowing that the information is inaccurate."[16] As a result, the parameters of the accuracy obligation imposed on Furnishers is not always well settled.

Regulatory agencies repeatedly have opined on Furnishers' accuracy obligations. On July 1, 2009, and effective July 1, 2010, the Inter-agency FACT Act Rule was issued defining the accuracy obligations imposed on furnishers of credit reporting information.[17] The Inter-Agency Fact Act Rule derived from the earlier passage of the Fair and Accurate Credit Transactions Act (FACT Act) on December 4, 2003, amending the FCRA.[18] Applicable to Furnishers and the process of resolving consumer disputes of information, the FACT Act made three primary changes: (1) It required federal agencies to promulgate guidelines and regulations requiring creditors to establish reasonable procedures regarding the "accuracy and integrity" of the data they report to CRAs; (2) it required federal agencies to promulgate guidelines and regulations identifying circumstances under which Furnishers, for the first time, must investigate certain disputes received directly from consumers (as opposed indirectly through the CRAs); and (3) if a Furnisher receives a dispute from a consumer through the CRA and the Furnisher finds inaccuracy or incompleteness, or can not verify the information, the Furnisher is required to delete, modify, or permanently block the information.[19]

The first significant activity in furtherance of these 2003 enabling statutes was the issuance of a Joint Inter-Agency Report by the Federal Trade Commission (FTC) and the Board of Governors of the Federal Reserve Board (FRB) in August 2006.[20] The Joint Inter-Agency Report not only road-mapped the Metro-2, ACDV and e-OSCAR processes, but also concluded that "the FACT Act requirements should be given time to take effect before legislators and regulators considered making additional changes to the dispute process."[21] On December 13, 2007, the agencies issued a proposed Inter-Agency Rule, as required by the FACT Act enabling statutes, and invited comment. The agencies found that "neither the text nor the legislative history of the FACT Act resolves how the terms 'accuracy' and 'integrity' should be defined" with regard to policies and procedures for furnishing consumer data. Accordingly, the agencies proposed two separate schemes, the "Regulatory Scheme" under which these terms would be defined in the regulations, and the "Guideline Scheme" where the terms would be defined as mere guidelines.

The Inter-Agency Rule, issued on July 1, 2009, chose a middle ground.[22] The Rule put the definitions of "accuracy" and "integrity" into the text of the regulations. But, to defray concerns that placement of the terms in the definitions of the regulation would increase litigation initiated by plaintiffs asserting that furnished information failed to meet the accuracy and integrity standards, the agencies limited the applicability of defined terms to each agency's regulations, and confirmed that "the definitions do not impose standalone obligations on furnishers but guide and inform the duties otherwise imposed on furnishers under the regulations."

The agencies summarized the Rule as follows:

> The final rules include the accuracy and integrity regulations, which contain definitions of key terms such as "accuracy," "integrity," "direct dispute," and "furnisher" and require furnishers to establish and implement written policies and procedures regarding the accuracy and integrity of consumer information provided to a CRA. The final rules also include guidelines concerning the accuracy and integrity of information furnished to CRAs that furnishers must consider in developing their policies and procedures.[23]

The Rule adopted a definition of "accuracy" which means such information that a Furnisher provides to a consumer reporting agency about an account or other relationship with the consumer correctly: (1) reflects the terms of and liability for the account or other relationship; (2) reflects the consumer's performance and other conduct with respect to the account or other relationship; and (3) identifies the appropriate consumer.[24]

The Rule adopted a definition of "integrity" as meaning information that a Furnisher provides to a CRA about an account or other relationship with the consumer that: (1) is substantiated by the Furnisher's records at the time it is furnished; (2) is furnished in a form that is designed to minimize the

15. *(Continued from previous page)*

has promulgated a regulation that defines the term 'accuracy' for consumer credit reporting: Accuracy means that information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer correctly: (1) Reflects the terms of and liability for the account or other relationship; (2) Reflects the consumer's performance and other conduct with respect to the account or other relationship; and (3) Identifies the appropriate consumer. 12 CFR § 41.41(a).").

16. 15 U.S.C. § 1681s-2(a)(1)(A).

17. Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, 117 Stat. 1953 (Dec. 4, 2003) [the FACT Act]. *See* the Inter-Agency FACT Act Rule, 74 Fed. Reg. 31484 (2009); *see also* FRB, FTC, and Other Federal Agencies' Final Rules to Enhance Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of FACT Act, 2009 WL 2699105 ("The final rules include the accuracy and integrity regulations, which contain definitions of key terms such as 'accuracy,' 'integrity,' 'direct dispute,' and 'furnisher' and require furnishers to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of consumer information provided to a CRA.").

18. *See* FACT Act, *supra* note 17.

19. *Id.*

20. Joint Inter-Agency Report ¶¶ 101-511, Agencies Propose Rules To Enhance Accuracy, Integrity Of Information Furnished To Consumer Reporting Agencies (Regulation V; 12 CFR §§ 41, 222, 334, 571 & 717, and 16 CFR § 660, 2010 WL 2607919 ("The OCC, Board, FDIC, OTS, NCUA, and FTC (Agencies) are publishing for comment proposed regulations and guidelines to implement the accuracy and integrity provisions in section 312 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act)") [Joint Inter-Agency Report].

21. Joint Inter-Agency Report, *id.*, at 34.

22. 74 Fed. Reg. 31484 (July 1, 2009) [the Rule].

23. *See supra* note 22. *See also* notes 17, 20 & 21.

24. 12 CFR § 1022.41(a).

likelihood that the information may be incorrectly reflected in a consumer report; and (3) includes the information in the Furnisher's possession about the account or other relationship that the relevant agency has determined is required, in that the absence of it would likely be materially misleading when evaluating a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.[25]

The Rule's definition of "integrity" reflected a compromise between the proposed Regulatory Definition Approach and the proposed Guidelines Definition Approach. In other words, "in order to satisfy the definition of 'integrity,' furnished information must include items in a furnisher's possession about the account or other relationship only if the relevant [a]gency has determined that its absence would be materially misleading in evaluating a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, and has listed that item of information in the Agency's guidelines."[26] The Rule also requires Furnishers to maintain written policies and procedures, and to periodically review and update them as necessary to ensure their continued effectiveness.[27]

B. Furnishers' Obligations on Re-Investigation

It is clear that the FCRA affords no private right of action for a Furnishers' mere failure to report information without accuracy or integrity.[28] Rather, a private right of action arises against a Furnisher only after the consumer first disputes with a CRA the accuracy of an item of information on the consumer's consumer report, and the CRA then notifies the Furnisher of the consumer's dispute.[29] Such notice from a CRA triggers the Furnisher's obligation to investigate and respond to the dispute under 15 section 1681s-2(b).[30]

The "[F]urnisher's investigation pursuant to 15 [section] 1681s-2(b)(1)(A) may not be unreasonable."[31] "By its ordinary meaning, an 'investigation' requires an inquiry likely to turn up information about the underlying facts and positions of the parties, not a cursory or sloppy review of the dispute."[32] At a minimum, after receiving a dispute over the accuracy of information, the Furnisher must: (1) conduct an investigation with respect to the disputed information; (2) review all relevant information provided by the consumer reporting agency; (3) report the results of the investigation to the consumer reporting agency; and (4) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which information was furnished and that compile and maintain files on consumers on a nationwide basis.[33] Thus, a FCRA plaintiff must demonstrate that a Furnisher's investigation missed a fact that would have resolved the dispute in the consumer's favor.[34] Moreover, "an investigation of a dispute is not necessarily unreasonable because it results in a substantive conclusion unfavorable to the consumer, even if that conclusion turns out to be inaccurate."[35]

C. Reporting Payments Made During the Debtor's Bankruptcy Case

1. FCRA and Metro-2 Requirements for Furnishing Information on Consumer Bankruptcies

Since a report mentioning a bankruptcy may have a detrimental effect on a consumer's credit score, it is important that the report accurately reflect what kind of bankruptcy is involved as well as the correct status of the bankruptcy proceeding.

The Consumer Data Industry Association, Inc. (CDIA) has created and published guidelines for reporting information titled Credit Reporting Resource Guide (CRRG), which provides Frequently-Asked Questions (FAQs) concerning accounts where the consumer has filed for bankruptcy protection. The CRRG has not been adopted by the FTC, the Bureau of Consumer Financial Protection (CFPB), or the FRB, but, given the lack of guidance by the CFPB and the developing case law in this area, the CRRG can be a valuable, though non-binding, resource for guidance in furnishing information where a bankruptcy is involved.[36]

The Metro-2 format requires that a Furnisher of information specify in some detail the nature of any reference to bankruptcy. The FCRA provides that any consumer report of a consumer's bankruptcy must identify the chapter under which the case arises, "if provided by

25. *Id.* § 1022.41(b).

26. These guidelines are identical for all relevant agencies. *Cf.*: 16 CFR pt. 660, App. A (FTC); 12 CFR pt. 1022, App. E (CFPB); 12 CFR pt. 222, App. E (FRB).

27. 12 CFR § 1022.42.

28. Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057 (9th Cir. (Nev.) 2002) ("It can be inferred from the structure of the statute that Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished. Hence, Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental bodies.").

29. *Id.*

30. *Id. See also* Wright v. Specialized Loan Servicing, LLC, No. 1:15-CV-0287 JLT, 2015 WL 859604 (E.D.Cal. Feb. 27, 2015) ("Plaintiff fails to allege that any credit reporting agency notified Defendant of the disputed credit. Without such notice from a credit reporting agency – not Plaintiff – no duty to investigate was triggered under the FCRA."); *accord* Ewing v. Wells Fargo Bank, No. CV 11-8194-PCT-JAT, 2012 WL 4514055 (D.Ariz. Oct. 2, 2012) (dismissing a plaintiff's FCRA claim for failure to allege that the reporting agency sent notice of the plaintiff's consumer dispute to the defendant).

31. Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147 (9th Cir. (Cal.) 2009).

32. *Id.*

33. *See*: Nelson v. Chase Manhattan Mort. Corp., 282 F.3d 1057 (9th Cir. (Nev.) 2002); Spector v. Experian Information Services, Inc., 321 F. Supp.2d 348 (D.Conn. 2004).

34. Brooks v. Citibank (South Dakota) N.A., 345 F. App'x 260 (9th Cir. (Or.) 2009) (Plaintiff "offers no real analysis of what additional information Citibank should have consulted…"); Chiang v. Verizon New England, Inc., 595 F.3d 26 (1st Cir. (Mass.) 2010).

35. *See, e.g.*: *Gorman*, 584 F.3d at 1161 (*see supra* note 31); Blakeney v. Experian Information Solutions, No. 15-CV-05544-LHK, 2016 WL 1535085 (N.D.Cal. Apr. 15, 2016).

36. Historically, primary responsibility for enforcement and rulemaking under the FCRA was charged to the FTC. In 2010, in the Dodd-Frank Act, Congress transferred most rulemaking authority under the FCRA to the CFPB. The remaining rulemaking authority was retained by the FRB. *See* Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 76 Fed. Reg. 44462 – 01 (July 26, 2011). Both the FTC and CFPB are granted administrative enforcement power under the FCRA. 15 U.S.C. § 1681s.

the source information" about the bankruptcy.[37] The FCRA requires a Furnisher to distinguish between bankruptcies designed to discharge liability for all of the debtor's obligations (Chapter 7 cases) and those designed to repay some or all obligations, *e.g.*, under a wage earner plan (Chapter 11, 12, or 13 cases).[38] Thus, a consumer bankruptcy should be reported as arising under Chapter 7, Chapter 11, Chapter 12, or Chapter 13.

Moreover, the Metro-2 base segment calls for a "consumer information indicator" or code designating specific bankruptcy information. The Metro-2 codes distinguish between Chapter 7, 11, 12, and 13 bankruptcies as well as the filing of a petition, discharge, dismissal or withdrawal. Courts have wrestled with the intersection of the FCRA's accuracy requirement and Furnishers' use of the METRO-2 codes. For example, courts have rejected the argument that Furnishers' non-compliance with the CRRG and METRO-2 codes, by itself, renders reporting inaccurate.[39] On the other hand, courts have also found compliance with the CRRG to be dispositive.[40] Some courts caution, however, that following the CRRG and METRO-2 can sometimes still result in inaccurate reporting.[41]

2. Chapter 7

In a Chapter 7 liquidation case, there are two basic segments where account information could change based upon a certain bankruptcy event: (1) furnishing information pre-discharge; and (2) furnishing information post-discharge.

a. Post-Petition/Pre-Discharge Credit Reporting

The weight of authority holds that the automatic stay does not prohibit the reporting of information after the filing of a bankruptcy case but prior to the discharge of the debt.[42] However, neither the FCRA nor the Bankruptcy Code deal directly with a creditor's reporting requirements when a borrower is in bankruptcy, other than that the Furnisher must report that the consumer has filed a Chapter 7 bankruptcy. A Furnisher can report the following with respect to specified fields.[43]

Field	Information
CII	A (meaning the filing of a Chapter 7 petition)
Account Status	Status at the time of the bankruptcy filing
Payment History	D (meaning that no payment history is available this month) followed by the history reported prior to the bankruptcy filing
Current Balance	Contractual outstanding balance amount
Scheduled Monthly Payment Amount	Contractual monthly payment amount
Account Past Due	Contractual amount past due
Date of Account Information	Current month's date

37. 15 U.S.C. § 1681c(d).

38. *See*: Conf. Rep. No. 1587, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4394, 4411, 4415; Isaac, FTC Informal Staff Opinion Letter, Nov. 5, 1998.

39. *See* Giovanni v. Bank of America, N.A., Giovanni v. Bank of America, Nat. Ass'n, No. C 12-02530 LB, 2013 WL 1663335 (N.D.Cal. Apr. 17, 2013) (rejecting the premise that a Furnisher that "did not comply with CDIA instructions in reporting [the plaintiff's] late payments…under the Metro-2 Format" submitted inaccurate information because the plaintiff "d[id] not allege [the defendant] was required to follow the Metro-2 Format,…or that deviation from those instructions constitutes an inaccurate or misleading statement"); Mortimer v. Bank of Am., N.A., No. C 12-1936 CW, 2012 WL 3155563 (N.D.Cal. Aug. 2, 2012) ("failure to comply with the CDIA guidelines does not render [a] report incorrect."); Sheridan v. FIA Card Servs., N.A., No. C13-01179 HRL, 2014 WL 587739 (N.D.Cal. Feb. 14, 2014) (*accord*); Jones v. Experian Info. Solutions, Inc., No. 1:11-CV-826, 2012 WL 2905089 (E.D.Va. July 16, 2012) ("The mere fact that Capital One failed to consult an advisory external source, such as the CDIA Resource Guide, is of no consequence when its investigation otherwise reflects a careful and thorough inquiry into the consumer credit dispute."); *In re* Jones, No. 09-14499-BFK, 2011 WL 5025329 (Bankr.E.D.Va. Oct. 21, 2011) (same parties: "it does not appear that the agency with administrative jurisdiction over the interpretation and enforcement of FCRA, the Federal Trade Commission, has adopted this standard as a national standard").

40. *See*: Grossman v. Barclays Bank Delaware, No. CIV.A. 12-6238 PGS, 2014 WL 647970 (D.N.J. Feb. 19, 2014); Toliver v. Experian Info. Solutions, Inc., 973 F. Supp.2d 707 (S.D.Tex. 2013) (CDIA manual's codes are "known and accessible to those in the credit reporting industry," rendering it "unreasonable to conclude that the codes are misleading.").

41. In *Jones*, No. 1:11-CV-826, 2012 WL 2905089 (E.D.Va. July 16, 2012) (*see supra* note 39), for example, the court noted that "the position taken in the CDIA Resource Guide… – that a debt must be reported at a zero current balance upon entry of the Confirmation Order, prior to [a petitioner's] Chapter 13 discharge – [is] inconsistent with the Chapter 13 discharge provision in 11 U.S.C. § 1328, and the weight of authority." *See also* Sheridan v. FIA Card Servs., N.A., No. C13-01179 HRL, 2014 WL 587739 (N.D.Cal. Feb. 14, 2014) (Likewise, the CDIA directive to report "no data" instead of overdue payments while a Chapter 7 petition is pending, has been rejected where "it was factually accurate…that [the] accounts were past due.").

42. *See, e.g.*: Mortimer v. JP Morgan Chase Bank, Nat. Ass'n, No. C 12-1936 CW, 2012 WL 3155563 (N.D.Cal. Aug. 02, 2012)); Hickson v. Home Federal of Atlanta, 805 F. Supp.1567 (N.D.Ga. 1992); *but see Matter of* Sommersdorf, No. 1-91-03272, 139 B.R. 700, Bankr. L. Rep. P 74593, 1992 WL 87885 (Bankr.S.D.Ohio May 24, 1991); *In re* Singley, No. 97-42600, 233 B.R. 170, 41 Collier Bankr. Cas. 2d 1623, 1999 WL 299018 (Bankr.S.D.Ga. May 3, 1999).

43. *See generally* Credit Reporting Resource Guide (CDIA 2015). The charts in the text above, and references to Metro-2 and the CDIA Manual in this article, are the authors' own interpretation, and should not be a substitute for any readers' own review of the Metro-2 codes, the CDIA Manual, and obligations under the FCRA, including review by independent counsel or trained credit reporting professionals.

b. Automatic Stay Considerations

The automatic stay arises immediately upon the filing of a bankruptcy petition and operates to prohibit, among other actions, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."[44] A violation of the automatic stay, if found to be willful, gives rise to potential liability for actual damages, including attorneys' fees and costs, and in "appropriate circumstances" punitive damages.[45]

Some cases have held that the automatic stay does not prohibit the reporting of information after the filing of a bankruptcy petition but prior to the discharge of the debt.[46] In *Giovanni v. Bank of America, N.A.*,[47] for example, Judge Beeler held that a Chapter 7 debtor could not state a FCRA claim against Furnishers who reported delinquent payments while the Chapter 7 cases were pending -- even if the reporting was not consistent with the CRRG.[48] Other courts agree, rejecting the argument that a Chapter 7 debtor cannot be late on his/her payments coming due during the pendency of the bankruptcy because such payments are not owing.[49] Still other courts have found that reporting of an account as it passes through a Chapter 7 case can be technically accurate, but still misleading so as to be actionable under the FCRA -- as when the creditor fails to inform the consumer reporting agencies that the debt is disputed or subject to a discharge in bankruptcy.[50]

Bankruptcy Code section 362(b), however, provides a list of actions that are specifically exempt from the automatic stay. One of these exemptions is the furnishing of information related to past due support obligations owed by the debtor.[51] A litigant may argue that the negative inference of the specific exceptions is that any other type of reporting during the course of a bankruptcy case is in fact a stay violation.[52] However, at least one court has expressly rejected this proposition.[53] Further, such a position would run contrary to the CRRG which provides for such reporting post-petition.

c. Post-Discharge Reporting: the Discharge Injunction

The FTC has been clear regarding how a Furnisher must report information relating to the balance due post-discharge in a Chapter 7 bankruptcy. The FTC Official Staff Commentary to FCRA section 607, item 6 states:

> 6. Content of Report. A consumer report need not be tailored to the user's needs. It may contain any information that is complete, accurate, and not obsolete on the consumer who is the subject of the report. A consumer report may include an account that was discharged in bankruptcy (as well as the bankruptcy itself), as long as it

44. 11 U.S.C. § 362(a)(6).

45. *Id.* § 362(k)(1).

46. Abeyta v. Bank of America, N.A., No. 215CV02320RCJNJK, 2016 WL 304308 (D.Nev. Jan. 25, 2016), *appeal filed* (16-15707) ("BofA argues that Plaintiff has alleged no violation of the FCRA, because she does not allege that it is false that as of July 2010, Plaintiff was 120 – 149 days behind on her debt to BOA. The Court agrees. Plaintiff does not allege that the fact of the previous delinquency is untrue. She alleges only that the reported debt had been included on her June 2010 bankruptcy schedules and was eventually discharged. That, however, is not an allegation of inaccurately reported debt. Bankruptcy does not prevent the reporting of a previous debt."); *In re* Porcoro, 2017 WL 1162900 (Bankr.D.N.J., No. 15-24387 (SLM)) ("the undisputed facts show that Verizon simply reported the status quo to the credit reporting agencies during the pendency of the Debtor's bankruptcy proceeding. Because mere truthful reporting is not a violation of the automatic stay, the Debtor failed to carry his burden as to the first element of Section 362(k)"); Mortimer v. JP Morgan Chase Bank, Nat. Ass'n, No. C 12-1936 CW, 2012 WL 3155563 (N.D.Cal. Aug. 2, 2012)); Hickson v. Home Federal of Atlanta, 805 F. Supp.1567 (N.D.Ga. 1992).

47. 2013 WL 1663335 (N.D. Cal. 2013).

48. Giovanni v. Bank of America, N.A., No. C 12-02530 LB, 2013 WL 1663335 (N.D.Cal. Apr. 17, 2013).

49. *See, e.g.,* Mestayer v. Experian Information Solutions, Inc., No. 15-CV-03645-EMC, 2016 WL 631980 (N.D.Cal. Feb. 17, 2016) ("As best the Court can understand it, Ms. Mestayer seems to be asserting that it was not clear that the reported account balance/delinquency was a debt incurred before the bankruptcy petition (not after) and, as such, would potentially be subject to discharge. But Ms. Mestayer is demanding too much. CapOne reported the fact that Ms. Mestayer was in bankruptcy proceedings. It also reported the date of the account balance/delinquency. CapOne never made a representation or any other suggestion that the account balance/delinquency was a post-petition rather than a pre-petition debt. Instead, CapOne was simply silent. But that silence was not misleading. With the information provided by CapOne, any person or entity evaluating Ms. Mestayer's credit report to make a credit decision could easily investigate and determine whether the debt was subject to an impending bankruptcy petition."); Mortimer v. Bank of America, N.A., No. C-12-01959 JCS, 2013 WL 57856 (N.D.Cal. Jan. 3, 2013), at *9 (N.D. Cal. April 10, 2013); *id.*, 2013 WL 57856 (N.D.Cal. Jan.3, 2013); Harrold v. Experian Information Solutions, Inc., No. C 12-02987 WHA, 2012 WL 4097708 (N.D.Cal. Sep. 17, 2012); Mortimer v. JP Morgan Chase Bank, National Association, No. C 12-1936 CW, 2012 WL 3155563 (N.D.Cal. Aug. 2, 2012) ("While it might be good policy…to bar reporting of late payments while a bankruptcy petition is pending, neither the Bankruptcy Code nor the FCRA does so.").

50. Venugopal v. Digital Federal Credit Union, No. 5:12-CV-06067 EJD, 2013 WL 1283436 (N.D.Cal. Mar. 27, 2013) ("report indicates that Defendant reported overdue payments on Plaintiff's credit account to all three CRA's each month from the time Plaintiff filed for bankruptcy up until entry of the [Bankruptcy] discharge order…in this case, while Defendant's reporting to Experian about the alleged debt may have been technically accurate, it still could have been misleading so as to materially alter the understanding of the debt. Defendant failed to report to Experian that Plaintiff's debt had been discharged as a result of the bankruptcy petition. Defendant also failed to report that the debt was in dispute. The incompleteness of the reporting could be misleading so as to form the basis of a FCRA claim.").

51. The Bankruptcy Code, at 11 U.S.C. § 362(b), provides in part:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –
>
> (2) under subsection (a) –
>
> (E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

11 U.S.C. § 362(b)(2)(E).

52. As a matter of course, any activity, including credit reporting, may support a stay violation claim if the debtor can show the activity was done for the purpose of harassing or coercing the debtor to pay a debt. *See, e.g., In re* Pratt, 462 F.3d 14 (1st Cir. (Me.) 2006). Accordingly, the exception for reporting overdue support should be construed as Congressional intent to provide an absolute safe harbor for any credit reporting regarding overdue domestic support, rather than an supporting the inference that all other credit reporting violates the automatic stay.

53. To read § 362(b)(2)(E) as the debtors suggest, *i.e.*, that it creates a singular and exclusive exception to § 362(a) for credit reporting, would require the court to conclude that Congress intended to invalidate a significant provision of the FCRA, *i.e.*, § 1681c(a)(1), through and with an amendment to the Bankruptcy Code, *i.e.*, § 362(b)(2)(E). Not only is that an absurd result, but, that conclusion is wholly inconsistent with Congress' historical efforts to ensure that § 1681c(a)(1) of the FCRA is consistent with the Bankruptcy Code. A better understanding of § 362(b)(2)(E), and one consistent with Congressional efforts to harmonize the FCRA and the Bankruptcy Code, is that § 362(b)(2)(E) was added through BAPCPA in 2005 to give parents asserting rights under § 1681s-1 of the FCRA where those rights did not previously exist. In other words, whereas § 1681s-1 of the FCRA speaks of credit reports that include overdue support information received from or verified by a state or local agency, under § 362(b)(2)(E) such reports may now include information received directly from a parent to whom overdue support is owed. In that respect, § 362(b)(2)(E) is an expansion of the existing credit reporting exclusion to § 362(a) recognized in § 1681c(a)(1) of the FCRA.

In re Keller, No. 12-22391-B-13, 75 Collier Bankr. Cas. 2d 1139, 2016 WL 3004488 (Bankr.E.D.Cal. May 17, 2016).

reports a zero balance due to reflect the fact that the consumer is no longer liable for the discharged debt.[54]

Metro-2 instructions also require that debts discharged in bankruptcy be reported with a zero balance. Reaffirmation of a debt can also be distinguished by virtue of the Metro-2 codes. A debt subject to the bankruptcy discharge can also be reported as "charged off to profit or loss," if true.[55] When a consumer continues or resumes payments on an obligation discharged in bankruptcy, a Furnisher may report delinquencies subsequent to the bankruptcy, so long as the information is accurate, complete, updated and otherwise complies with the FCRA.[56] A Furnisher can report[57] certain fields:

Field	Information
CII	E (meaning the consumer received of a Chapter 7 discharge)
Account Status	Status at the time of the bankruptcy filing
Payment History	D (meaning that no payment history is available this month) followed by the history reported prior to the bankruptcy filing
Current Balance	Zero balance
Scheduled Monthly Payment Amount	Zero
Account Past Due	Zero
Date of Account Information	Current month's date – discontinue further reporting

Thus, when a bankruptcy court issues a discharge, both the regulatory guidance and Metro-2 make clear that the balance due subject to the discharge in bankruptcy must be listed as having a zero balance. While courts have not concluded uniformly that a failure to do so is an automatic violation of the discharge injunction, at a minimum it may open the door to costly litigation.[58]

A question remains as to whether the reporting of additional information regarding the loan, such as post-discharge payments, violates the FCRA if the reporting lists the debt as discharged with a zero balance. The challenges Furnishers face arise from the limited set of fields afforded through e-OSCAR and the codes provided by Metro-2 that do not necessarily capture every single possible scenario in consumer bankruptcies. Nevertheless, when a consumer continues or resumes payments on an obligation discharged in bankruptcy, a creditor may report delinquencies subsequent to the bankruptcy, so long as the information is accurate, complete, updated and otherwise complies with FCRA.[59]

Multiple courts have held that a creditor does not violate the FCRA by failing to report that a debtor has remained current on his or her obligation post-discharge, so long as the creditor reports that the debt is subject to the discharge and has a zero balance.[60] If the consumer surrenders the collateral during the bankruptcy case, however, some courts have found a FRCA violation

54. Pursuant to the transfer of authority noted *supra* at note 36, this guidance was withdrawn by the FTC in 2010 when rulemaking power under the FCRA was transferred to the CFPB. *See* Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 76 Fed. Reg. 44462 – 01 (July 26, 2011). The CFPB has not yet provided guidance on this issue. *See* 12 CFR §§ 1022.1, *et seq*. Accordingly, the FTC's guidance remains the last word on this issue from the regulatory side and courts still regularly rely on it. *See* Dixon v. Green Tree Servicing, LLC, No. 2:13-CV-227-PPS, 2015 WL 2227741 (N.D.Ind. May 11, 2015).

55. McKorkle, FTC Informal Staff Opinion Letter, June 3, 1999.

56. *See* Foster, FTC Informal Staff Opinion Letter, Feb. 15, 2000.

57. *See generally* Credit Reporting Resource Guide (CDIA 2015). As noted above, the charts, references to Metro-2, and the *(Continued in next column)*

57. *(Continued from previous column)*

CDIA Manual in this article are the authors' own interpretation, and should not be a substitute for any readers' own review of the Metro-2 codes, the CDIA Manual, and obligations under the FCRA, including review by independent counsel or trained credit reporting professionals.

58. See also Radney v. Bayview Loan Servicing, LLC, No. 15-CV-9380, 2016 WL 3551677 (N.D.Ill. June 30, 2016)) ("The parties' disagreement over this section turns on whether including the original scheduled payment amounts for the months post-discharge and a statement that 'No Data' is provided for the "Actual Amount Paid" is inaccurate reporting. At this stage in determining the sufficiency of the pleadings, Plaintiff has sufficiently pled that this depiction of his mortgage may have been inaccurate and that failure to investigate his dispute constituted a violation of the FCRA.").

59. Foster, FTC Informal Staff Opinion Letter, Feb. 15, 2000.

60. *See, e.g.*: Schueller v. Wells Fargo & Co., No. 13-2057, 559 F. App'x 733, 2014 WL 2119208 (10th Cir.(N.M.) May 22, 2014); Dixon v. Green Tree Servicing, LLC, No. 2:13-CV-227-PPS, 2015 WL 2227741 (N.D.Ind. May 11, 2015); Horsch v. Wells Fargo Home Mortgage, 94 F. Supp.3d 665 (E.D.Pa. 2015); Groff v. Wells Fargo Home Mortgage, Inc., 108 F. Supp.3d 537 (E.D.Mich. 2015).

where the Furnisher reported the past due balance post-discharge in order to "create the false impression that [the borrower] was continuing to make payments years after the debt was discharged."[61]

d. Discharge Injunction Considerations

i. The Effect of the Discharge

As noted, the Bankruptcy Code section 524 discharge does not eliminate the debt, only the debtor's personal liability for it.[62] If, however, a consumer resumes payments post-bankruptcy, a Furnisher may report delinquencies subsequent to the bankruptcy so long as the information is accurate.[63]

A Chapter 7 discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived."[64] A discharged debtor has a remedy of contempt for a violation of a discharge injunction. Civil contempt remedies typically include a debtor's actual damages, including attorneys' fees and costs, and possibly exemplary damages.

ii. Navigating a Failure to Correct Inaccurate Information under FCRA and the Bankruptcy Code

Case law is developing as to whether furnishing consumer information on bankrupt accounts without any affirmative action to collect the debt violates the Bankruptcy Code discharge injunction at 11 U.S.C. section 524.[65] In the context of claims for post-discharge credit reporting, courts have applied three analyses to reach two different conclusions, as to: (1) whether inaction can constitute action; (2) whether the court should consider the subjective intent of the creditor; and (3) whether the court can infer intent from knowledge.[66] Courts finding no duty to correct reporting post-bankruptcy believe that a creditor, through inaction, cannot violate the discharge injunction.[67] On the other hand, some courts have stated that a willful failure to correct a credit report can constitute a violation of the discharge injunction.[68]

Some cases have held that a failure to update a report, thereby continuing to report a discharged debt as still owing, without other acts to collect the debt, does not violate the discharge injunction because a creditor is under no obligation under the Bankruptcy Code to change the way it reports the status of the loan.[69] Other courts have held that failure to update or correct credit reports post-bankruptcy can constitute "debt collection" that violates the section 524 discharge injunction.[70] Most courts, however, have held that furnishing consumer

61. Jackson v. Experian Info. Sols., Inc., No. 15 C 11140, 2016 WL 2910027 (N.D.Ill. May 19, 2016).

62. *See*: *supra* note 11; *In re* Perry, No. 1:09-BK-11476-GM, 540 B.R. 710, 2015 WL 7188369 (Bankr.C.D.Cal. Nov. 13, 2015)); Vogt v. Dynamic Recovery Services (*In re* Vogt), No. 94-22171 RJB, 257 B.R. 65, 37 Bankr. Ct. Dec. 42, 5 Colo. Bankr. Ct. Rep. 57, 2000 WL 1922307 (Bankr.D.Colo. Dec. 6, 2000); 11 U.S.C. § 524(f) ("Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.").

63. *See*: Foster, FTC Informal Staff Opinion Letter (Feb. 15, 2000); Dixon v. Greentree Servicing, LLC, No. 2:13-CV-227-PPS, 2015 WL 2227741 (N.D.Ind. May 11, 2015) (no willful violation of FCRA to fail to report post-discharge payments received out of concern for violating the discharge injunction); Groff v. Wells Fargo Home Mortg., Inc., 108 F. Supp.3d 537 (E.D.Mich. 2015) ("Moreover, as the *Horsch* court observed, any report of payments voluntarily made by the Groffs as relating to the discharged mortgage loan would suggest to anyone viewing the plaintiff's credit report that the bank was engaged in exactly the conduct prohibited by the bankruptcy discharge – collecting or attempting to collect money from Groff to satisfy a previously discharged debt. That reporting would itself have been inaccurate and false, because it would not accurately and completely reflect the truth that the plaintiff's debt had been extinguished"); Schueller v. Wells Fargo & Co., No. 13-2057, 559 F. App'x 733, 2014 WL 2119208 (10th Cir.(N.M.) May 22, 2014) ("[Debtor] says the credit report should not have reflected that his account was closed and had a zero balance due, and should have included the fact that he made payments after November 1. Wells Fargo responds that it would have been inaccurate and misleading to report that Mr. Schueller's loan balance remained outstanding; thus, it reported that the account was closed and had a zero balance due. In addition, Mr. Schueller's credit reports reflected that the debt was discharged in bankruptcy, *see, e.g.,* R. Vol. 1 at 83, thus alerting any potential creditors that only Mr. Schueller's personal liability had been discharged…Mr. Schueller has cited no authority requiring Wells Fargo to report his post-bankruptcy mortgage payments. Under these circumstances, we conclude that Mr. Schueller has not carried his burden of showing that the information Wells Fargo furnished was inaccurate or incomplete, nor has he shown that the information about his home loan debt and bankruptcy was materially misleading."); Horsch v. Wells Fargo, 94 F. Supp.3d 665 (E.D.Pa. 2015).

64. 11 U.S.C. § 524(a)(2).

65. *See, e.g.*, Young & McIntyrea, *The Impact of BAPCPA-An Overview*, 63 Consumer Fin. L.Q. Rep. 32 (2009) (*supra* note 6).

66. *See, e.g.*, Stevens & Szygenda, *Post-Bankruptcy Credit Reporting: What Should Be Done?*, 27 No. 6 Banking & Fin. Services Pol'y Rep. 1 (June 2008) ("Consistent with the plain meaning of 'act,' the *In re Mahoney* and *In re Mogg* courts have concluded that a failure to update a credit report could not on its own constitute a violation of the discharge injunction because a creditor through inaction could not violate the injunction"). *See also infra* note 67.

67. *In re* Mahoney, No. 01-54158, 368 B.R. 579, 57 Collier Bankr. Cas. 2d 1673, 2007 WL 1217851 (Bankr.W.D.Tex. Apr. 23, 2007); *In re* Mogg, No. 05-34066, 2007 WL 2608501 (Bankr.S.D.Ill. Sep. 05, 2007).

68. *In re* Haynes, No. 14 CV 1474 VB, 2015 WL 862061 (S.D.N.Y. Mar. 2, 2015) ("Plaintiffs do not assert claims under the FCRA; rather, they allege defendants violated the discharge injunction. To prove their claims, plaintiffs need only show defendants attempted to collect debts by not informing credit reporting agencies those debts had been discharged. *See*: *In re* McKenzie-Gilyard, No. 1-05-14317-ESS, 388 B.R. 474, 2007 WL 5209389 (Bankr.E.D.N.Y. Dec. 11, 2007)"); 4 COLLIER ON BANKRUPTCY, ¶ 524.02[2][b] (16th ed. 2014) (the discharge injunction "bars any act to collect a discharged debt….The failure to update a credit report to show that a debt has been discharged is [therefore] a violation of the discharge injunction if shown to be an attempt to collect the debt."). Plaintiffs do *not* need to prove that the defendants failed to comply with the FCRA. *See, e.g.*: *In re* Torres, No. 04-13404(RDD), 367 B.R. 478, 2007 WL 1300955 (Bankr.S.D.N.Y. May 3, 2007) ("[N]oncompliance with the FCRA is not necessary for the plaintiffs to state a claim under Bankruptcy Code section 524(a)."); *Matter of* Sommersdorf, No. 1-91-03272, 139 B.R. 700, Bankr. L. Rep. P 74593, 1992 WL 87885 (Bankr.S.D.Ohio May 24, 1991).

69. *See, e.g.*: Vogt v. Dynamic Recovery Services (*In re* Vogt), No. 94-22171 RJB, 257 B.R. 65, 37 Bankr. Ct. Dec. 42, 5 Colo. Bankr. Ct. Rep. 57, 2000 WL 1922307 (Bankr.D.Colo. Dec. 6, 2000) ("[t]he creditor was under no obligation under the Bankruptcy Code to change the way it reported the status of the loan."); Irby v. Fashion Bug (*In re* Irby), No. 04-3430, 337 B.R. 293, 2005 WL 3729400 (Bankr.N.D.Ohio Sep. 29, 2005); *In re* Bruno, No. 02-12988 K, 356 B.R. 89, 57 Collier Bankr. Cas. 2d 18, 2006 WL 3086307 (Bankr.W.D.N.Y. Oct. 31, 2006); Davis v. Farm Bureau Bank, No. CIV.A. SA-07-CA-967, 2008 WL 1924247 (W.D.Tex. Apr. 30, 2008); *In re* Dendy, No. C/A00-05338-JW, 396 B.R. 171, 2008 WL 4775735 (Bankr.D.S.C. May 5, 2008). *See generally* Young & McIntyre, supra note 65.

70. *In re* Puller, No. 05-1881, 57 Collier Bankr. Cas. 2d 290, 2007 WL 1811209 (Bankr.N.D.W.Va. June 20, 2007) ("the only issue is whether Credit Collections complied with the terms of the discharge injunction by not immediately correcting the information that it supplied to credit reporting agencies nearly one-year before the Debtor filed her bankruptcy petition"). In *Puller,* the Court stated, "[T]he court is not persuaded by the reasoning of *Smith*, *Bruno*, or *Irby*, *supra*, to the extent that those cases hold that, under no circumstances, can a failure to update a debtor's account with a credit reporting agency be subject to a cause of action for a violation of the discharge injunction"). *See also*: *In re* Torres, No. 04-13404(RDD), 367 B.R. 478, 2007 WL 1300955 (Bankr.S.D.N.Y. May 3, 2007) ("The essence of the plaintiffs' allegations is that Chase has continued to lay a trap for them until the eventual day that they need an accurate credit report."); *In re* Mahoney, No. 01-54158, 368 B.R. 579, 57 Collier Bankr. Cas. 2d 1673, 2007 WL 1217851 (Bankr.W.D.Tex. Apr. 23, 2007) ("Once the creditor knew why the debtor needed a change, and reacted opportunistically, *that act* could conceivably constitute a violation of the discharge. In this regard, then, *Vogt* probably ought not be treated as good law.").

credit information can be collection activity -- at least under the FDCPA, because if a debt collector who has received a dispute reports the account to the CRAs without first verifying the debt "the report to the CRAs is collection activity in violation of the FDCPA."[71] The FTC has suggested that this can be collection activity.[72] Stated another way, the "sheer number of such cases may suggest that some creditors are systematically taking such action in an effort to diminish the value of a discharge in bankruptcy."[73]

In *In re McKenzie-Gilyard*,[74] the court discussed how credit reporting interacts with the bankruptcy discharge injunction:

> As described above, the failure of a furnisher of credit information to update a consumer's credit report may not, standing alone, violate the discharge injunction….But the willful failure of a furnisher of credit information to update or correct the information provided to a credit reporting agency may give rise to a claim for a violation of the discharge injunction. Several courts have recently considered what a plaintiff must plead and prove in order to establish the willfulness element of such a claim….That is, a creditor's intentional failure to update a credit report with the hope that this will lead the debtor to repay the debt may amount to contempt of the discharge injunction.[75]

iii. A Framework for Analysis

As indicated above, courts have struggled with whether such claims fall within the exclusive province of the bankruptcy court. A sensible approach seems to recognize the difference between a section 1681s2-a claim and a section 1681s2-b claim under the FCRA.

A post-discharge failure to update credit reporting to report a debt as discharged, for which the FCRA affords no private right of action, ought to fall within the province of the bankruptcy court if the activity suggests an attempt to collect on a debt. A failure to re-investigate a post-discharge dispute by the consumer, for which FCRA affords a private right of action, should fall within the realm of the civil courts.[76]

This approach evaluates the issue within the context of whether a claim falls within the bankruptcy court's exclusive jurisdiction,[77] but case law continues to develop.[78] While section 1681s2-a provides no private right of action under the FCRA, a court could find that the failure to update violates the bankruptcy discharge injunction because it constitutes collection activity, even though there would be no private right of action under the FCRA. Where a consumer disputes through a CRA the accuracy of the information furnished, however, the consumer has a private right of action under the FCRA and there is no need for a bankruptcy court to exercise its jurisdiction.

Some courts have so held. For example, Judge Illston recently rejected the creditor's argument in *Hanks v. Talbott Classic National Bank*,[79] holding that such a FCRA claim was not precluded by the Bankruptcy Code as the FCRA deals with the accuracy of credit reporting while the discharge injunction deals with collection activity.

3. Chapter 13

In contrast to the typical short duration of a Chapter 7 case (approximately six-to-eight months), Chapter 13 cases can last for up to five years, although a majority of the cases never reach completion -- they are either dismissed or converted to a Chapter 7 case prior to confirmation of a plan or prior to plan completion and discharge. The effect of a dismissal of a Chapter 13 case vacates all orders and reinstates all property of the estate as if the case was not filed.[80]

In a Chapter 13 reorganization case there are three basic circumstances where account information could change based upon a certain bankruptcy event, namely: (1) furnishing information prior to plan confirmation; (2) furnishing information after plan confirmation but pre-discharge; and (3) furnishing information post-discharge.

71. *See, e.g.*: Moscona v. California Business Bureau, Inc., No. 10-CV-1468 BEN CAB, 2011 WL 5085522 (S.D.Cal. Oct. 25, 2011)); Purnell v. Arrow Financial Services, No. 07-1903, 303 F. App'x 297, 2008 Fed. Appx. 0761N, 2008 WL 5235827 (6th Cir. (Mich.) Dec. 16, 2008) (assuming, without deciding that the debt collector's reporting of a debt to a credit reporting agency after receiving, but not responding to, a request for verification constituted "collection activity"); Becker v. Client Bank, N.A., Inc., No. 2:10-CV-02799 LKK, 2011 WL 1103439 (E.D.Cal. Mar. 22, 2011) ("The undersigned notes that the alleged 'debt collection' activities plaintiff ascribes to defendants appear to include telling credit reporting agencies of his past due payments (FAC at ¶ 309), and by continuing to attempt to collect on his debts in violation of the Forbearance Agreement. (*E.g.*, Oppo. at 24.) Defendants have not cited cases stating that either of these allegations cannot sufficiently support a debt collection claim as a matter of law."); Quale v. Unifund CCR Partners, 682 F. Supp.2d 1274 (S.D.Ala. 2010); Edeh v. Midland Credit Mgmt., Inc., 748 F. Supp.2d 1030 (D.Minn. 2010); Semper v. JBC Legal Group, No. C04-2240L, 2005 WL 2172377 (W.D.Wash. Sep. 6, 2005)); *but see* Breed v. Nationwide Ins. Co., No. CIV A 305CV-547-H, 2007 WL 1408212 (W.D.Ky. May 8, 2007); Jackson v. Genesys Credit Mgmt., No. 06-61500-CIV, 2007 WL 2113626 (S.D.Fla. July 23, 2007).

72. John F. LeFevre, FTC Informal Staff Letter, Dec. 23, 1997 ("[W]e believe that reporting a charged-off debt to a consumer reporting agency…constitutes collection activity….").

73. *See, e.g.*: Norman v. Applied Card Sys. (*In re* Norman), No. 04-11682, 2006 WL 2818814 (Bankr.M.D.Ala. Sep. 29, 2006); *In re* McKenzie-Gilyard, No. 1-05-14317-ESS, 388 B.R. 474, 2007 WL 5209389 (Bankr.E.D.N.Y. Dec. 11, 2007)); *see also In re:* Small, No. 08-52114, 2011 WL 1868839 (Bankr.E.D.Ky. May 13, 2011) (creditor's failure to update such information, standing alone, is not a violation of discharge injunction").

74. *In re* McKenzie-Gilyard, No. 1-05-14317-ESS, 388 B.R. 474, 2007 WL 5209389 (Bankr.E.D.N.Y. Dec. 11, 2007).

75. *Id.*

76. *Cf.* NCLC, Fair Credit Reporting § 4.4.6.10.2 (2015) (arguing that improper re-investigation under FCRA should give rise to a violation of the discharge injunction).

77. A bankruptcy court has "exclusive jurisdiction of all cases under title 11" and non-exclusive jurisdiction over cases "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a),(b). Actions to enforce the automatic stay and the discharge injunction are within the exclusive jurisdiction of the bankruptcy court. *See*: E. Equip. & Servs. Corp. v. Factory Point Nat. Bank, Bennington, 236 F.3d 117 (2nd Cir. (Vt.) 2001) (automatic stay); Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186 (9th Cir. (Cal.) 2011) (discharge injunction).

78. Young & McIntyre, *supra* note 65.

79. 2012 WL 3236323 (N.D. Cal. 2012). *See also*: Montgomery v. Wells Fargo Bank, N.A., No. C12-3895 TEH, 2012 WL 5497950 (N.D.Cal. Nov. 13, 2012) ("Disputes regarding the completeness and accuracy of credit reports do not involve inquiries into whether the underlying debt may be collected; rather, they involve inquiries about how the debt has been reported. For this reason, Courts have held that such claims are not precluded by the Bankruptcy Code."); Kasim v. Equifax Info. Serv., No. CIV.08-627-HA, 2008 WL 4858267 (D.Or. Nov. 10, 2008)); Duke v. Trans Union LLC, No. CIV. 08-520-KI, 2008 WL 4319982 (D.Or. Sep. 16, 2008).

80. *See* 11 U.S.C. § 349(b).

a. Furnishing Information Prior to Plan Confirmation

Neither the FCRA nor the Bankruptcy Code explain how a Furnisher should report information with respect to an account under a Chapter 13 wage earner plan prior to confirmation, except that the Furnisher must report that the consumer has filed a Chapter 13 bankruptcy petition.[81] A Furnisher can report[82] the following with respect to certain fields:

b. Furnishing Information After Plan Confirmation, Pre-Discharge

After Chapter 13 plan confirmation, the current balance on an account should be reported as the Chapter 13 plan balance, the amount past due should be reported as zero, and the scheduled monthly payment amount should be the Chapter 13 plan monthly payment amount.[83] A Furnisher can report the following with respect to certain fields:

Field	Information
CII	D (meaning the filing of a Chapter 13 case)
Account Status	Status at the time of the bankruptcy filing
Payment History	D (meaning that no payment history is available this month) followed by the history reported prior to the bankruptcy filing
Current Balance	Contractual outstanding balance amount
Scheduled Monthly Payment Amount	Contractual monthly payment amount
Account Past Due	Contractual amount past due
Date of Account Information	Current month's date

81. *See infra* note 82.

82. *See generally* Credit Reporting Resource Guide (CDIA 2015). As noted previously, the charts, references to Metro-2, and the CDIA Manual in this article are the authors' own interpretation, and should not be a substitute for a reader's own review of the Metro-2 codes, the CDIA Manual, and obligations under the FCRA, including review by independent counsel or trained credit reporting professionals.

83. *See generally* Credit Reporting Resource Guide (CDIA 2015). As noted, the charts, references to Metro-2, and the CDIA Manual in this article are the authors' own interpretation, and should not be a substitute for any readers' own review of the Metro-2 codes, the CDIA Manual, and obligations under the FCRA by independent counsel or trained credit reporting professionals.

Field	Information
CII	D (meaning the filing of a Chapter 13 case)
Account Status	Status at the time of the bankruptcy filing
Payment History	D (meaning that no payment history is available this month) followed by the history reported prior to the bankruptcy filing
Current Balance	Balance set forth in the confirmed Chapter 13 plan (which should decline as paments are made)[84]
Scheduled Monthly Payment Amount	Monthly payment amount set forth in the confirmed Chapter 13 plan[85]
Account Past Due	Zero[86]
Date of Account Information	Current month's date

c. Breach of Chapter 13 Plan/Contempt Considerations

A confirmed Chapter 13 bankruptcy plan is binding upon the debtor and all creditors.[87] Accordingly, when a debtor modifies the terms of the debt obligation in a Chapter 13 plan, the debtor may argue that a creditor fails to accurately report the debt under the FCRA by reporting the pre-confirmation debt obligations, even if the creditor reports that the debtor is in a Chapter 13 bankruptcy proceeding.

Caselaw is rapidly developing in this area, with many courts – particularly in the Northern District of California – holding that, as a matter of law, reporting historically accurate balances during the pendency of a bankruptcy cannot be inaccurate or incomplete under the FCRA.[88] However, reporting delinquent payments during bankruptcy may be misleading when the reporting contravenes traditional accuracy rules under the FRCA, such as failing to show that a charge is disputed or part of a bankruptcy.[89] For example, in *Blakeney*

84. This may be difficult. With respect to unsecured claims (*i.e.*, credit card accounts) a plan typically does not identify what amount will be paid -- at best, it may provide a percentage the plan proposes to pay unsecured creditors. With respect to claims that can be bifurcated into secured and unsecured portions (*i.e.*, some auto loans) the plan may provide for the amount to be paid on the secured portion of the claim, but it may be difficult to determine the unsecured portion. Additionally, a confirmed plan can be modified later, so these values may change during the life of a Chapter 13 case.

85. Again, this will often be impossible to determine, especially with respect to unsecured claims. Typically, unsecured creditors do not receive a distribution under a plan until all administrative claims and secured claims are paid in full. Once these claims are paid and funds are available to disburse to unsecured creditors, the monthly payment amount will not be uniform.

86. This may be inaccurate in that there could be a default in Chapter 13 plan payments by the debtor.

87. *See*: 11 U.S.C. § 1327(a); United Student Aid Funds, Inc. v. Espinosa, No. 08-1134, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158, 78 USLW 4207, 63 Collier Bankr. Cas. 2d 428, 76 Fed. R. Serv. 3d 364, 52 Bankr. Ct. Dec. 254, Bankr. L. Rep. P 81716, 10 Cal. Daily Op. Serv. 3559, 2010 Daily Journal D.A.R. 4307, 22 Fla. L. Weekly Fed. S 173, 2010 WL 1027825 (U.S. Mar. 23, 2010).

88. Harris v. Experian Info. Sols., Inc., No. 16-CV-02162-BLF, 2017 WL 1354778, at *7 (N.D. Cal. Apr. 13, 2017); Tanimura v. Experian Info. Sols., Inc., No. 16-CV-02224-BLF, 2017 WL 1354767, at *7 (N.D. Cal. Apr. 13, 2017); Rodriguez v. Experian Info. Sols., Inc., No. 16-CV-04668-BLF, 2017 WL 1354764, at *7 (N.D. Cal. Apr. 13, 2017); Green-Browning v. Experian Info. Sols., Inc., No. 16-CV-04638-BLF, 2017 WL 1354765, at *7 (N.D. Cal. Apr. 13, 2017); Cristobal v. Equifax, Inc., No. 16-CV-06329-JST, 2017 WL 1489274, at *3 (N.D. Cal. Apr. 26, 2017); Mensah v. Experian Info. Sols., Inc., No. 16-CV-05689-WHO, 2017 WL 1246892, at *7 (N.D. Cal. Apr. 5, 2017); Ervin-Andrews v. Experian Info. Sols., Inc., No. 16-CV-03330-BLF, 2017 WL 1316890, at *5 (N.D. Cal. Apr. 10, 2017); Blakeney v. Experian Info. Sols., Inc., 2016 WL 4270244, at *5 (N.D. Cal. 2016) ("However, courts in this district have consistently held that it is not misleading or inaccurate to report delinquent debts that have not been discharged."); Dyson v. Equifax, Inc., No. 16-cv-03327-BLF, 2017 WL 1133517, at *4 (N.D. Cal. Mar. 27, 2017); Kragen v. Experian Info. Sols., Inc., No. 16-CV-04644-BLF, 2017 WL 1092378 (N.D.Cal. Mar. 23, 2017); Sandoval v. Experian Info. Sols., Inc., No. 16-CV-03344-BLF, 2017 WL 1092361 (N.D.Cal. Mar. 23, 2017); Smith v. Experian Info. Sols., Inc., No. 16-CV-04653-BLF, 2017 WL 1092377 (N.D.Cal. Mar. 23, 2017); Rara v. Experian Info. Sols., Inc., No. 16-CV-06376-PJH, at *4 (N.D. Cal. Mar. 20, 2017); Mamisay v. Experian Info. Sols., Inc., No. 16-CV-05684-YGR, 2017 WL 1065170 (N.D.Cal. Mar. 21, 2017); Ramos v. Experian Info. Sols., Inc., No. 16-CV-06375-PJH, 2017 WL 1047019 (N.D.Cal. Mar. 20, 2017); Olsen v. Experian Info. Sols., Inc.,
(Continued in next column)

88. *(Continued from previous column)*

No. 16-CV-05707-PJH, 2017 WL 1046962 (N.D.Cal. Mar. 20, 2017)); Basconcello v. Experian Info. Sols., Inc., No. 16-CV-06307-PJH, 2017 WL 1046969 (N.D.Cal. Mar. 20, 2017); Burrows v. Experian Info. Sols., Inc., No. 16-CV-06356-PJH, 2017 WL 1046973 (N.D.Cal. Mar. 20, 2017); Anderson v. Experian Info. Sols., Inc., No. 16-CV-03328-BLF, 2017 WL 914394 (N.D.Cal. Mar. 8, 2017); Keller v. Experian Info. Sols., Inc., No. 16-CV-04643-LHK, 2017 WL 130285 (N.D.Cal. Jan. 13, 2017) (dismissing plaintiff's FCRA claim with prejudice to the extent premised on the theory that furnishing information inconsistent with a confirmed Chapter 13 plan violates the FCRA, and holding "the legal status of a debt does not change until the debtor is discharged from bankruptcy.") (citing In Jaras v. Experian Info. Sols., Inc., No. 16-CV-03336-LHK, 2016 WL 7337540 (N.D.Cal. Dec. 19, 2016) (in turn holding "as a matter of law, it is not misleading or inaccurate to report delinquent debts during the pendency of a bankruptcy proceeding prior to the discharge of the debts.")); Blakeney v. Experian Information Solutions, No. 15-CV-05544-LHK, 2016 WL 1535085, at *1 – 2 (N.D. Cal. April 15, 2016); Abbot v. Experian Information Solutions, Inc., No. 15-CV-05541-LHK, 2016 WL 1365950, at *4 (N.D. Cal. April 6, 2016).

89. *Cristobal*, No. 16-CV-06329-JST, 2017 WL 1489274 (*see supra* note 88); Blakeney v. Experian Information Solutions, No. 15-CV-05544-LHK, 2016 WL 4270244 (N.D.Cal. Aug. 15, 2016), *citing* Mortimer v. Bank of Am., N.A., Mortimer v. JP Morgan Chase Bank, Nat. Ass'n, No. C 12-1936 CW, 2012 WL 3155563 (N.D.Cal. Aug. 02, 2012) (finding that reporting delinquencies during the pendency of bankruptcy is not misleading so long as the creditor reports that the account was discharged through bankruptcy and the outstanding balance is zero); Venugopal v. Digital Fed. Credit Union, Venugopal v. Digital Federal Credit Union, No. 5:12-CV-06067 EJD, 2013 WL 1283436 (N.D.Cal. Mar. 27, 2013) (holding that reporting of historically accurate debt may violate the FCRA when
(Continued on next page)

v. Experian Information Solutions[90] and *Abbot v. Experian Information Solutions, Inc*.,[91] the plaintiffs argued that the credit reporting was inconsistent with the payment terms of the Chapter 13 plan, but failed to set forth the terms of the plan and/or why the credit reporting was inconsistent with the plan. Accordingly, the court granted the respective defendants' motions to dismiss. Further, in *Blakeney v. Experian Information Solutions II*[92] the court found that, despite Chapter 13 plan confirmation, it was not misleading or inaccurate for the creditor to report delinquent debts because those debts had yet to be discharged.[93]

The Bankruptcy Code does not confer any specific right or expressly authorize any action for enforcement of any provisions relating to Chapter 13 plan confirmation. Some courts, viewing a confirmed plan as a contract between the debtor and the creditor, will allow a debtor to bring a claim under non-bankruptcy law to enforce an alleged violation of the plan.[94] However, other bankruptcy courts have held that the only remedy available to a debtor for the Furnisher's failure to abide by the terms of a confirmed Chapter 13 plan would be to file a motion seeking contempt in the underlying bankruptcy court pursuant to 11 U.S.C. section 105 and Bankruptcy Rule 9020.[95] In *In re Luedtke*,[96] for example, the bankruptcy court concluded that the reporting of the consumer's historical delinquency despite the consumer being current under the of the terms of his confirmed bankruptcy plan rendered the creditor in contempt of court for violating the confirmation order.[97]

d. Furnishing Information Post-Discharge

A Furnisher can report[98] the following with respect to certain fields:

Field	Information for Claim Paid in Full Under Plain	Information for Mortgage Claim
CII	H (meaning the consumer completed the plan and received a Chapter 13 discharge)	Q (which removes the previously reported bankruptcy indicator)
Account Status	Status at the time of the bankruptcy filing	Contractual status that applies
Payment History	D (meaning that no payment history is available this month) followed by the history prior to the bankruptcy filing	D (meaning that no payment history is available this month) followed by the history prior to the bankruptcy filing
Current Balance	Zero	Contractual outstanding balance amount
Scheduled Monthly Payment Amount	Zero	Contractual monthly payment amount
Account Past Due	Zero	Contractual amount past due
Date of Account Information	Current month's date – discontinue further reporting	Current month's date

89. *(Continued from previous page)*

the reporting did not include that the debt was discharged in bankruptcy or that the debt was in dispute); *accord* Abbot v. Experian Information Solutions, Inc., Abbot v. Experian Information Solutions, Inc., No. 15-CV-05541-LHK, 179 F. Supp.3d 940, 2016 WL 1365950 (N.D.Cal. Apr. 6, 2016).

90. *Blakeney*, No. 15-CV-05544-LHK, 2016 WL 4270244 at *1 – 2 (*see supra* note 89).

91. *Abbot*, 179 F. Supp.3d 940 at *4 (*see supra* note 89).

92. *Blakeney*, No. 15-CV-05544-LHK, 2016 WL 4270244 (*see supra* note 89).

93. *Id.* at *6.

94. *In re* Myles, No. 06-11116, 395 B.R. 599, 2008 WL 4707550 (Bankr.M.D.La. Oct. 15, 2008) ("the plaintiffs still have contract claims for violations of their terms because the confirmed plans are binding contracts").

95. *In re* Keller, No. 12-22391-B-13, 75 Collier Bankr. Cas. 2d 1139, 2016 WL 3004488 (Bankr.E.D.Cal. May 17, 2016), at *5 ("A violation of the confirmation order invokes § 1327(a) and may be remedied by a contempt order under § 105."); *In re* Rodriguez, No. 02-10605, 421 B.R. 356, 2009 WL 4823999 (Bankr.S.D.Tex. Dec. 09, 2009) ("the breach of contract theory is not independent of the breach of the confirmed plan theory. [citation omitted]. The breach of contract theory cannot stand as a separate cause of action").

96. No. 02-35082-SVK, 2008 WL 2952530, at *6 (Bankr.E.D.Wis. July 31, 2008) ("When the Credit Union reports that the Debtor owes amounts according to the original loan, those reports are not accurate, and violate the confirmation order").

97. *Id.*

98. *See generally* Credit Reporting Resource Guide (CDIA 2015).

e. Chapter 13 Discharge Considerations

i. Non-Mortgage Debt

A Chapter 13 discharge results in a discharge of the debtor's liability for all debts, as provided by the confirmed Chapter 13 plan, with some limited exceptions.[99] Unsecured claims, including credit card debt, will be provided for in a Chapter 13 plan and paid (to the extent the plan calls for a dividend to unsecured creditors). Therefore, any remaining balance is discharged upon plan completion. Similarly, bifurcated claims, including auto loan debt, typically will be provided for in a Chapter 13 plan and the secured and unsecured portions paid -- any remaining balance is similarly discharged upon plan completion. The discharge provisions of section 524(a)(2) are applicable to Chapter 13 cases.

ii. Mortgage Debt

Under Bankruptcy Code sections 1322(b)(2), 1322(b)(5) and 1328(a)(1), mortgage debt, especially where that debt is secured by the debtor's principal residence, is not subject to the discharge in a Chapter 13 proceeding.[100] That having been said, the provisions of Bankruptcy Code section 524(a)(2) are implicated to a limited extent by section 524(i), which requires that a creditor apply payments in accordance with the terms of a confirmed and completed Chapter 13 plan.[101]

The Bankruptcy Code does not give any guidance on the related credit reporting issues under the FCRA. A duty to correct a credit report, however, may be implied by both the Bankruptcy Code and by the FCRA. As to the former, as noted, section 524(i) requires a creditor to credit payments received, lest the failure to do so violate the discharge injunction. However, by its own terms, section 524(i) does not come into play unless and until the plan has been completed.[102] Thus, since section 524(i) requires crediting payments at the completion of the plan, section 524(i) is consistent with an obligation to update the CRAs as to the payments received.[103]

D. The Problem of Pre-Bankruptcy Sale of Debt

Debts sold by creditors to debt buyers can create particular problems for the parties if the debtor files bankruptcy after the sale of the debt.[104] Some creditors/debt sellers allegedly would not update consumer reports after bankruptcy,[105] and others claimed that they were not able to do so.[106] Despite the urging by Furnishers to clarify the ambiguities regarding a debt seller's obligations with respect to accounts that later were the subject of the debtor's bankruptcy, the Inter-Agency Rule[107] does not offer clear guidelines for debt sellers' obligations once a sold debt went through bankruptcy. The Inter-Agency Rule states:

> [A]lthough most furnishers will, as appropriate, update information provided to CRAs at the time a charge-off is paid in full or a settlement is reached after charge-off, many furnishers do not report interim changes based on a payment schedule agreed to as part of recovery efforts, nor do they report a revised status based on bankruptcy proceedings that take place after a charge-off. This commenter stated that the final rules should make clear that furnishers do not have a duty to report changes to account status once regular reporting ceases, provided that the data furnished was accurate at the time it was furnished. The Agencies expect that, to the extent that a consumer cures a failure to abide by the terms of the account

99. 11 U.S.C. § 1328(a). *See also supra* notes 11 & 62.

100. In the context of a case where the debtor surrenders real property collateral under the terms of a plan and completes the plan, receiving a Chapter 13 discharge, a mortgage creditor who fails to report a zero balance and fails to correct its reporting after receiving a credit dispute may be subject to a FCRA claim. Twomey v. Ocwen Loan Servicing, LLC, 2016 WL 4429895, at *4 (N.D. Ill. 2016).

101. 13 U.S.C. § 524(i) provides:

> The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required under the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

102. The BAPCPA amendment appears to have been intended to force lenders to comply with the terms of the confirmed plan so that, upon plan completion, the claim will have been paid in full and the debtor will have a current loan and a fresh start. There is no legislative history, however, to support Congressional intent for section 524(i) because Congress held no hearings on the amendments. Congress may have intended to rectify a problem caused by certain lender practices. The consumer bar complained that some lenders applied plan payments first to attorneys' fees, inspection fees and other miscellaneous charges (which had not been approved by the bankruptcy court) instead of against the balance owed under the proof of claim. In those instances, the mortgage lender would still show a delinquency following completion of the plan and might attempt to collect the delinquency from the debtor upon discharge. Section 524(i) is believed to address that problem. However, by its own terms, section 524(i) does not come into play unless and until the plan has been completed. Upon plan completion, a creditor's application of trustee funds in a manner inconsistent with the terms of the plan is a violation of the consumer's Chapter 13 discharge. If the plan is not completed, the creditor can apply payments in any manner provided under its contract or applicable law. Under the plain language of section 524(i), the creditor is under no obligation to apply plan payments in accordance with the confirmed plan, unless and until the plan has been completed and the debtor is discharged. Prior to the entry of discharge, there can be no violation of the discharge injunction. *See generally* Resnick & Sommer, Collier Special Pamphlet: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 with Analysis and Commentary, at 5 – 6 (2005).

103. As noted *supra* at note 102, upon plan completion, a creditor's application of trustee funds in a manner inconsistent with the terms of the plan is a violation of the consumer's Chapter 13 discharge. If the plan is not completed, the creditor can apply payments in any manner provided under its contract or applicable law. In practice, if: (1) the creditor has filed an accurate proof of claim; (2) the plan is completed; and (3) the debtor has not defaulted on the monthly payment obligations, then upon plan completion the loan should either be current or the secured claim paid in full. Where the debtor paid arrears through the plan, the "plan" and the "contract" should at that point be in agreement with each other so that reporting from that point on should be identical. Where the debtor paid the secured claim (and any unsecured portion of the claim) through the plan (*i.e.*, an auto loan), any remaining balance owing upon completion of the plan is discharged and should be reported as such. If the plan is not completed or the debtor fails to make on-going monthly installments, then the creditor is under no obligation to apply payments in the manner set forth under the plan. As such, during the term of the plan, generally creditors will report consistent with what is contractually owed -- not necessarily what the plan provides.

104. *See*: National Consumer Law Center, Fair Debt Collection § 1.5.4.4 (2015); National Consumer Law Center, Fair Credit Reporting § 4.3.2.4.5 (2011).

105. Landgraff v. GEMB, No. CIV.A.06-1703, 2007 WL 1101277 (E.D.Pa. Apr. 10, 2007) (credit card issuer had policy of not updating accounts sold or transferred to reflect that account was included in bankruptcy, even when consumer disputed to CRA).

106. McKenzie-Gilyard v. HSBC Bank Nevada, No. 1-05-14317-ESS, 388 B.R. 474, 2007 WL 5209389 (Bankr.E.D.N.Y. Dec. 11, 2007) (HSBC argued that once it sold debtor's account, it no longer had the ability to update the tradeline with the CRAs).

107. *See supra* Part II.A.

> or relationship, a furnisher should, consistent with section I.(b)(4) of the guidelines, provide an update of the cured status to a CRA.[108]

Instead, as to the accurate reporting required by 15 U.S.C. section 1681s2-a, the Rule suggests that the duty to update regarding sold accounts post-bankruptcy falls on the CRAs, in part as a result of class action settlements,[109] not on Furnishers:

> The proposed exceptions related primarily to information with respect to which any consumer dispute would be more appropriately directed to the CRA, such as information derived from public records, which may be obtained directly from public sources [Footnote 32] and information about requests for consumer reports ("inquiries").[110]

The Rule's Footnote 32, however, appears to distinguish the obligation to report accurately under 15 U.S.C. section 1681s2-a and a Furnisher's obligation with respect to responding to a consumer's dispute funneled through a CRA:

> Footnote 32: The public records exception applies only to information derived by the CRA from public records. It would not exempt a consumer's dispute concerning the accuracy of a furnisher's reference to a particular account being included in bankruptcy, for example.[111]

This is particularly true where Furnishers have the ability to scrub accounts on which they report to the CRAs against public bankruptcy records.[112]

III. Conclusion

Given the increasing number of bankruptcy-related FCRA claims against Furnishers of consumer information to CRAs,[113] both Furnishers and courts need clear guidelines with regard to the duties to report accurate information as consumer debtors' accounts pass through a bankruptcy case and are ultimately subject to a discharge. Such guidance should be provided, lest Furnishers and courts be left on their own to navigate the complex waters between the FCRA and federal bankruptcy law, like Odysseus choosing between Scylla and Charybdis.

108. *See* Rule, *supra* note 22, at 31495.

109. *E.g.* Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1162 (9th Cir. 2013) ("As part of that settlement, Defendants agreed to implement procedures that would presume the discharge of certain pre-bankruptcy debts"); *see generally*, NCLC, Fair Credit Reporting § 4.3.2.4.1 (2015) ("As a result of class action settlements…all three major nationwide CRAs have agreed to revise their procedures to correct this problem.").

110. *See* Rule, *supra* note 22, at 31497.

111. *Id.*, at Footnote 32.

112. Miller v. Wells Fargo & Co., No. CIV.A. 3:05-CV-42-S, 2008 WL 793676 (W.D.Ky. Mar. 24, 2008) ("At the time of the Mendez bankruptcy filing, Wells Fargo utilized computer software to electronically search bankruptcy filings based on Social Security numbers. The software compared the Social Security numbers listed in the bankruptcy filings with the Social Security numbers associated with Wells Fargo accounts. If a match occurred, the computer system would automatically notify the credit reporting agencies each month of all Wells Fargo borrowers whose accounts were included in bankruptcy. Because Mr. Miller's Social Security number was detected by the software, Wells Fargo's software incorrectly reported to the credit reporting agencies in July and August 2002, that Mr. Miller's loan account was included in bankruptcy.").

113. *See supra* Part I.