The Document Speaks for Itself: Res Ipsa Loquitur in the Fair Credit Reporting Act

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ABSTRACT: The Fair Credit Reporting Act provides remedies for individuals who have been injured by a credit reporting agency's negligence. These negligence claims generally require showing that an agency has not followed reasonable procedures to ensure the maximum possible accuracy of the information they receive and distribute. However, many plaintiffs do not have access to the kinds of evidence necessary to bring such a claim and withstand summary judgment. Some courts have theorized the common law doctrine res ipsa loquitur—"the thing speaks for itself"—is an adequate remedy for this issue, allowing a jury to infer negligence based on circumstantial evidence. This Note argues that courts should recognize this doctrine in the Fair Credit Reporting Act context to sufficiently serve Congress's intent to protect consumers. Absent such recognition, Congress should amend the Fair Credit Reporting Act to explicitly permit jury inferences of negligence.

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INTRODUCTION

Imagine experiencing great excitement about finally buying your first house. You are looking to settle down, and you have a few houses in mind. Meanwhile, you apply for a mortgage. *There should be no issue*, you think; you make monthly payments on your credit card bills and your student loans, and you consider yourself fairly responsible with money. But unfortunately for you, the credit report your bank received incorrectly says you are delinquent on *several* of your bills and asserts your liability for a line of credit that does not belong to you.[1] Your application is summarily rejected. You can contact the credit reporting agency ("CRA") that compiled your report and request they review their information, but the damage is done.[2] Meanwhile, you have no way of knowing precisely what went wrong at the CRA to lead to the dissemination of inaccurate information.[3] What is your remedy?

Congress passed the Fair Credit Reporting Act ("FCRA") to protect consumer privacy interests from a growing credit reporting industry that

1. One survey of consumers found that at least a third of respondents had inaccuracies on their credit reports. *See* SYED EJAZ, CONSUMER REPS., A BROKEN SYSTEM: HOW THE CREDIT REPORTING SYSTEM FAILS CONSUMERS AND WHAT TO DO ABOUT IT 15 (2021), https://advocacy.consumerreports.org/wp-content/uploads/2021/06/A-Broken-System-How-the-Credit-Reporting-System-Fails-Consumers-and-What-to-Do-About-It.pdf [https://perma.cc/8U3V-YF36].

2. Denials of credit can be sufficient to show damages under the Fair Credit Reporting Act. *See, e.g.*, Sloane v. Equifax Info. Servs., LLC, 510 F.3d 495, 501 (4th Cir. 2007) (upholding a jury verdict that found a plaintiff suffered damages where she "attempted to secure lines of credit from a variety of financial institutions, only to be either denied outright or offered credit on less advantageous terms tha[n] she might have received absent Equifax's improper conduct").

3. A credit report contains inaccuracies when information contained therein is "inaccurate on its face, inconsistent with information the CRAs already had on file, or obtained from a source that was known to be unreliable." Wright v. Experian Info. Sols., Inc., 805 F.3d 1232, 1240 (10th Cir. 2015).

largely operated without guardrails.[4] The FCRA provides a private right of action for consumers who believe CRAs have willfully or negligently violated their duties to follow reasonable procedures to ensure the accuracy of the information they distribute.[5] But courts are not clear on the amount of direct evidence required to bring a negligence claim under the FCRA, especially concerning the reasonableness of CRA procedures.[6]

This Note examines the applicability of res ipsa loquitur in negligence claims under the FCRA. Part I discusses the FCRA, covering the history of credit reporting as a practice and explaining the necessity for legislation to address privacy concerns arising out of that industry.[7] Part I also briefly explains negligence at common law, discussing burden-shifting tools like res ipsa loquitur.[8] Part I finally examines the FCRA's negligence provision and how it operates.[9] Next, Part II analyzes circuit court cases that address the use of res ipsa loquitur in FCRA negligence cases, including problems with a recent Eighth Circuit case that rejected the doctrine's applicability.[10] Finally, Part III argues that the Supreme Court should grant certiorari to resolve the disagreement between courts over res ipsa loquitur, and advocates for amending the FCRA to permit res ipsa loquitur in negligence claims to further effectuate that statute's original purpose.[11]

I. THE HISTORY OF THE FAIR CREDIT REPORTING ACT

Credit reporting exists as a system for verifying one's ability to repay debts.[12] The credit reporting industry has evolved substantially since its inception, and increased privacy risks required more regulation to protect consumers from the industry's increased size.[13] Consequently, Congress passed the FCRA in 1970, granting consumers a private right of action against CRAs that fail to comply with the statute's many requirements.[14] This right

4. *See* 15 U.S.C. § 1681 (2018) (describing the purpose of the FCRA in light of congressional findings).

5. *See id.* § 1681n (providing a private right of action against CRAs who are willfully noncompliant); *id.* § 1681o (providing a private right of action against CRAs who are negligent).

6. *See infra* Part II.

7. *See infra* Section I.A.

8. *See infra* Sections I.B.1–.2.

9. *See infra* Section I.B.3.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See* FED. TRADE COMM'N, CREDIT AND YOUR CONSUMER RIGHTS 1 (2013). https://consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0070-credit-and-your-consumer-rights_1.pdf [https://perma.cc/W3Q3-CJXD].

13. *See infra* Section I.A.1. Indeed, this evolution is ongoing; the credit reporting industry continues to expand into new territories as lenders seek to adjust their practices to incorporate alternative data into their credit models. *See* Aniket Kesari & Mark Verstraete, *Stories, Statistics, and the Regulation of Alternative Data*, 111 IOWA L. REV. 253, 255–57 (2025).

14. *See* 15 U.S.C. §§ 1681–1681x.

of action is not limited to willful noncompliance; negligence may be the basis for a consumer complaint, though it is unclear to what extent common law negligence doctrines—such as res ipsa loquitur, a burden-shifting tool designed to make unintentional tort claims easier to prove—apply in the FCRA context.

The following sections broadly explain the purpose of the FCRA and its negligence provision. First, Section I.A discusses the history of the credit reporting industry and the context in which the FCRA was drafted. Section I.A also addresses the FCRA's requirements and definitions and explains how the legislature's intent has shaped other FCRA issues. Next, Section I.B provides a brief background on common law negligence and res ipsa loquitur. Lastly, Section I.B explains how common law negligence principles shape the FCRA's negligence provision.

A. THE CREDIT REPORTING INDUSTRY

Credit reporting is an enormous industry and has a substantial impact on the economy.[15] A 2012 Consumer Financial Protection Bureau ("CFPB") report found that CRAs in the United States generated over $4 billion in revenue from selling lists of consumers' noncredit information, credit monitoring services, and analytical services for calculating credit scores.[16]

Lenders use credit reports to review a borrower's credit application and to estimate the likelihood that a consumer will repay their debt.[17] Financial institutions, insurance companies, employers, and landlords may all request access to credit reports for similar reasons.[18] On the other end of that spectrum, individuals use lines of credit for a variety of purposes—credit cards, student loans, car loans, mortgages, and more.[19] After making their desired purchases using their credit line, an individual must pay back the parties from whom they borrowed. Sometimes they do; often they do not.[20] Regardless, the information on an individual's credit report impacts their ability to receive a

15. CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM 2 (2012), https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf [https://perma.cc/WT7D-VF58].

16. *Id.* at 7. TransUnion, Equifax, and Experian are the largest of these agencies. *Id.* at 6.

17. *Id.* at 5.

18. *Credit Reports*, FED. DEPOSIT INS. CORP. (Aug. 1, 2023), https://www.fdic.gov/consumer-resource-center/credit-reports [https://perma.cc/5CFW-LN6N].

19. CONSUMER FIN. PROT. BUREAU, *supra* note 15, at 5.

20. *See, e.g.*, Falen Taylor, *Mortgage Delinquencies Increase Slightly in the First Quarter of 2025*, MORTG. BANKERS ASS'N (May 13, 2025), https://www.mba.org/news-and-research/newsroom/news/2025/05/13/mortgage-delinquencies-increase-slightly-in-the-first-quarter-of-2025 [https://perma.cc/L434-Y949] (showing that U.S. mortgage delinquency rate surpassed four percent in early 2025); April Rubin, *Americans Are Behind on Car Payments at a Record Level*, AXIOS (Mar. 7, 2025), https://www.axios.com/2025/03/07/car-loan-payment-delinquencies-record-high (on file with the *Iowa Law Review*) (showing record-high delinquency on subprime car loan payments).

loan in the future, as well as the interest rates at which those loans are issued.[21] This system has a long history, but the system operated with very little regulation prior to the FCRA's passage in 1970.[22]

1. Credit Reporting Before the FCRA

Credit surveillance became a necessity during the nineteenth century when relationships between creditors and borrowers increased in complexity.[23] Before regular use of written records, credit evaluations generally focused on "insight into [a borrower's] character."[24] There was little structure to the system: Creditors were only kept accountable by social constraints (as lending usually took place within small, tightly knit communities),[25] and creditors typically only lent small amounts of money to individuals they knew personally.[26]

Thus, the modern American credit reporting system arose out of practical limitations with the word-of-mouth system that preceded it.[27] Early credit bureaus operated written lists of individuals who had outstanding debts, and those individuals were "deemed poor credit risks."[28] By the mid-twentieth century, credit managers had "established a national credit reporting infrastructure that operated with impressive efficiency,"[29] which they further bolstered with propaganda campaigns meant to encourage consumer borrowing.[30] As

21. *Credit Reporting*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/credit-reporting/index-credit-reporting.html [https://perma.cc/BB2Q-99EU].

22. *See infra* Section I.A.1.

23. JOSH LAUER, CREDITWORTHY: A HISTORY OF CONSUMER SURVEILLANCE AND FINANCIAL IDENTITY IN AMERICA 17 (2017).

24. *Id.* at 30.

25. *See* Ira D. Moskatel, Note, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act*, 47 S. CAL. L. REV. 1070, 1085–86 (1974) ("If an agent failed to treat a subject fairly, word could get around that he was not to be trusted and he would be socially or commercially ostracized.").

26. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 15, at 7.

27. *See* LAUER, *supra* note 23, at 30–31 (discussing the transition from a reputation-based borrowing system to a system of written records).

28. CONSUMER FIN. PROT. BUREAU, *supra* note 15, at 7.

29. LAUER, *supra* note 23, at 126.

30. *See id.* at 130–36.

borrowing increased, so too did the necessity for that national infrastructure.[31] Soon, CRAs amassed huge amounts of capital.[32]

CRAs were largely unregulated prior to the FCRA, and consumers were unaware of how the process worked. A consumer likely had no idea their credit report was being prepared or distributed unless they were specifically told.[33] Professional norms and unenforceable ethics codes were the primary tools for governing CRA behavior,[34] frequently leaving Americans powerless to remedy injuries caused by mistaken credit reporting.[35] Congress was generally silent on the issue until 1966 when the congressional Special Subcommittee on the Invasion of Privacy debated hypothetical privacy risks of a proposed federal credit database[36] made possible by advancements in methodology and electronic technology.[37]

Congress soon discovered that CRAs in the private sector already operated a large database of unregulated consumer data.[38] Paul Baran of the Rand Corporation—who "would later be recognized as one of the Internet's

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31. *See* Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1041 (1971) ("There is no satisfactory, economical substitute for a credit bureau report. The creditor can: (1) do nothing, relying on the [credit] application; (2) undertake an investigation on its own; (3) hire a private investigator; or (4) buy a credit report. The first alternative involves an unacceptable level of risk. The second would result in high administrative expenses which even the largest corporations are normally unwilling to undertake. Private detective services are extremely expensive relative to credit reports. Thus, most creditors rely exclusively on credit reports for pre-decision information." (footnotes omitted)).

32. This amassment of power was, at least in part, due to the legitimacy granted by government participation. For example, the Department of Veterans Affairs purchased information from CRAs when considering VA home loans. *See* LAUER, *supra* note 23, at 216.

33. Moskatel, *supra* note 25, at 1086; *see also* ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 68 (1971) ("Because the activities of credit bureaus *appear* relatively inoffensive, most people are willing to disclose substantial quantities of personal information in order to obtain the benefits of the credit economy." (emphasis added)).

34. LAUER, *supra* note 23, at 213.

35. *Id.* A large part of the issue was the high bar for existing private rights of action under common law. *See* Robert M. Hardy, Comment, *Fair Credit Reporting Act: Constitutional Defects of the Limitation of Liability Clause*, 11 HOUS. L. REV. 424, 427 (1974) ("Prior to the passage of the FCRA most litigation by consumers against credit reporting agencies . . . [was] in the nature of defamation. . . . In most of the cases against credit bureaus . . . . the agency could escape liability by virtue of a judicially extended qualified privilege." (footnotes omitted)); *see also* Moskatel, *supra* note 25, at 1071 (describing how state statutes could not provide adequate protections for consumers, and libel suits were generally unsuccessful because they required showing credit investigators were "malicious or reckless").

36. LAUER, *supra* note 23, at 212; *see also* Jennifer Holt, *60 Years Ago, Congress Warned Us About the Surveillance State. What Happened?*, MIT PRESS READER (Sept. 27, 2024), https://thereader.mitpress.mit.edu/60-years-ago-congress-warned-us-about-the-surveillance-state-what-happened [https://perma.cc/YX94-MQM4] (describing the special subcommittee's skepticism of President Johnson's proposed federal "data center").

37. Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95, 95 (1983); *see also* LAUER, *supra* note 23, at 213 ("Statistical credit scoring, assisted by powerful computers, was transforming the way lenders evaluated individual creditworthiness.").

38. *See* LAUER, *supra* note 23, at 214–15.

chief architects"—testified to the subcommittee explaining the development of this system despite a lack of government approval.[39] Baran's testimony "sent shivers" through the subcommittee.[40]

Worse, Congress later discovered this data was accessible with ease, often requiring little verification.[41] Columbia Professor Alan Westin testified that he was able to obtain his research assistant's personal information from the Credit Bureau of Greater New York by simply calling and asking nicely for the information.[42] Senator William Proxmire further discussed egregious breaches of consumer confidentiality during a Senate hearing, citing testimony from a television network reporter who "was able to obtain 10 out of 20 reports requested at random from 20 credit bureaus" using a fake company name and a fake cover story.[43] Congressional action was necessary to address these growing privacy concerns.

2. Passing the FCRA

Congress sought to accomplish three broad goals while drafting the FCRA, each generally addressing a lack of due process for consumers in the credit reporting industry.[44] First, Congress aspired to establish avenues that would inform consumers when they were subject to credit reports.[45] Second, Congress sought to assist consumers with remedying erroneous information in their credit reports.[46] Finally, Congress wanted to increase the likelihood that consumer reports would be accurate.[47] These goals were reflected in the earliest title of the legislation as introduced by Senator Proxmire, who dubbed the legislation "A Bill to Protect Consumers Against Arbitrary or Erroneous Credit Ratings, and the Unwarranted Publication of Credit Information."[48] The goal of protecting consumer interests is reflected in the explicitly stated purpose of the FCRA: to "insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the

39. *Id.*

40. *Id.* at 215.

41. *Id.* at 218–19.

42. *Commercial Credit Bureaus: Hearings Before a Subcomm. of the Comm. on Gov't Operations, H.R.*, 90th Cong. 7–9 (1968) (statement of Alan F. Westin, Professor, Columbia Univ.). Professor Westin described the incident as "an outrageous disclosure of personal information and a breach of this woman's privacy." *Id.* at 9.

43. S. REP. NO. 91-517, at 4 (1969).

44. *See* G. Allan Van Fleet, Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 COLUM. L. REV. 458, 466 (1976) (noting Congress's desire to create a system of "due process" for the consumer).

45. Maurer, *supra* note 37, at 112.

46. *Id.*

47. *Id.* at 113.

48. CHI CHI WU & ARIEL NELSON, NAT'L CONSUMER L. CTR., FAIR CREDIT REPORTING § 1.4.2 (10th ed. 2022). The bill was redubbed the "Fair Credit Reporting Act" the following legislative session. *Id.* § 1.4.3.

consumer's right to privacy" and to require that CRAs "adopt reasonable procedures" while pursuing this goal "in a manner which is fair and equitable to the consumer."[49]

Competing interests fought over the scope and direction of the FCRA. Some of these interests were political: The Nixon Administration reportedly wanted the Senate bill to have stronger protections,[50] though a stronger version of the FCRA failed for procedural reasons in the House of Representatives.[51] Other fights were financial, as Americans' growing desire for accountability clashed with CRAs' desires to keep the bill from harming their bottom line. Ultimately, the industry's outsized impact on both politics and the economy controlled much of the debate over the FCRA;[52] the FCRA could not pass without first receiving industry approval.[53] But although the credit reporting industry had sway in the substance of the final bill,[54] its passage marked the beginning of real consumer protection from that industry's ever-growing reach.

3. The FCRA in Practice

The text of the FCRA creates a broad scope of coverage and protection for consumers. It regulates the behavior of CRAs, defining "consumer reporting agency" as:

> [A]ny *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.[55]

The FCRA further defines "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental

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49. 15 U.S.C. § 1681(a)–(b).

50. 116 CONG. REC. 36576 (1970) (statement of Rep. Leonor Sullivan).

51. Van Fleet, *supra* note 44, at 464–66.

52. *See* S. REP. NO. 91-517, at 3 (1969) ("For the most part, the credit reporting system has served the consumer well and the abuses have not been widespread.").

53. *See* Van Fleet, *supra* note 44, at 465–66.

54. *See, e.g.*, WU & NELSON, *supra* note 48, § 1.4.3 (discussing several concessions made in the drafting process to comfort CRAs); Van Fleet, *supra* note 44, at 465–66 ("[T]he industry, which had argued for a system of self-regulation, was able to effect many fundamental compromises on the bill. . . . Thus[,] . . . the FCRA [was a] product of compromise." (footnote omitted)). Some critics lamented these compromises and accused the industry of having too much say in the legislative process. Professor Arthur Miller believed the FCRA "had been butchered . . . drawn and quartered," that "its vitals were left on the Committee's chopping block," and that its "dissection" was the result of "[i]ndustry lobbyists and bank-oriented senators." MILLER, *supra* note 33, at 86.

55. 15 U.S.C. § 1681a(f) (emphasis added).

subdivision or agency, or other entity," capturing the various possible structures through which consumer abuses may arise.[56]

The FCRA outlines several compliance procedures for CRAs to follow. First, the FCRA requires CRAs to "maintain reasonable procedures designed to avoid violations" of the rest of the statute's provisions and take reasonable efforts to verify identities of credit report users, noting CRAs may not provide information to any user it reasonably believes may misuse credit reports.[57] The FCRA also requires CRAs to "follow reasonable procedures to ensure maximum possible accuracy" of information contained in credit reports.[58] CRAs may not prohibit purchasers of credit reports from sharing the content of those reports with the consumer.[59] CRAs that fail to abide by these requirements—either willfully or negligently—may be held civilly liable by the injured consumer.[60]

The FCRA also protects several consumer rights. Consumers are entitled to: (1) learn if information in their report has been used to take adverse actions; (2) see their report; (3) dispute inaccurate or incomplete information with the CRA or the furnisher of that information; (4) have inaccurate or incomplete information deleted; (5) have old information excluded; and (6) generally limit outside access to their report.[61] Such extensive rights further demonstrate the consumer-protective approach that Congress intended the FCRA to create.[62]

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56. *Id.* § 1681a(b).

57. *Id.* § 1681e(a).

58. *Id.* § 1681e(b).

59. *Id.* § 1681e(c).

60. *Id.* § 1681n (willful noncompliance); *id.* § 16810 (negligent noncompliance). Note that both provisions apply to "any person" found in violation of the statute, again reflecting its broad scope.

61. *See* Robert B. Avery, Paul S. Calem, Glenn B. Canner & Raphael W. Bostic, *An Overview of Consumer Data and Credit Reporting*, 2003 FED. RSRV. BULL. 47, 48–49.

62. These rights are not exclusively enforced via private cause of action. Although the main focus of this Note is the FCRA's private enforcement mechanisms, § 1681n and § 16810, it is worth briefly discussing the agencies tasked with interpreting and implementing other various provisions of the FCRA. The FCRA is enforced in part by the Federal Trade Commission, and the CFPB has primary rulemaking responsibility. Tiffany George, *50 Years of the FCRA*, FED. TRADE COMM'N (Oct. 27, 2020), https://www.ftc.gov/business-guidance/blog/2020/10/50-years-fcra [https://perma.cc/NU94-MG6D]; *Credit Reporting Requirements (FCRA)*, CONSUMER FIN. PROT. BUREAU (Jan. 7, 2025, 7:00 AM), https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/fair-credit-reporting-act [https://perma.cc/J3PU-7RWF]. CFPB authority over FCRA rulemaking is relatively new, as the agency was only created in the aftermath of the 2008 financial crash. Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES (July 21, 2010), https://www.nytimes.com/2010/07/22/business/22regulate.html (on file with the *Iowa Law Review*).

The CFPB is another example of congressional intent to protect consumers—albeit this time through the creation of an administrative agency tasked with supplementing private enforcement. One prominent rule promulgated by the Biden Administration prohibits creditors from considering medical debt in lending decisions, which had previously been permitted under applicable regulations. *See generally* Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V), 90 Fed. Reg. 3276 (Jan. 14, 2025) (codified at 12 C.F.R. § 1022 (2025)). Thus, it would be accurate to say the CFPB took its FCRA rulemaking

Recognizing the history and purpose of the FCRA, many courts have interpreted provisions of the FCRA in favor of consumers. For example, the *Dornhecker* court[63] resolved ambiguity in favor of the plaintiff where the defendant argued the FCRA did not provide a private right of action.[64] And when addressing joint liability issues under the FCRA, the *McSherry* court[65] found "no legislative history suggesting that Congress was interested in 'softening' the blow for joint wrongdoers."[66] After reviewing the history and purpose of the statute, *McSherry* held that the FCRA did not provide jointly liable defendants the right to contribution and indemnity from one another.[67] Later courts adopted this analysis, noting that providing defendants a right to contribution and indemnity would "undermine[] the statute's purpose" by decreasing accuracy of consumer reports, since defendants would likely use that right to escape some liability.[68] Thus, congressional intent plays a substantial role in shaping FCRA jurisprudence.[69]

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role very seriously under the Biden Administration. *See generally* David N. Anthony, Timothy J. St. George, Noah J. DiPasquale & Noland Butler, *A Review of Recent Consumer Credit Reporting Litigation and Regulatory Activity and a Look Ahead*, 77 CONSUMER FIN. L.Q. REP. 292, 292–95, 298–302 (2023) (discussing FCRA litigation trends in light of more liberal CFPB rulemaking and anticipating the CFPB's regulatory activities in 2024).

This avenue for consumer protection may be in danger, though, as the Trump Administration—representing a growing conservative movement on the subject—has sought to sabotage the CFPB's efforts in its broader crusade to dismantle the administrative state. *See* Joe Hernandez, *The Trump Administration Has Stopped Work at the CFPB. Here's What the Agency Does*, NPR (Feb. 10, 2025, 4:35 PM), https://www.npr.org/2025/02/10/nx-s1-5292123/the-trump-administration-has-stopped-work-at-the-cfpb-heres-what-the-agency-does [https://perma.cc/WWA8-VNFM]. In particular, Trump's CFPB has largely cooperated in removing its own teeth, in one case advocating for a district court to strike down Regulation V by entering into a consent judgment proposal with the very trade associations challenging the agency's promulgation of that rule. Cornerstone Credit Union League v. CFPB, No. 4:25-CV-16, 2025 WL 1920148, at *1, *15 (E.D. Tex. July 11, 2025) (recognizing that the CFPB is "under new leadership," and vacating Regulation V).

These recent developments make the arguments contained herein—that the FCRA should be construed liberally to further congressional intent to effectuate consumer protection—far more salient; without a robust administrative apparatus supplementing private enforcement, private enforcement itself must be made easier, either by the judiciary or by Congress. *See infra* Part III.

63. Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918, 922 (N.D. Ill. 2000).

64. *See id.* at 924–27 (recognizing an implied right of action under § 1681s–2 based on a four-part test established in *Cort v. Ash*, 422 U.S. 66 (1975)).

65. McSherry v. Cap. One FSB, 236 F.R.D. 516, 518 (W.D. Wash. 2006).

66. *Id.* at 522.

67. *Id.*

68. Boatner v. Choicepoint Workplace Sols., Inc., No. CV 09-1502-MO, 2010 WL 1838727, at *2 (D. Or. May 6, 2010).

69. Of course, this rule is not absolute, and it does not always cut in favor of the consumer. *See infra* Section III.A (discussing the Supreme Court's mixed track record on the subject when answering the few FCRA questions it grants certiorari).

B. THE FCRA NEGLIGENCE STANDARD

Common law negligence provides remedies for unintentional injuries. At common law, evidentiary standards have evolved to occasionally permit jury inferences of negligence where a plaintiff is not in control of the information they would otherwise need to prove their case.[70] Although the FCRA preempts common law injuries that fall outside the scope of 15 U.S.C. § 16810,[71] courts have generally followed the common law framework in applying § 16810.[72]

1. Negligence at Common Law

Negligence arose at common law as a remedy for unintentional injuries occurring during a course of otherwise lawful actions. The origin of negligence jurisprudence in the United States can be traced back to the nineteenth century when courts began grappling with different theories of liability in tort claims.[73] Generally, modern negligence claims require showing that: (1) a defendant owed a plaintiff a duty of care; (2) the defendant breached that duty of care; (3) the plaintiff suffered an injury; and (4) the defendant's breach both actually caused and proximately caused the plaintiff's injury.[74] The traditional duty of care owed by individuals to one another is that of a reasonable person, where "reasonableness" is an objective standard determined by a jury.[75] However, a doctrine called "negligence per se" permits a statute to provide the basis for a duty of care, and violation of that statute may satisfy the breach element.[76]

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70. *See, e.g.*, Byrne v. Boadle (1863) 159 Eng. Rep. 299, 299–301; 2 H. & C. 722, 722–27; Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 294–96 (1st Cir. 1999).

71. 15 U.S.C. § 16810.

72. *See, e.g.*, Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003) (holding a plaintiff's § 16810 claim could not surpass summary judgment where plaintiff does not establish defendant owed a duty of care, a necessary common law negligence element); *cf.* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57–58 (2007) (explaining that issues over the interpretation of § 1681n, the FCRA's willful noncompliance provision, should be resolved in favor of common law interpretations).

73. *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 77–96 (52d prtg. 1923) (1881) (comparing strict liability and fault-based liability in torts).

74. *See, e.g.*, Chew v. Am. Greetings Corp., 754 F.3d 632, 635–36 (8th Cir. 2014) ("Under Arkansas law, in order to prevail on a claim of negligence, the plaintiff must prove [1] that the defendant owed a duty to the plaintiff, [2] that the defendant breached that duty, and [3] that the breach was the proximate cause of the plaintiff's injuries." (quoting Yanmar Co. v. Slater, 386 S.W.3d 439, 449 (Ark. 2012))); Dunn v. Menard, Inc., 880 F.3d 899, 906 (7th Cir. 2018) ("To establish a cause of action for negligence under Illinois law, a plaintiff must prove: '(1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; and (3) an injury proximately caused by the breach.'" (quoting Wilfong v. L.J. Dodd Constr., 930 N.E.2d 511, 519 (Ill. App. Ct. 2010))).

75. *See* HOLMES, *supra* note 73, at 107–09 (discussing the reasonable person standard and its application).

76. *See* RESTATEMENT (SECOND) OF TORTS § 286 (AM. L. INST. 1965); *see also* Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920) (holding that violation of a statute may be a sufficient basis for courts to find breach of duty in a negligence claim).

Despite the strengths of modern negligence doctrine and its remedies for victims of unintentional torts, one particular weakness arose as its application extended. Specifically, plaintiffs who suffered an injury—but did not have sufficient evidence to show negligence's cause or breach elements by virtue of that evidence being within the defendant's control—could be turned away by courts for failing to establish a prima facie case. Courts imported burden-shifting models to address these information asymmetries.[77]

2. Res Ipsa Loquitur

Res ipsa loquitur is a common law burden-shifting doctrine used by plaintiffs to fill these evidentiary gaps.[78] The doctrine—Latin for "the thing speaks for itself"—permits a jury to infer negligence where a plaintiff establishes: (1) a harm of a kind that does not ordinarily occur absent negligence; (2) the harm was caused by an instrumentality exclusively in the defendant's control; and (3) the harm was not caused by an act or omission of the plaintiff.[79] The doctrine originated in English courts to address policy concerns with forcing plaintiffs to prove the existence of facts entirely outside their control.[80]

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77. *See infra* Section I.B.2; Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 294–97 (1st Cir. 1999) (discussing res ipsa loquitur shifting the burden of proof in negligence cases); *see also* Straley v. United States, 887 F. Supp. 728, 744–46 (D.N.J. 1995) (discussing the res ipsa burden shift in product liability cases). The burden shift is not exclusive to the negligence context; observed more broadly, burden shifts have largely been adopted to address *power* asymmetries between litigants. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (establishing a burden-shift framework for litigants in the employment discrimination law context, wherein the burden shifts twice: first, from the plaintiff to the defendant, upon a prima facie showing of discrimination; then second, from the defendant *back* to the plaintiff to show pretext, if the defendant has provided a legitimate, nondiscriminatory reason for an adverse employment action); *see also* Andrew J. Brueck, Note, *SLAPP to the Face: Why Iowa's New Anti-SLAPP Statute Should Apply in Federal Court*, 111 IOWA L. REV. 305, 313 (2025) ("If the defendant demonstrates that [a SLAPP] suit implicates covered speech, the burden shifts to the plaintiff to provide evidence showing they are likely to prevail. If the plaintiff meets their burden, then the defendant's anti-SLAPP motion is denied and the case proceeds as normal." (footnote omitted)).

78. *See* RESTATEMENT (SECOND) OF TORTS § 328D (AM. L. INST. 1965).

79. *See id.* § 328D(1); *see also* Holzhauer v. Saks & Co., 697 A.2d 89, 92–93 (Md. 1997) (recognizing this formulation of the doctrine); Patrick v. Bally's Total Fitness, 292 A.D.2d 433, 434–35 (N.Y. App. Div. 2002) (same); Winfrey v. GGP Ala Moana LLC, 308 P.3d 891, 902 (Haw. 2013) (same).

80. *See* Byrne v. Boadle (1863) 159 Eng. Rep. 299, 301; 2 H. & C. 722, 727–28. Chief Baron Pollock explains:

> [I]t would be *wrong* to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. . . . A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence *seems to me preposterous.*

Id. (emphases added). Pollock's focus on the "wrongness" of a more restrictive rule reflects a concern about policy impacts.

Practically, res ipsa loquitur is a very generous doctrine for plaintiffs.[81] Plaintiffs generally invoke res ipsa[82] in personal injury cases; take *Grajales-Romero v. American Airlines, Inc.*, for example.[83] In *Grajales-Romero*, an airline passenger alleged the airline acted negligently when the passenger was struck by a metal signpost that was improperly attached to a countertop.[84] There, the passenger "presented no evidence regarding the inspection, maintenance, and operation of the ticket counter" that would have established that American Airlines breached a duty of care.[85] Rather, his argument rested entirely on the idea that the signpost would not have fallen on him absent negligent conduct by the airline.[86] The jury agreed with the passenger at trial and inferred negligence, which the First Circuit affirmed on appeal.[87] Even absent *any* direct evidence from the passenger supporting an allegation that American breached its duty of care and caused his injury, the court found liability.[88] Whether res ipsa loquitur applies in other contexts has been the subject of debate.[89]

3. FCRA Negligence Claims

The FCRA establishes a private right of action against any person who negligently fails to comply with its provisions.[90] Of course, the consumer bears

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81. *Cf.* Jeffrey H. Kahn & John E. Lopatka, *Res Ipsa Loquitur: Reducing Confusion or Creating Bias?*, 108 KY. L.J. 239, 243 (2019) (hypothesizing that "a res ipsa [jury] instruction biases decisions in favor of plaintiffs").

82. "Res ipsa" is a common shorthand for "res ipsa loquitur." This Author uses both phrases interchangeably.

83. Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 294–95 (1st Cir. 1999).

84. *Id.* at 292.

85. *Id.* at 294.

86. *See id.* at 294–95.

87. *Id.* at 295–96.

88. *Id.* at 295. The First Circuit also held that res ipsa loquitur need not specifically be addressed in jury instructions, so long as the jury has been instructed properly on drawing inferences from circumstantial evidence. *Id.* at 296.

89. *See infra* Part II; Fleming James, Jr., *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 VA. L. REV. 179, 202–03 (1951) ("Res ipsa loquitur was most often invoked in early cases by a passenger against a carrier. It was contended, occasionally and for the most part unsuccessfully, that the doctrine was limited to such a relationship. . . . It is now clear that the doctrine is not limited to any particular relationship." (footnote omitted)); Susan Block-Lieb & Edward J. Janger, Impact Ipsa Loquitur*: A Reverse Hand Rule for Consumer Finance*, 45 CARDOZO L. REV. 1133, 1169–71 (2024) (providing res ipsa loquitur as an example of a common law tort doctrine that could be adopted in the consumer protection context to address information asymmetries that would otherwise doom plaintiffs); *see also* Chad G. Marzen, *Agriculture and Res Ipsa Loquitur*, 70 OKLA. L. REV. 679, 681 (2018) ("In sum, . . . courts vary on whether it is appropriate to apply [res ipsa loquitur in agriculture cases] depending upon the type of fact pattern in the case.").

90. 15 U.S.C. § 16810(a). Some scholars have noted that a likely justification for establishing a negligence standard rather than a strict-liability standard for inaccurate reporting was preventing a "chilling" effect on the reporting of accurate information. *See, e.g.*, Richard M. Hynes, *"Maximum Possible Accuracy" in Credit Reports*, 80 LAW & CONTEMP. PROBS. 87, 104 (2017) ("Liability for misstatements but not omissions acts as a tax on reporting information that can chill furnishers

the burden of discovering inaccuracies in the first place, a difficult symptom of the inherent power imbalance between consumers and CRAs.[91] But when successful, an injured party may recover actual damages and the cost of the action, along with reasonable attorney fees.[92] The statute preempts any claim falling outside the scope of § 16810, the statute's negligent noncompliance provision; any common law negligence claim not within the scope of § 16810 is not permitted.[93]

The scope of the FCRA's negligence provision expanded during the drafting process.[94] Initially, the FCRA only held CRAs liable for "gross negligence."[95] But that standard became subject to debate, and the House conference ultimately changed the standard to "ordinary . . . negligence" before passing the bill.[96] The Senate conference accepted the change, noting "it [would be] exceedingly difficult to prove gross negligence" and an ordinary negligence

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from reporting . . . . This potential chilling effect may also explain why the FCRA uses a negligence standard instead of strict liability.").

Strict liability for credit inaccuracies could frustrate the goals of the entire credit reporting system in a way negligence does not. The system is meant to provide methods for verifying a debtor's ability to repay their debts, but a strict liability system would incentivize CRAs to omit information that would otherwise be necessary to report, since the FCRA establishes no obligation for CRAs to report anything at all. *Id.* The negligence standard allows CRAs to escape liability if they make a good faith effort—following reasonable procedures—to provide accurate information. *Id.* at 105 ("As long as the credit bureaus and the furnishers behave reasonably, and courts do not make mistakes, the industry will face no liability and there will be no chilling effect.").

91. *See* Edward Thrasher, Note, *The Fair Credit Reporting Act: Deficiencies and Solutions*, 21 TEMP. POL. & C.R. L. REV. 599, 611–12 (2012) (discussing the inherent power imbalance between consumers and CRAs and outlining the process for informing CRAs about inaccuracies).

92. 15 U.S.C. § 16810(a)(1)–(2).

93. *See id.* § 1681h(e); *see also* Shannon v. Equifax Info. Servs., LLC, 764 F. Supp. 2d 714, 727–28 (E.D. Pa. 2011) (holding that § 16810 provides the *only* available remedy for some of plaintiff's claims, and negligence claims falling outside the statute's scope are necessarily preempted).

94. While CRAs had a substantial impact on the drafting of the FCRA, that impact apparently did not extend to the debate over the scope of the negligent noncompliance provision. Section 1681(a) sheds some light on this apparent disparity. That section, which notes congressional findings and its interest in passing the FCRA, describes the importance of CRAs: "Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3). But the rest of the provision describes the "need to insure that consumer reporting agencies exercise their grave responsibilities" in a reasonable manner, since the entire industry is "dependent upon fair and accurate credit reporting." *Id.* § 1681(a)(1), (4).

Thus, while technical requirements outlined for CRAs were the subject of debate and compromise to placate CRA concerns, the legislative findings and purpose support the proposition that the private enforcement mechanisms for the act—the willful noncompliance and negligent noncompliance provisions—were generally above CRA scrutiny due to the simple fact that their inclusion was necessary for the law to work. CRAs appeared to care more about *what behavior they were liable for* rather than the standard of liability itself, which they wouldn't be able to escape either way if the FCRA became law—and they knew it almost certainly would.

95. 116 CONG. REC. 35940 (Oct. 9, 1970) (statement of Sen. William Proxmire).

96. 116 CONG. REC. 36573 (Oct. 13, 1970) (statement of Rep. Leonor Sullivan).

standard would be more appropriate.[97] This change was specifically accepted with the goal of "provid[ing] a greater incentive for reporting agencies and users of information to comply with" the FCRA.[98]

Generally, a plaintiff's negligence claim under the FCRA must show "either 1) that the credit agency's procedures, although reasonably calculated to assure accuracy, were not followed with respect to the individual report, or 2) that given the seriousness of the resulting harm, the agency's procedures, although followed, were not reasonably calculated to insure the maximum possible accuracy."[99] Other specific elements vary based on which provision of the FCRA a plaintiff accuses the CRA of noncompliance.[100]

Some FCRA negligence claims proceed easier than others. For example, a CRA that has no procedures for ensuring accuracy by definition has failed to follow "reasonable procedures" as required by 15 U.S.C. § 1681e(b).[101] However, since the FCRA's inception, parties have disputed the meaning of "reasonableness" in situations where CRAs *do* follow a procedure.[102] Early courts understood the requirements laid out by § 1681e to mean "reasonable procedures to discover circumstances which make otherwise adverse data less damning,"[103] liberally construing the text in favor of the consumer. This is the context in which evidentiary standards issues arise.[104]

II. THE QUASI-CIRCUIT SPLIT OVER RES IPSA LOQUITUR

FCRA case law does not specify how much direct evidence a plaintiff must show to survive summary judgment when alleging a CRA did not follow reasonable procedures. If a consumer is harmed in a manner that could feasibly have been the result of unreasonable procedures, but they must bring direct evidence showing that the CRA did not follow reasonable procedures, the chances of success for that consumer are low because CRAs are in the best position to know their own procedures and are not obligated to disclose them.

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97. 116 CONG. REC. 35940 (Oct. 9, 1970) (statement of Sen. William Proxmire).

98. *Id.*

99. Maurer, *supra* note 37, at 114 (footnote omitted).

100. *See, e.g.*, Philbin v. Trans Union Corp., 101 F.3d 957, 963 (3d Cir. 1996) (stating that negligent noncompliance with 1681e(b)—which pertains to the preparation of credit reports—requires establishing: "(1) inaccurate information was included in a consumer's credit report; (2) the inaccuracy was due to defendant's failure to follow reasonable procedures to assure maximum possible accuracy; (3) the consumer suffered injury; and (4) the consumer's injury was caused by the inclusion of the inaccurate entry").

101. *See* Miller v. Credit Bureau of Washington, D.C., [1969–73 Transfer Binder] Consumer Credit Guide (CCH) ¶ 99,173, at 89,068 (D.C. Super. Ct. 1972) (holding a CRA violated the reasonable procedures requirement by not having *any* procedures to verify accuracy).

102. *See* Van Fleet, *supra* note 44, at 496–503 (explaining early FCRA jurisprudence and the difficulty of determining "reasonable procedures" as required by the Act).

103. *Id.* at 501 (discussing two early cases litigating the "reasonable procedures" requirement: *Miller*, [1969–73 Transfer Binder] Consumer Credit Guide (CCH) ¶ 99,173, and *Green v. Stores Mut. Protective Ass'n*, 74 Civ. 4607 (S.D.N.Y. Oct. 7, 1975)).

104. *See infra* Part II.

Thus, summary judgment unfairly culls valid consumer claims where the consumer does not have access to relevant evidence, and the unclear standard for reasonableness further culls cases that do survive summary judgment. The extent to which a plaintiff may rely on circumstantial evidence of negligence is unclear; at least four cases address res ipsa loquitur as a possible way to address the issue, with varying degrees of interest.[105]

Courts' reluctance to recognize res ipsa loquitur in the FCRA context frustrates the statute's legislative purpose of protecting consumers. A burden-shift model like res ipsa loquitur could give consumers a stronger fighting chance to vindicate their rights, but courts have been hesitant to endorse such a model. Section II.A discusses early scholarship and case law establishing res ipsa loquitur as a potential FCRA tool.[106] Section II.B then describes *Lloyd v. FedLoan Servicing*, the Eighth Circuit decision that created a quasi-circuit split on the issue.[107] Lastly, Section II.C dissects the Eighth Circuit's decision in *Lloyd*, examining the inconsistent case law left in its wake.[108]

A. STEWART *AND* PHILBIN*: THE EVIDENCE SPEAKS FOR ITSELF*

Evidentiary standards under the FCRA were hotly debated in the years immediately following its passage.[109] One author, Ira Moskatel, was quick to pose res ipsa loquitur as a potential model.[110] However, Moskatel's early scholarship necessarily relied on a shortage of information on how CRAs

105. *See* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 52 (D.C. Cir. 1984); *Philbin*, 101 F.3d at 965; Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003); Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1026 n.5 (8th Cir. 2024).

106. *Stewart*, 734 F.2d at 52; *Philbin*, 101 F.3d at 965; *Ausherman*, 352 F.3d at 901–02.

107. *Lloyd*, 105 F.4th at 1026 n.5. This Author uses the term "quasi-circuit split" to describe the issue because, as discussed below in Sections II.C.1 and III.A, whether the conflict between the above cases meets the definition of "circuit split" is up for debate and reasonable minds could disagree. However, while the Author's position is that these cases *do* constitute a circuit split, that distinction is mostly immaterial to the Author's broader argument that the case law is unclear in *Lloyd's* wake and requires clarity.

108. *Id.*; *see infra* Section II.C.

109. *See generally* Moskatel, *supra* note 25; *see also* Lawrence D. Frenzel, Comment, *Fair Credit Reporting Act: The Case for Revision*, 10 LOY. L.A. L. REV. 409, 434–35 (1977) (discussing early FCRA cases and noting that "the burden of proof question in actions brought pursuant to the FCRA remains a significant problem").

110. Moskatel, *supra* note 25, at 1107–08. Moskatel was not the only author to suggest res ipsa loquitur as a solution to this issue, though he appears to be the only one to analyze it extensively. One eagle-eyed FCRA scholar noted the likely need for res ipsa loquitur less than six months after Richard Nixon signed the FCRA. *See* Note, *supra* note 31, at 1052 n.88 ("Just as proving the negligence of a giant manufacturer was once an insuperable obstacle to recovery for injury due to defective products, the proof of negligence by a large, computerized information supplier would be nearly impossible. A presumption of negligence or the application of *res ipsa loquitur* would be necessary to make recovery a meaningful possibility."). Lawrence D. Frenzel argued on behalf of this solution shortly thereafter. Frenzel, *supra* note 109, at 435 ("A shift in the burden of proof, similar to *res ipsa loquitur* in negligence cases, would provide a greater 'incentive' for credit agencies to maintain accurate reporting standards.").

traditionally operated along with a scarce collection of case law pertaining to § 16810.[111] As a result, Moskatel dismissed res ipsa loquitur as an available doctrine under the FCRA "absent further congressional action."[112] But courts were open to Moskatel's proposal, even if Moskatel's proposed solution—an amendment proposed by Senator Proxmire—proved unsuccessful.[113]

The first court to adopt a burden-shifting model on the reasonableness issue was the *Stewart* court.[114] Plaintiff James Stewart—a school teacher and property owner—applied for credit cards with American Express and Diner's Club, along with a Credit Bureau, Inc. ("CBI") membership for his part-time credit consulting business.[115] Each application was denied.[116] Upon visiting the local CBI office and investigating his credit report, he discovered four distinct inaccuracies in his credit report.[117] He filed suit shortly after notifying CBI of these inaccuracies.[118] The district court granted summary judgment for CBI, but the D.C. Circuit reversed, holding that a prima facie § 1681e(b) claim does not require that the plaintiff provide direct evidence of CRA unreasonableness.[119] Rather, where claims turn on the reasonableness of a CRA's procedures in verifying information, the plaintiff need only "minimally present some evidence from which a trier of fact can *infer* that the [CRA] failed to follow reasonable procedures in preparing a credit report."[120] The burden of proof shifts to the CRA once the plaintiff meets that low evidentiary standard. Importantly, in examining lower-court holdings to reach its conclusion,[121] the court made sure to note that the evidentiary standard is *not*

111. *See* Moskatel, *supra* note 25, at 1108 ("While TRW Information Services, Inc. has published a code of ethics for credit reporting, there is no authoritative study of the mechanics of credit reporting." (footnote omitted)). Further, there has been significantly more case law in the fifty years since Moskatel wrote his note than in the four years between the FCRA's passage and that note's publication.

112. *Id.*

113. *Id.* The amendment Moskatel advocates was appropriately dubbed "A Bill to Amend the Fair Credit Reporting Act." S. 2360, 93d Cong. (1973). For a brief description of the progression and demise of this amendment, see Van Fleet, *supra* note 44, at 466 n.48.

114. Stewart v. Credit Bureau, Inc., 734 F.2d 47, 52–53 (D.C. Cir. 1984).

115. *Id.* at 49.

116. *Id.*

117. *Id.* at 49–50.

118. *Id.* at 50.

119. *Id.* at 52–53.

120. *Id.* at 51 (emphasis added).

121. *See id.* at 52 (citing both *Bryant v. TRW, Inc.*, 487 F. Supp. 1234 (E.D. Mich. 1980), *aff'd* 689 F.2d 72 (6th Cir. 1982), and *Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F. Supp. 962 (S.D. Ohio 1983), as examples of "cases in which the plaintiffs prevailed despite their failure to present direct evidence on defendants' reporting procedures").

strict liability; a mere showing of inaccuracy would not be enough to establish a claim.[122]

The Third Circuit was the first court to explicitly acknowledge res ipsa loquitur as a potential standard in FCRA claims related to reasonableness.[123] In *Philbin v. Trans Union Corp.*, James Philbin alleged Trans Union incorrectly included information about a large tax lien on his credit report after he informed Trans Union that the tax lien actually belonged to his father, James Philbin, Sr.[124] Philbin was denied credit as a result of the inaccuracy.[125] To resolve the dispute, the court looked to persuasive authority from sister circuit courts, including Eleventh Circuit case law indicating that questions of reasonable procedures belonged to a jury.[126] The Third Circuit then considered the application of burden-shifting frameworks in other circuits to reasonableness questions.[127] In light of those combined authorities, the Third Circuit opined that courts could adopt a framework in which "a jury may, but need not, infer from the inaccuracy that the defendant failed to follow reasonable procedures."[128] Although the Third Circuit did not weigh in on whether this framework was its preference,[129] it nonetheless determined Philbin met the standard required to preclude summary judgment on his negligence claim.[130] The Third Circuit's acknowledgment of res ipsa loquitur—along with its appreciation of the reasoning underlying the application of that

122. *See id.* at 51. *But see* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (holding the mere showing of an inaccuracy *is* sufficient to establish a prima facie unreasonableness showing prior to the burden shift).

123. *See* Philbin v. Trans Union Corp., 101 F.3d 957, 965 (3d Cir. 1996), *abrogated on other grounds by* Cortez v. Trans Union, LLC, 617 F.3d 688, 721 n.39 (3d Cir. 2010) (clarifying the standard for willful noncompliance in the FCRA but otherwise supporting the *Philbin* court's negligence analysis).

124. *Id.* at 960.

125. *Id.* at 960–61.

126. *Id.* at 964–65 (citing Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir. 1991)).

127. *Id.* (citing *Guimond*, 45 F.3d at 1333).

128. *Id.* at 965.

129. The *Philbin* court identifies the res ipsa loquitur framework as the "middle position" of the three frameworks it considers (but does not choose between). The broader framework would operate such that "once a plaintiff demonstrates inaccuracies in a credit report, the burden shifts to the defendant to prove as an affirmative defense the presence of reasonable procedures." *Id.* The implication is that a CRA would automatically be found liable if it provided no rebuttal at all to a plaintiff's evidence.

The narrower framework—which the court deems "more plausible" than the broader framework—would not require any burden shift to the defendant at all, but would permit a jury to infer a failure to follow reasonable procedures from the fact of the inaccuracy. *Id.* The burden of proof in this framework remains entirely with the plaintiff. If the plaintiff fails to meet that burden, the CRA will not be held liable, regardless of whether the CRA has presented evidence of its own. The major distinction between the res ipsa framework and the narrow framework is that the narrow framework does not involve a burden shift, whereas res ipsa does.

130. *Id.* at 970.

doctrine to FCRA cases[131]—made way for other circuit courts to consider adopting similar standards.

No other court has explicitly adopted res ipsa loquitur in the FCRA context, but at least one other circuit court has acknowledged its potential. In *Ausherman v. Bank of America Corp.*, the Fourth Circuit upheld a lower court's summary judgment order against the plaintiff, noting that the plaintiff's reliance on res ipsa loquitur could not succeed because he did not allege any specific violation of a duty of care under the FCRA.[132] Implicit in the court's analysis is an openness to the doctrine if properly pleaded by the appropriate plaintiff.

B. LLOYD V. FEDLOAN*: THE FCRA SPEAKS FOR ITSELF*

The Eighth Circuit was the first circuit court to dismiss res ipsa loquitur as a possibility in the FCRA context.[133] In *Lloyd v. FedLoan Servicing*, Plaintiff Chiya Lloyd took out at least nine student loans serviced by Defendant FedLoan Servicing, who provides information to Experian for its credit reports.[134] Throughout 2019, Lloyd disputed several inaccurate statements provided to Experian by FedLoan indicating she was delinquent on several payments.[135] One particularly egregious inaccuracy was a ninety-day delinquency notice that was issued fewer than ninety days after the reported delinquency.[136] After months of investigation, the inaccuracies were removed. Lloyd subsequently filed suit alleging negligent noncompliance under the FCRA.[137] Among other theories, Lloyd argued that Experian reporting ninety-day delinquencies—when such delinquencies would have been impossible—was evidence that Experian had not used reasonable procedures to verify the accuracy of the report's contents as required by law.[138]

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131. *Id.* The court says the FCRA presents similar issues to the kinds of cases where res ipsa loquitur is typically invoked:

> The justification for importing such a rule into the FCRA context would be that . . . the inaccuracy has been caused by an instrumentality under the exclusive control of the defendant. Such a defendant is in a far better position to prove that reasonable procedures were followed than a plaintiff is to prove the opposite.

Id. at 965. *But see* Moskatel, *supra* note 25, at 1108 (arguing that concerns about plaintiffs' lack of access to information within the defendant's exclusive control is not the only reason res ipsa loquitur exists and expressing skepticism at its applicability).

132. *See* Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

133. Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1026 n.5 (8th Cir. 2024).

134. *Id.* at 1023.

135. *Id.*

136. Lloyd's August credit report indicated she was ninety days delinquent on her June 26, 2019 loan invoice. This would have been impossible, because ninety days after June 26 is September 24. Appellant's Opening Brief and Addendum at 30–31, *Lloyd*, 105 F.4th 1020 (No. 22-2840), 2022 WL 17184498, at *30–31 [hereinafter Lloyd Opening Brief].

137. *Lloyd*, 105 F.4th at 1024.

138. *See* Lloyd Opening Brief, *supra* note 136, at 30–31.

After the district court granted summary judgment for the defendants, the Eighth Circuit heard Lloyd's appeal and affirmed the district court's decision.[139] Although the decision turned in part on the court's determination that Lloyd had failed to show sufficient evidence of damages,[140] the court determined res ipsa loquitur would not apply to Lloyd's case anyway. Writing the doctrine off in a footnote ("footnote five"), the court said:

> While the dissent would allow Lloyd's negligence claim to proceed under *res ipsa loquitur*, no circuit court has expressly applied the doctrine in the FCRA context. *See Johnson v. Trans Union, LLC*, 524 F. App'x 268, 270 (7th Cir. 2013) (including *res ipsa loquitur* in the "litany of implausible arguments" presented on appeal); *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896 (4th Cir. 2003) (expressly declining to apply *res ipsa loquitur* to prove a duty under the FCRA); *Philbin v. Trans Union Corp.*, 101 F.3d 957 (3d Cir. 1996) (noting *res ipsa loquitor* [sic] is one theory that has been discussed by other courts but finding it unnecessary to decide among the various theories advanced by the plaintiff); *Stewart v. Credit Bureau Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984) (while the district court hypothesized there could be an instance when inaccurate credit reports by themselves can be read as evidencing unreasonable procedures, the appellate court did not apply *res ipsa loquitur* in reviving the plaintiff's claims but instead vacated the district court's opinion due to the procedural posture and insufficient record).[141]

The court found the doctrine was "inapplicable under the facts and circumstances" of Lloyd's claim.[142] The court also found Lloyd had not adequately identified which of Experian's and FedLoan's procedures were insufficient to meet the FCRA's reasonableness requirement.[143]

The Eighth Circuit did not dismiss Lloyd's res ipsa loquitur theory without a fight. Chief Judge Lavenski Smith filed an opinion dissenting from the court's grant of summary judgment on Lloyd's negligence claim specifically.[144] Focusing on the defendants' investigation into the impossible ninety-day delinquency, Chief Judge Smith wrote:

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139. *Lloyd*, 105 F.4th at 1030.

140. *Id.* at 1028–30.

141. *Id.* at 1026 n.5. The court's several citations are preserved as they are examined in detail below. *See infra* Section II.C.

142. *Lloyd*, 105 F.4th at 1027.

143. *Id.* at 1025–26.

144. Conversely, Chief Judge Smith concurred with the majority in its holding that Lloyd had not shown FedLoan and Experian "willfully" violated the FCRA. *Id.* at 1030–31 (Smith, C.J., concurring in part). For an interesting discussion on circuit court judges and their decisions to author separate opinions, often breaking from the norm of an appellate court's uniform judicial voice, see generally Allison Orr Larsen & Neal Devins, *The Judicial Voice on the Courts of Appeals*, 111 IOWA L. REV. 655 (2026).

> [A] reasonable jury could permissibly infer that no set of investigation procedures, which allows factually impossible information to remain in a consumer's credit file, reasonably "assure[s] maximum possible accuracy." Upon the completion of their investigations, FedLoan and Experian confirmed that Lloyd had indeed been 90 days delinquent on her June 26 bill as of August 24. From this fact, a reasonable jury could conclude that the investigations were unreasonable. Merely counting the days on the calendar would have sufficed.[145]

Chief Judge Smith's dissent points to the *Ausherman* court's and the *Philbin* court's recognition of res ipsa loquitur as an available theory of recovery for plaintiffs like Lloyd, scolding the majority for "undermin[ing] Congress's goal of ensuring an accurate credit reporting system . . . that is fair to consumers."[146]

C. THE CASE LAW DOES NOT SPEAK FOR ITSELF

The *Lloyd* court takes a different approach than its sister circuits. Its holding improperly dismisses res ipsa loquitur without explaining itself, choosing only to note that no other court had explicitly applied the doctrine in the FCRA context.[147] In dismissing Lloyd's res ipsa loquitur argument outright with no explanation, the Eighth Circuit frustrates the FCRA's legislative purpose and makes FCRA negligence claims more difficult.

1. The *Lloyd* Court Improperly Dismissed Case Law

There are two major errors in the *Lloyd* court's reasoning for not permitting Lloyd's claim to proceed on the theory of res ipsa loquitur. First, the *Lloyd* court seems to misrepresent the case law pertaining to res ipsa in the FCRA from the sister circuits. In footnote five, the court justifies its lack of engagement with res ipsa by citing several cases with far less applicable facts, seemingly treating Lloyd's case as sufficiently analogous to reject the doctrine's applicability.[148] For example, the court first cites *Johnson v. Trans Union, LLC*,[149] stating that court "include[d] *res ipsa loquitur* in the 'litany of implausible arguments' presented on appeal" by the appellant.[150] But the appellant in *Johnson* did not provide evidence that Trans Union "reported *any* inaccurate information about him,"[151] whereas in *Lloyd*, it was undisputed that Experian reported inaccurate information. Thus, the reason the Seventh Circuit

145. *Lloyd*, 105 F.4th at 1032–33 (quoting Bibbs v. Trans Union LLC, 43 F.4th 331, 342 (3d Cir. 2022)).

146. *Id.* at 1033.

147. *Id.* at 1026 n.5 (majority opinion).

148. *Id.*

149. Johnson v. Trans Union, LLC, 524 F. App'x 268, 270 (7th Cir. 2013).

150. *Lloyd*, 105 F.4th at 1026 n.5.

151. *Johnson*, 524 F. App'x at 270.

considered res ipsa implausible was because, under those circumstances, it was. Res ipsa loquitur was "implausible" as applied in *Johnson*, but not necessarily as a matter of law. It was not so clear in Lloyd's case that her facts and circumstances rendered res ipsa "inapplicable."[152]

The *Lloyd* court then cites *Ausherman v. Bank of America Corp.*, stating that the court "expressly declin[ed] to apply res ipsa loquitur to prove a duty under the FCRA."[153] But the *Ausherman* court's holding merely reiterated that a plaintiff must point to a provision of the law that was violated—specifically, by an entity that was *actually required to comply* with that provision. The *Ausherman* court's holding was based on the fact that Ausherman could not point to any specific duty owed to him under the FCRA by Bank of America, the defendant.[154] Notably, though, *Ausherman* did not rule out the application of res ipsa in the right case.[155]

Conversely, Lloyd clearly identified the duty of care required by the FCRA.[156] The case on appeal concerns whether she presented sufficient evidence for summary judgment purposes of a breach of that duty, and that this breach caused her injury.[157] Whereas the *Ausherman* court had to decide whether a duty of care was owed, the *Lloyd* court needed to decide what evidence was sufficient to prove a breach of duty where one *was* owed. Thus, the issues between the two cases are different enough that the *Lloyd* court's use of *Ausherman* as a reason not to consider res ipsa loquitur lacks justification.

The *Lloyd* court then addresses the two most pro-res ipsa circuit court cases: *Philbin* and *Stewart*. The court says that *Philbin* "not[es] res ipsa loquitor [as] one theory that has been discussed by other courts but find[s] it unnecessary to decide among the various theories advanced by the plaintiff."[158] And in describing *Stewart*, the court notes that although the lower court recognized inaccuracies as sufficient to show unreasonable procedures, the D.C. Circuit "did not apply res ipsa loquitur . . . but instead vacated the district court's

152. *Lloyd*, 105 F.4th at 1027.

153. *Id.* at 1026 n.5 (emphasis omitted).

154. Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901 (4th Cir. 2003). The FCRA "imposes no requirements on users or subscribers of credit reports like [the defendant]. Rather, § 1681e only imposes requirements on consumer reporting agencies." *Id.* (emphasis omitted).

155. *See generally id.* at 901–02 (distinguishing Ausherman's claim from Philbin's case at the Third Circuit, and discussing how res ipsa loquitur would be used were it applicable to Ausherman's situation).

156. Lloyd points to § 1681i(a) as the basis for claim, which pertains to reasonable reinvestigation after a consumer dispute. *See Lloyd*, 105 F.4th at 1024; Lloyd Opening Brief, *supra* note 136, at 25–27.

157. The majority writes: "While Lloyd generally argues that Experian failed to follow its procedures and failed to have proper procedures in place to detect inconsistencies in a furnisher's reporting, she did not point to any step in Experian's reinvestigation procedure as insufficient." *Lloyd*, 105 F.4th at 1025. This line of inquiry speaks to the breach and causation elements for negligence claims rather than the duty element.

158. *Id.* at 1026 n.5 (emphasis omitted).

opinion."[159] The court's characterizations of these cases are accurate but insufficient to explain a refusal to use the doctrine in *Lloyd*.

No explanatory parenthetical in footnote five adequately justifies a refusal to apply res ipsa loquitur to these facts. Where it does attempt to justify its refusal, the court merely restates why *other* courts have done so with different, far less favorable facts for plaintiffs. This court was presented an opportunity to apply this doctrine as the other courts hypothesized would be permissible if the proper plaintiff brought suit. Thus, even if Chief Judge Smith's dissent is wrong about the existence of a circuit split after *Lloyd*,[160] at the very least, he correctly identifies that the majority carelessly dismissed its sister circuits' precedent.

A second major flaw in *Lloyd* is that the court appears to neglect the common law understandings of the FCRA's civil liability provisions, as noted by Chief Judge Smith's dissent.[161] In *Safeco Insurance Co. of America v. Burr*, the Supreme Court—seeking to determine whether the petitioner was liable under the FCRA's willful noncompliance provision[162]—held the prevailing understanding of the FCRA's terms should be the "common law usage,"[163] absent explicit language in the statute indicating otherwise.[164]

Circuit courts imbed common law into their interpretation of the FCRA as well. For example, the Tenth Circuit[165] acknowledged what is effectively an adoption of the Hand formula[166] for CRAs, noting "CRAs are not required to research [information they receive] further when 'the cost of verifying the accuracy of the source' outweighs the 'possible harm inaccurately reported information may cause the consumer.'"[167] So, where inaccuracy of a report

159. *Id.* (emphasis omitted).

160. *Id.* at 1033 (Smith, C.J., dissenting in part) ("Today's decision . . . appears to create a split between our circuit and at least some of our sister circuits.").

161. *Id.* at 1032.

162. 15 U.S.C. § 1681n.

163. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57–58 (2007).

164. *Id.*; *see also* Beck v. Prupis, 529 U.S. 494, 500–01 (2000) ("[W]hen Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind unless otherwise instructed.'" (quoting Morissette v. United States, 342 U.S. 246, 263 (1952))).

165. *See* Wright v. Experian Info. Sols., Inc., 805 F.3d 1232, 1239 (10th Cir. 2015).

166. The "Hand formula" was developed by Judge Learned Hand to determine reasonableness in negligence suits. The formula posits that a defendant is liable for negligence where the burden of a precaution is less than the probability of a harm absent the precaution, multiplied by the expected damages if the event occurs. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173–74 (2d Cir. 1947) (holding a third party was contributorily negligent for not manning a barge in the middle of the day, an occurrence for which the court found no reasonable excuse in light of the foreseeable risks).

167. *See Wright*, 805 F.3d at 1239 (quoting Henson v. CSC Credit Servs., 29 F.3d 280, 285 (7th Cir. 1994)).

is at issue, courts weigh the costs of potential remedies to determine reasonableness.[168]

Because res ipsa loquitur is a common law creation within the wider body of common law negligence doctrine,[169] courts should have no issue allowing negligence claims to withstand summary judgment on the basis of res ipsa loquitur.

2. The *Lloyd* Court's Holding Frustrates the FCRA's Legislative Purpose

The holding in *Lloyd* frustrates the FCRA's legislative purpose. In passing the FCRA, Congress's stated purpose was to ensure accuracy and equitability while protecting consumer privacy.[170] These goals are frustrated by forcing consumers to bring forth direct evidence of unreasonable procedures to survive summary judgment when circumstantial evidence may be available, and CRA internal procedures are generally unavailable to consumers.

Courts' views differ on whether inaccurate credit reports themselves can be fairly read as evidence of unreasonable procedures,[171] but those credit reports are some of the best evidence that a consumer may have access to in pursuing their negligence claims. CRAs are in a far better position than the consumer to know what procedures they use to investigate and verify credit information. The kind of grossly inaccurate information the FCRA is meant to protect against is the exact kind that typically results in denials of credit, which may be the basis for damages.[172] Certainly, then, the legislative intent of the FCRA tends to support a jury inference of negligence in cases where, absent other direct evidence of unreasonable procedures, a plaintiff is noted ninety days delinquent on a payment in a mathematically impossible fashion.[173]

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168. *See, e.g.*, Hammoud v. Equifax Info. Servs., 52 F.4th 669, 675 (6th. Cir. 2022) ("[I]t would be unreasonable to 'require a live human being, with at least a little legal training, to review every [dismissal of a legal action]' and classify it because of the 'enormous burden' credit reporting agencies would incur. . . . The calculus changes, however, once the consumer raises concerns that their information may be inaccurate.").

169. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 328D (AM. L. INST. 1965); *see also supra* Section I.B.2.

170. *See* 15 U.S.C. § 1681(a), (b); *see also supra* Section I.A (discussing the origin of the FCRA, Congress's goals in crafting the bill, and courts' willingness to interpret the statute with the consumer's interest in mind).

171. *Compare* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51 (D.C. Cir. 1984) (holding a mere inaccuracy is insufficient to show unreasonable procedures), *with* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (holding a mere inaccuracy may be sufficient to show unreasonable procedures). For a more robust discussion on this subject written in the context of the 2003 amendments to the FCRA, see generally Jennifer Cuculich, Note, *Who Bears the Burden of Proof Under the Fair Credit Reporting Act, 15 U.S.C. §1681e(b)? Consumers May Bear the Biggest Burden in This Climate of Heightened National Security*, 14 LOY. CONSUMER L. REV. 305 (2002).

172. *See* Sloane v. Equifax Info. Servs., LLC, 510 F.3d 495, 501 (4th Cir. 2007) (recognizing denial of credit as sufficient to establish damages under the FCRA).

173. *See* Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1030 (8th Cir. 2024) (Smith, C.J., dissenting in part).

III. CONSUMERS NEED CERTIORARI OR CONGRESSIONAL ACTION

Moving past summary judgment in an FCRA negligence claim has become increasingly difficult, and the messy case law surrounding the use of res ipsa loquitur in the FCRA must be remedied to properly serve Congress's intent. To solve this issue, the Supreme Court should grant certiorari, though this option may prove unlikely. Regardless of the Court's approach, Congress should amend the FCRA—as it has done in the past—by codifying res ipsa into § 1681n and granting juries the ability to make inferences of negligence. Section III.A provides a viable argument that the Supreme Court could use to recognize res ipsa in the FCRA, and Section III.B proposes statutory language that Congress could use to codify res ipsa into the FCRA.

A. THE SUPREME COURT SHOULD RESOLVE THE QUASI-CIRCUIT SPLIT

One possible solution is for the Supreme Court to grant certiorari on this issue and recognize res ipsa loquitur in the FCRA context. The Supreme Court has resolved circuit splits arising out of the FCRA in the past: One recent case, *TRW Inc. v. Andrews*,[174] resolved a circuit split over whether the FCRA implicitly provides a discovery exception rule other than the one explicitly provided in the FCRA.[175] Another recent string of cases stemmed from an open question as to whether the FCRA constitutes a waiver of sovereign immunity by the federal government where the government is accused of violating its provisions.[176] In short, this Supreme Court does not shy away from interpreting this statute.

The Supreme Court should recognize FCRA res ipsa arguments by applying congressional intent to its own common law understanding of the FCRA's language. A generally accepted canon in statutory interpretation permits courts to ascribe the common law meanings of terms to statutes where Congress has not given any reason to do otherwise.[177] The Court has already acknowledged this canon in the FCRA context: In *Safeco Insurance Co. of America v. Burr*, the Court found "no reason to deviate from the common law understanding" of the FCRA's language where Congress had not indicated its desire to the

174. TRW Inc. v. Andrews, 534 U.S. 19, 22 (2001).

175. *Id.* at 22–23.

176. *See* United States v. Bormes, 568 U.S. 6, 16 (2012) (choosing not to address the sovereign immunity waiver and instead opting to remand the issue to the circuit court below); Robinson v. Dep't of Educ., 140 S. Ct. 1440, 1440 (2020) (mem.) (denying certiorari on that same issue in an unsigned order over Justice Thomas's public dissent). The Court held that the FCRA did constitute such a waiver. *See* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 64 (2024).

177. *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013) ("'[W]hen a statute covers an issue previously governed by the common law,' it is presumed that 'Congress intended to retain the substance of the common law.'" (quoting Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010))); *see also* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

contrary.[178] It would stand to reason that, if the willful noncompliance provision is meant to be understood in light of common law usage, so too should the negligent noncompliance provision. And if a common law understanding of negligence brings along attached principles and doctrines[179] like res ipsa loquitur, then the FCRA should permit plaintiffs to proceed without direct evidence of negligence as res ipsa permits, provided there is no "statutory purpose to the contrary."[180] The Court would need to analyze whether the FCRA's purpose in either § 1681 or in the text of the negligent noncompliance provision itself provide any reason to deviate from the common law understanding of "negligence."

The Court's analysis in *Safeco* would be informative of its stances on arguments that CRAs might bring against the use of res ipsa in FCRA claims. In *Safeco*, the Court looked to the construction of the willful noncompliance provision and determined that every textual indicator pointed to the willful noncompliance provision permitting suits alleging recklessness, in line with the common law understanding of the word "willful."[181] Though the precise legal question would be slightly different for the res ipsa issue, the Court could use similar tools to reach a similar outcome. For instance, the *Safeco* Court found no persuasive evidence in the legislative history that Congress intended for "willfulness" to deviate from the common law construction.[182] The Court also found unpersuasive the argument that the common law construction would produce absurd results.[183] Both of these arguments could play out similarly for the negligent noncompliance provision: The legislative history does not provide evidence that Congress desired to deviate from the common law understanding of negligence, and the "absurd results" argument would be a tall ask in light of the FCRA's explicitly stated purpose in § 1681.[184]

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178. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 69 (2007).

179. *See supra* notes 161–68 and accompanying text (discussing lower court interpretations of the FCRA in manners consistent with the common law).

180. *Isbrandtsen Co.*, 343 U.S. at 783.

181. *See Safeco*, 551 U.S. at 56–60.

182. *Id.* at 58–60.

183. *Id.* at 60. A statutory construction produces absurd results where "no reasonable person could approve" its disposition. *Absurdity Doctrine*, BLACK'S LAW DICTIONARY (12th ed. 2024).

184. This argument against res ipsa would suggest that invoking the doctrine in the FCRA context produces absurd results by making FCRA negligence claims too easy, thereby over-extending CRA liability. *Cf.* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). An alternative interpretation would be available by simply not extending the negligence provision to include common law doctrines like res ipsa.

But because the purpose of the FCRA is to "require that consumer reporting agencies adopt reasonable procedures . . . in a manner which is fair and equitable to the consumer," and a narrow interpretation of "negligence" prohibiting res ipsa would continue to allow CRAs a monopoly over the requisite information to bring one of these claims, it is not clear the legislative purpose would be effectuated by this alternative interpretation. 15 U.S.C. § 1681. Moreover,

In theory, the Supreme Court has its argument laid out, and the right plaintiff could bring suit to clarify the messy case law. Such a disposition would effectuate the purpose of the FCRA by allowing consumers like Lloyd to remedy injustices in the credit reporting industry, while incentivizing CRAs to put more work into making their procedures more transparent and accurate. CRAs would search for ways to innovate their processes to prevent borrowers from having mathematical impossibilities (like a ninety-day delinquency notice provided well before ninety days have passed) featured in their credit reports that cause them harm.

Consumer protection advocates have reason to remain skeptical, though; it is unclear how consumer friendly the Supreme Court would be if it granted certiorari on this issue. For example, in *TransUnion LLC v. Ramirez*,[185] the majority addressed a class-action suit against TransUnion and severely limited the class size by holding that most of them had not shown sufficient evidence of damages to obtain Article III standing.[186] Although the Court held that a credit report incorrectly labeling a consumer as a "potential terrorist" was a sufficient harm to establish a violation of the FCRA,[187] the Court determined that only plaintiffs whose reports were actually distributed to third parties could sue in federal court.[188] The plaintiffs who merely received the "potential terrorist" designation did not suffer a concrete enough harm for standing.[189] Even where a plaintiff like Lloyd could use res ipsa loquitur to show a CRA breached its duty and caused an injury, that plaintiff may struggle to bring their claim if the alleged injury is a mere statutory violation;[190] the Court may

parties challenging res ipsa loquitur in the FCRA would have a difficult time showing that no reasonable person could approve of its use, given that at least a few reasonable judges have mused over its applicability. *See supra* Part II.

185. *See generally* TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).

186. *Id.* at 418.

187. *Id.* at 432–33.

188. *Id.*

189. *See id.* at 433–39 (finding that the 6,332 members of the class who did not have their information distributed could not point to any common law analogue that would provide basis for recovery).

190. There is at least some support on the Supreme Court for resolving issues like those presented in *Ramirez* in light of congressional intent. Justice Thomas—uncharacteristically joined by Justices Kagan, Sotomayor, and Breyer—wrote in dissent: "[D]espite Congress' judgment that [mere statutory violations] deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing." *Id.* at 443 (Thomas, J., dissenting).

Justice Thomas and the Court's liberals would permit recovery for the plaintiffs in *Ramirez* on the basis that, in their view, Congress very plainly created a private right of action for individuals of a certain class, regardless of the *concreteness* of the alleged harm:

> Congress created a cause of action providing that '[a]ny person who willfully fails to comply' with an FCRA requirement 'with respect to any *consumer* is liable to *that consumer*.' If a consumer reporting agency breaches any FCRA duty owed to a specific consumer, then that individual (not all consumers) may sue the agency. No one disputes that each class member possesses this cause of action. And no one disputes

not even deem such a case justiciable in the first place.[191] Thus, although *Ramirez* was addressing a distinct issue related to standing, its disposition shows the Court may not necessarily show sympathy to res ipsa loquitur as a tool for consumer protection; congressional intent may give way to other modes of analysis more favorable to CRAs.[192]

Nevertheless, the consumer advocate could partially rebut this concern by retooling *Ramirez* as a case favorable to consumer protection through res ipsa loquitur based on the Court's desire to preserve common law as persuasive authority in its decision-making. The *Ramirez* majority, denying relief for thousands of plaintiffs, reasoned that the plaintiffs could not establish Article III standing because the FCRA right under which they sought relief did not have any analogous rights at common law, since the closest harm was common law defamation, which requires publication.[193] The bottom-line holding is undoubtedly anti-consumer,[194] but the underlying reasoning—and its dependence on the common law as an analytical tool—could bolster the argument that negligent noncompliance under § 16810 should be understood in light of the common law. Indeed, *Ramirez* is one of many recent cases in which the Court utilizes common law as a tool to resolve modern legal issues.[195] If the Court reads other provisions of the FCRA based on their

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that the jury found that TransUnion violated each class member's individual rights. The plaintiffs thus have a sufficient injury to sue in federal court.

Id. at 450 (quoting 15 U.S.C. § 1681n(a)). Under this view, FCRA claims would be easier to bring, in line with congressional intent to ensure accuracy and protect consumers.

191. As a general rule, a plaintiff's standing is a requirement for a cause of action to be justiciable. Otherwise, there is no "case or controversy" required for a federal court to have jurisdiction under Article III. *See* U.S. CONST. art. III, § 2; *Ramirez*, 594 U.S. at 423.

192. Indeed, the Supreme Court is embroiled in an ongoing ideological battle about the extent to which textualism should give way to indicia of congressional intent. *See, e.g.*, Stanley v. City of Sanford, 145 S. Ct. 2058, 2089 n.12 (2025) (Jackson, J., dissenting) ("The majority's contention that I reject '"pure textualism" [a]s insufficiently pliable to secure the result [I] seek,' stems from an unfortunate misunderstanding of the judicial role. Our interpretative task is not to seek our own desired results (whatever they may be). And, indeed, it is precisely because of this solemn duty that, in my view, it is imperative that we interpret statutes consistent with all relevant indicia of what *Congress* wanted, as best we can ascertain its intent." (citation omitted)).

193. *Ramirez*, 594 U.S. at 434 ("Publication is 'essential to liability' in a suit for defamation. And there is 'no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury.'" (citations omitted)).

194. *Cf.* Mark Joseph Stern, *The Supreme Court's Conservatives Issued a Decision Too Extreme for Clarence Thomas*, SLATE (June 25, 2021, 4:10 PM), https://slate.com/news-and-politics/2021/06/transunion-kavanaugh-thomas.html [https://perma.cc/ZL9Y-6VY4] ("Cognizant that the FCRA would not enforce itself, Congress also gave consumers the ability to sue credit reporting agencies . . . . [Justice Kavanaugh's] rule requires courts to toss out the claims of 6,332 people who were falsely flagged as criminals . . . .").

195. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 242 (2022) (citing, among other things, a thirteenth-century common law treatise to justify stripping abortion rights in the modern era).

common law definitions,[196] and the Court has also taken steps to analyze the harms protected by the FCRA in light of their common law analogues,[197] the Court may be comfortable expanding that desire to preserve the common law in § 16810. *Ramirez* would not be so indicative of any negative attitude toward consumers under this view, and the Court could easily justify res ipsa loquitur through this mode of analysis.

Regardless, it is unclear whether the circuits have adopted strong enough stances on res ipsa loquitur in the FCRA to warrant the Supreme Court granting certiorari. To determine whether to resolve an issue, the Court considers whether a circuit court has ruled "*in conflict* with the decision of another United States court of appeals on the same important matter."[198] Reasonable minds may disagree on whether *Lloyd* truly establishes a circuit split; although Chief Judge Smith asserts it does, one charitable reading of the majority opinion could lead the Court to conclude that no such split exists. That reading may have merit, because the *Lloyd* court does not explicitly disregard res ipsa loquitur as a possible tool for FCRA plaintiffs. Its statement that "no circuit court has expressly applied the doctrine in the FCRA context" does not entirely close the door on the Eighth Circuit applying this doctrine in the future, even if it reflects unwillingness to do so.[199]

The Supreme Court is unlikely to have the opportunity to grant certiorari on a case any time soon; Lloyd has not appealed the Eighth Circuit's judgment, which would have been required within ninety days of its decision,[200] and there do not appear to be any other circuit court cases poised to address the issue. Still, to properly effectuate the FCRA's purpose, the Supreme Court should recognize the common law roots of the FCRA's negligence provision and permit consumers to bring claims based on the theory of res ipsa loquitur.

B. CONGRESS SHOULD AMEND THE FCRA

Alternatively, Congress could clarify via amendment that res ipsa loquitur is an acceptable theory for FCRA negligence claims lacking direct evidence. Such an amendment may be necessary even if the Supreme Court *did* grant certiorari on this issue, as it is easy to imagine the Court merely telling Congress

196. *See supra* notes 162–64 and accompanying text (discussing *Safeco* and the common law reading of the willful noncompliance provision).

197. *Ramirez*, 594 U.S. at 434.

198. SUP. CT. R. 10(A) (emphasis added).

199. Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1026 n.5 (8th Cir. 2024).

200. SUP. CT. R. 13(1) ("Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case . . . is timely when it is filed . . . within 90 days after entry of the judgment."). The Eighth Circuit decided *Lloyd* on June 21, 2024, over ninety days prior to my writing this Note.

to solve the issue themselves,[201] either because the FCRA is not written clearly enough or because the justices in the majority fear legislating from the bench.

The FCRA has been amended twice since its passage,[202] and there have been many other unsuccessful attempts in between.[203] Scholars have also proposed several amendments to solve various novel legal issues,[204] including Ira Moskatel, who specifically proposed amending the FCRA's negligent noncompliance provision.[205] Moskatel's proposal would have amended § 16810 to explicitly include a burden-shift model, while clarifying the requisite damages for the claim:

> (a) Any agency which fails to comply with any requirement imposed by this chapter shall be liable to the consumer in an amount equal to the sum of
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> > (1) any damages sustained as a result of the failure, *provided* that in any action not maintained as a class action to enforce liability under this section, such damages shall be equal to either $100 or the damages sustained whichever is larger, and

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201. It would not be out of character for the Supreme Court to reiterate to Congress its responsibility to legislate clearly, or otherwise remedy decisions seen by some as unjust. *See, e.g.*, Biden v. Nebraska, 600 U.S. 477, 500–07 (2023) (refusing to permit student loan forgiveness program because Congress had not clearly authorized the program); *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."); Terry v. United States, 593 U.S. 486, 502 (2021) (Sotomayor, J., concurring) ("Fortunately, Congress has numerous tools to right this injustice.").

202. *See* George, *supra* note 62 (discussing the two major amendments to the FCRA—the Consumer Credit Reporting Reform Act of 1996, and the FACT Act of 2003—along with several key developments since the FCRA's passage).

203. Lawmakers attempted to amend the FCRA several times in 2023 alone. *See, e.g.*, H.R. 2444, 118th Cong. (2023) ("[P]rohibits, upon a consumer's request, a credit reporting agency from including on a consumer credit report a consumer's prior name after a legal name change."); S. 1327, 118th Cong. (2023) ("[R]equires a consumer's affirmative informed consent before a consumer reporting agency may share that consumer's report with third parties for specified purposes."); S. 1654, 118th Cong. (2023) ("[A]llows for the reporting of certain positive consumer-credit information to consumer reporting agencies.").

204. *See, e.g.*, Donald Carrington Davis, *MySpace Isn't Your Space: Expanding the Fair Credit Reporting Act to Ensure Accountability and Fairness in Employer Searches of Online Social Networking Services*, 16 KAN. J.L. & PUB. POL'Y 237, 253–55 (2006) (proposing an amendment to § 1681a redefining "investigative consumer report" and "consumer reporting agency" to include social media companies, to broaden FCRA privacy protections in the social media age); Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1617–19 (2006) (arguing Congress should amend the FCRA to limit employer use of consumer credit information in employment decisions); Elizabeth Doyle O'Brien, Comment, *Minimizing the Risk of the Undeserved Scarlet Letter: An Urgent Call to Amend §1681E(B) of the Fair Credit Reporting Act*, 57 CATH. U. L. REV. 1217, 1240–43 (2008) (advocating an amendment clarifying what constitutes "maximum possible accuracy"); Thrasher, *supra* note 91, at 617 (proposing Congress amend the language in § 16811 to require a "complete and comprehensive investigation" rather than a "reasonable investigation").

205. *See* Moskatel, *supra* note 25, at 1130.

> (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.
>
> (b) No agency shall be liable to any consumer if it can prove by a preponderance of the evidence that the person or persons who prepared the report on that consumer followed reasonable procedures to insure compliance with this Act.[206]

Moskatel also proposed clarifying Congress's use of burden shifts in some parts of the FCRA—but not others—by simply removing any language invoking a burden shift from other areas of the statute.[207] Although Moskatel generally expressed skepticism at res ipsa as a tool to fix the FCRA,[208] the language of his amendment could serve as a starting point for an amendment oriented toward clarifying the standards of proof and the kinds of evidence a plaintiff may put forward.

The language contained in the Restatement (Second) of Torts § 328D is also helpful in drafting an amendment that permits an inference of negligence.[209] This provision, which describes res ipsa loquitur, reads as follows:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
>
> (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.
>
> (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.[210]

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206. *Id.*

207. *Id.*

208. Moskatel's hesitation to advocate common law res ipsa loquitur in the FCRA stems in part from his pursuing differing goals from those proposed in this Note. Moskatel focuses in relevant part on deterring CRAs from using unreasonable procedures, and to do this, his proposed amendment attempts to "forc[e] agencies to keep records." *Id.*

209. RESTATEMENT (SECOND) OF TORTS § 328D (AM. L. INST. 1965).

210. *Id.*

My proposed amendment would draw very heavily from this formulation of res ipsa loquitur.[211]

Since § 16810 establishes liability for CRAs who are negligently noncompliant with the rest of the FCRA's provisions, it is the ideal location for this proposed amendment, much like Moskatel's. Other provisions of the FCRA establish the duties CRAs must follow. Section 16810 provides an enforcement mechanism for those duties, so it stands to reason that § 16810 should also warn CRAs of permissible jury inferences for violations of those duties. Thus, Congress should amend § 16810 as follows, with the proposed amendment noted in italics:

> **(a) In general**. Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> > (1) any actual damages sustained by the consumer as a result of the failure; and
> >
> > (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.
>
> ***(b) Liability by inference of negligence****. Absent direct evidence of unreasonable procedures, a jury may infer negligent noncompliance with any requirement imposed under this subchapter where:*
>
> > *(1) the alleged negligence is of a kind which ordinarily does not occur where a person has used reasonable investigation or reinvestigation procedures;*
> >
> > *(2) other responsible causes, including the conduct of the consumer and third parties, are sufficiently eliminated by the evidence; and*
> >
> > *(3) the indicated negligence is within the scope of the person's duty to the consumer.*

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211. The Third Restatement of Torts introduced a simpler formulation of res ipsa which reads: "The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 (AM. L. INST. 2010). This would not be an effective foundation for an amendment to the FCRA; its language about classes of actors might prove superfluous, given that the FCRA explicitly outlines the classes of actors with which it is concerned. *See* 15 U.S.C. § 1681a(b). In other words, the Third Restatement formulation is arguably too broad to be useful here. Conversely, the language in the Second Restatement provides guardrails meant to prevent excessive use of the doctrine, still requiring some minimum amount of evidence by the plaintiff for a successful negligence claim. *See* Daniel J. Pylman, Res Ipsa Loquitur *in the Restatement (Third) of Torts: Liability Based Upon Naked Statistics Rather than Real Evidence*, 84 CHI.-KENT L. REV. 907, 933–35 (2010).

> **(*c*) Attorney's fees**. On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

This amendment would provide explicit guidance to courts and create a permission structure for adoption of common law doctrines in the FCRA context. By using the language provided by the Restatement (Second) of Torts, this amendment would provide remedy for plaintiffs lacking access to the information required to bring their claim.

My proposed amendment would not eliminate all legal issues stemming from § 16810 as it relates to the rest of the FCRA. For example, at least some of the debate in *Lloyd v. FedLoan* centered around whether CRAs are only required to follow the procedures explicitly outlined in the FCRA, or whether "reasonableness" imposes upon CRAs a duty to do more than the bare minimum.[212] The Eighth Circuit determined it preferred the former view of reasonableness, which may spell trouble for part (b)(3) of my proposed amendment in at least some jurisdictions.[213] Nevertheless, even where a court finds the limits of a CRA's duties in the text of the FCRA, congressional intent would be better served by permitting inferences of negligence where those duties may have been violated on the basis of consumer inability to access relevant evidence.

CONCLUSION

The FCRA focuses primarily on protecting the consumer and providing remedies when CRAs violate their duties. But often, injured plaintiffs do not have access to the kinds of direct evidence necessary to bring a claim; CRAs need only maintain "reasonable procedures" to investigate or verify information

212. *See* Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1024–26 (8th Cir. 2024). In *Lloyd*, the "bare minimum" outlined in the statute was that Experian conducted a reinvestigation as requested by the consumer when the consumer disputes the contents of a credit report. *See* 15 U.S.C. § 1681i(a)(1)(A). The *Lloyd* court held that, although Experian's reinvestigation did not remove each inaccurate delinquency after its first reinvestigation, it had no obligation to do so once it met its requirements under the statute, which was simply that they conduct one and it was reasonable. *Lloyd*, 105 F.4th at 1025–26.

In 2015, some legislators proposed legislation to address the "bare minimum" issue, though their efforts were unsuccessful. *See* Press Release, Sen. Brian Schatz, Senators Schatz, Warren, McCaskill, Colleagues Introduce Legislation to Protect Consumers from Credit Report Errors (July 23, 2015), https://www.schatz.senate.gov/news/press-releases/senators-schatz-warren-mccaskill-colleagues-introduce-legislation-to-protect-consumers-from-credit-report-errors [https://perma.cc/B7VH-FSWW] ("The SECURE Act would direct the Consumer Financial Protection Bureau to establish minimum procedures that a CRA must follow to ensure maximum possible accuracy of consumer reports.").

213. *Lloyd*, 105 F.4th at 1025–26.

contained in a credit report, but they are under no obligation to disclose to consumers what those procedures are. Although some courts acknowledge res ipsa loquitur as an avenue through which consumers may vindicate their rights in these situations, the Eighth Circuit's recent decision in *Lloyd* has muddied the case law and likely created a circuit split. This decision ignored precedent from other circuit courts and failed to apply the common law understanding of negligence to § 16810, causing tension with the consumer-focused purpose of the FCRA. The Supreme Court should clarify the murky case law and recognize the common law origins of the negligence provision of the FCRA, permitting res ipsa loquitur in FCRA cases where the facts could lead a jury to infer reasonable procedures were not followed. Additionally, Congress does not need to wait for the Court to act on this issue; Congress should also consider amending the FCRA to codify this doctrine into the negligent noncompliance provision using the Restatement (Second) of Torts as a guide. These solutions would further the FCRA's goals by protecting consumers' rights to privacy and accuracy in the modern era.

Imagine once again your excitement about buying your first house, and your subsequent disappointment that your mortgage is denied due to affirmatively inaccurate information contained in your credit reports.[214] Perhaps you are alleged ninety days delinquent on a loan payment due last week, a mathematical impossibility. Although you have no idea what procedures the CRA used to verify this information, you sue. The CRA moves for summary judgment because you have no direct evidence showing the CRA failed to follow reasonable procedures. This time, however, the court permits your claim to proceed on the basis that a jury could infer negligent noncompliance from the facts presented—either because the Supreme Court resolved a circuit split, or because Congress acted. Your rights as a consumer are vindicated, and all is as Congress intended when it passed the FCRA in 1970.

214. *See supra* Introduction.