

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**No. 97-4386**

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DEBORAH WILSON,  
Plaintiff-Appellant

v.

RENTAL RESEARCH SERVICES, INC.,  
Defendant-Appellee

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On Appeal from the  
United States District Court for

202-326-2436

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## STATEMENT OF INTEREST OF THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681, *et seq.*, requires “consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.” 15 U.S.C. § 1681(b). The Act establishes a dual scheme of private and public enforcement, and assigns the principal public role to the Federal Trade Commission (“FTC” or “Commission”) (15 U.S.C. § 1681s). It vests the FTC with appropriate “procedural, investigative, and enforcement powers.” *Id.*; *see* 15 U.S.C. § 1681g(c)(3). Practices that violate the FCRA “constitute an unfair or deceptive act or practice in commerce in violation of the FTC Act.” 15 U.S.C. § 1681s(a)(1). The Commission’s interpretations of the FCRA are entitled to deference by the courts. *See Estiverne v. Sak’s Fifth Ave.*, 9 F.3d 1171, 1173 (5<sup>th</sup> Cir. 1993).

The issues in this case concern: (1) the extent of a consumer reporting agency’s duty to “assure maximum possible accuracy” in consumer reports (15 U.S.C. § 1681e(b); and (2) the obligation of a consumer reporting agency under 15 U.S.C. § 1681i to reinvestigate assertedly inaccurate information that the agency



obtains from another consumer reporting agency and resells to its clients. Both issues have important ramifications for consumers who stand to be harmed by the inclusion in their consumer reports of derogatory information that does not pertain to them, or that is otherwise inaccurate. Because this Court's *en banc* decision may significantly affect the FCRA and the Commission's enforcement of the Act, the Commission offers this brief to assist the Court's resolution of this case.

## STATEMENT OF ISSUES

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<sup>1</sup>The FCRA was amended in 1996, and the events in this case occurred before the amendments became effective. Our discussion therefore focuses on the Act as it read before the amendments. Where we draw on the amended language for purposes of comparison or discussion, we make that clear. However, we note that the 1996 amendments did not materially affect most of the provisions that we rely upon in this brief.

credit information.<sup>3</sup> Thus, TRW sells information to “resellers” like Rental Research, which then include the information in reports to such end users as mortgage companies, banks, and landlords. *See* FTC Commentary on the FCRA § 604 (“*FTC Commentary*”

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<sup>3</sup>After this law suit was filed, TRW Inc. sold its consumer reporting business to Experian Information Solutions, Inc.

“telephone” Rental Research if the landlord was able to verify that any of the information in the report on Ms. Wilson actually pertained to her. Finally, the report listed additional items of adverse information about Ms. Wilson that Rental Research had obtained from TRW and that Ms. Wilson subsequently disputed.

Acting on Rental Research’s report, the landlord denied Ms. Wilson’s rental application. She then requested and obtained a copy of the report from Rental Research, and she subsequently advised Rental Research that ten of the detainer actions were not hers. She also complained of errors in the TRW-provided section of the report. *Id.* Rental Research responded by deleting the disputed detainer references, but it declined to reinvestigate the information that TRW provided, advising Ms. Wilson that she must contact TRW directly. *Id.*

Ms. Wilson then filed the present action. Among other things, she claims that Rental Research violated its statutory duty to follow reasonable procedures to assure maximum possible accuracy in its report on Ms. Wilson; and that Rental Research also violated its statutory duty under pre-1996 Section 611(a) of the FCRA to reinvestigate the alleged errors in the information that Rental Research had received from TRW and included in the report that it sold to Ms. Wilson’s prospective landlord. The district court granted Rental Research summary judgment against Ms. Wilson. A divided panel of this Court reversed in part and

affirmed in part the district court's decision. *Wilson v. Rental Research Services, Inc.*, 165 F.3d 642 (8<sup>th</sup> Cir. 1999).

Undertaking a *de novo* review of the record (165 F.3d at 646), the panel majority held that there was a triable issue whether Rental Research, by reporting all the detainer actions, breached its statutory duty to follow reasonable procedures to assure maximum possible accuracy as to the information it reported about Ms. Wilson. 165 F.3d at 647. Citing the purpose, history, and goals of the FCRA, the panel majority found that "Rental Research's practices . . . will lead to inaccuracies any time there is another person in the housing court database with a name similar to that of the subject of the report." 165 F.3d at 646. It concluded that "Rental Research's practices are not fair and equitable to the consumer, and its assertion that it fulfilled its obligations under the FCRA is contrary to both the purpose of the statute and the weight of authority interpreting it." 165 F.3d at 644. The panel majority noted that "[h]ere, the report produced by Rental Research, although an accurate reflection of the housing court records, was not maximally accurate in any sense with regard to Wilson, the individual who was the subject of the report, as required by § 1681e(b)." *Id.* at 645. Citing *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37 (D.C. Cir. 1984), the panel majority rejected Rental Research's argument that it had satisfied its statutory obligation by issuing a report that

contained housing court information, passed on without any alteration, coupled with a disclaimer that the reported information might not pertain to the subject of the report. The majority said:

We join the strong majority of courts since the *Koropoulos* decision in rejecting the “technical accuracy” defense in favor of a thorough examination of whether the report was maximally accurate with respect to the individual who is the subject of the report.

165 F.3d at 645 n.3. The panel majority concluded that Ms. Wilson’s claim that Rental Research had not used reasonable procedures to ensure the maximum possible accuracy should be considered by a jury:

In the instant case, the information contained in Wilson’s report was, on its face, enough to alert Rental Research that something was amiss. The report listed a total of twelve unlawful detainers in a period of less than three years, two of which were filed on the same day in different counties, and another two of which were filed less than two weeks apart in different counties.

165 F.3d at 647.

The panel, however, also held that Rental Research was not required by pre-1996 Section 611 to reinvestigate the items in the TRW portion of the report that Ms. Wilson disputed. 165 F.3d at 648. The panel declared that “*under the statute*

*at the time of the dispute, Rental Research was not the consumer reporting agency obligated to reinvestigate TRW's information.” Id. (emphasis added).*

Rental Research filed a timely petition for rehearing and suggestion for rehearing *en banc*. On July 16, 1999, this Court vacated the panel's decision and agreed to consider the matter *en banc*. Argument has been set for September 13, 1999.

### SUMMARY OF ARGUMENT

Section 607(b) of the FCRA imposes a clear and unequivocal duty on consumer reporting agencies to prepare consumer reports by using “reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” 15 U.S.C. § 1681e(b). Here, the undisputed facts show that Rental Research is a consumer reporting agency and employs methods that make inaccurate reports inevitable as to a large class of consumers -- those who have the misfortune of having a name similar to someone who has been the subject of housing court reports of unlawful detainer actions. Such wholesale inaccuracies were apparent on the face of Rental Research's report on Ms. Wilson and Rental Research therefore plainly had notice that its report was not accurate as to Ms. Wilson. Accordingly, Rental Research's procedures are likely unreasonable even when they happen to produce an accurate report. In

simply searching public record databases and listing unlawful detainer actions against anyone with a name similar to the subject of the report, Rental Research casts such a broad net that it inevitably catches inaccurate information and it has no apparent method of sorting out those inaccuracies. Given the purpose, policy, and structure of the FCRA, a consumer reporting agency violates Section 607(b) when its procedures result in consumer reports that systematically contain information that cannot possibly pertain to the subject of the report. Ms. Wilson has made a prima facie case showing a violation of the FCRA. At a minimum, she has established the existence of a disputed issue of material fact regarding the reasonableness of Rental Research's procedures.

The panel's (and lower court's) holding that pre-1996 Section 611 imposed no duty on Rental Research to reinvestigate disputed information that it obtained from TRW is contrary to the plain language of the FCRA. That language requires consumer reporting agencies to "reinvestigate" disputed information when a consumer "directly" notifies the agency of a dispute. Rental Research is a consumer reporting agency within the meaning of the FCRA, and Ms. Wilson directly reported to Rental Research that she disputed information in the TRW-supplied portion of Rental Research's report on her. Rental Research was therefore obligated to reinvestigate Ms. Wilson's claim. Moreover, the 1996



amendments did not materially change the statutory language that sets out the basic duty to reinvestigate disputed information. Thus, the panel’s position, if adopted by the Court *en banc*, could impair the future enforcement of the amended FCRA.

## ARGUMENT

### **A. Rental Research Is Not Entitled to Judgment as a Matter of Law Concerning Ms. Wilson’s Claim That It Failed to Follow Reasonable Procedures.**

Section 607 requires a consumer reporting agency to employ reasonable procedures in preparing consumer reports to assure that the information about the subject of the reports is accurate to the maximum extent possible. Cases arising under Section 607 thus present two questions: (1) whether the information about the consumer is accurate to the maximum extent possible; and (2) whether the consumer reporting agency used reasonable procedures in collecting and reporting the information. We treat each of these two questions separately below.

#### **1. Rental Research’s Reports Are Not Accurate as to the Subject of the Report.**

Rental Research points out that its report on Ms. Wilson correctly copied information contained in the housing court records and its disclaimer put the user on notice that the court records might not actually pertain to Ms. Wilson. Based on this “technical accuracy” of the report, the lower court refused to find a violation of





has created a comprehensive mechanism to protect consumers from abuses by consumer reporting agencies.

First, it has adopted a prophylactic strategy of putting reasonable procedures in place to minimize the risk that inaccurate information will appear in a person's consumer report when it is initially prepared. Section 607(b) of the Act requires:

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedure to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

15 U.S.C. § 1681e(b). Congress designed that Section to protect consumers from the harm and burden of having to fight about inaccurate credit reports after-the-fact.<sup>4</sup>

Second, Congress also granted consumers additional protections that enable them to compel the correction of those inaccurate reports that get through the screen that Section 607(b) imposes. The FCRA enables consumers to discover and challenge the contents of their credit files. 15 U.S.C. §§ 1681g, 1681h (current

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<sup>4</sup>As originally drafted, Section 607 required consumer reporting agencies to adopt "reasonable procedures" only when preparing investigative consumer reports, which are consumer reports that are based on personal interviews with a consumer's neighbors, friends, or associates. Before final passage of the Act, the Section was enlarged to cover all consumer reports. *See Bryant v. TRW*, 689 F.2d 72, 78 (6<sup>th</sup> Cir. 1982), quoting the remarks of Senator Proxmire in introducing the conference report on the bill, 116 Cong. Rec. 35940 (1970).

version at 15 U.S.C. §§ 1681g, 1681h (Supp. II, 1996)). It also imposes on credit reporting agencies an affirmative obligation to reinvestigate the information in their reports, when that information is challenged by the subject of the report. *See* 15 U.S.C. § 1681i (current version at 15 U.S.C. § 1681i (Supp. II 1996)).

Significantly, both pre-amendment and amended Section 611(a) expressly require consumer reporting agencies to delete from consumers' files all information that cannot be verified on reinvestigation. 15 U.S.C. § 1681i (current version at 15 U.S.C. § 1681i(a)(5)(A)(Supp. II 1996)).

Third, the Act creates incentives for consumer reporting agencies to comply with its provisions. The Act allows consumers to recover actual damages and attorneys' fees whenever a reporting agency negligently violates the Act (15 U.S.C. § 1681o) and to recover punitive damages whenever an agency wilfully violates the Act (15 U.S.C. § 1681n).

To the extent that Rental Research argues that it should be let off the hook because its report was "technically accurate" in that it simply reproduced housing court information and it gave a disclaimer, its argument is deficient as a matter of law. *E.g., Koropoulos*, 734 F.2d at 42; *Bryant*, 689 F.2d at 77. Rental Research's argument is not supported by either the purpose, the language, or the

structure of the FCRA.<sup>5</sup> Because Congress enacted the FCRA to protect consumers from abuses by the credit reporting industry, it would be inconsistent with the purpose of the Act to allow a consumer reporting agency to shield sloppy or incomplete reports with a mere disclaimer warning the recipients that the information in the report may not be solid. If the purpose of the Act is to require accurate consumer reports, that purpose is not served by the type of inaccurate reporting that Rental Research has engaged in here.

The statute's language and structure foreclose the result that Rental Research seeks here. Section 607 demands the "maximum possible accuracy of the information *concerning the individual about whom the report relates*" (emphasis added). As the panel majority correctly observed, the emphasized language requires that the "accuracy" of a consumer report be judged with respect to the

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<sup>5</sup>Indeed, no court of appeals has ever embraced that "defense." As the panel majority here commented, the "technical accuracy" defense was "initially accepted by a few district courts." 165 F.3d at 645 n.3, citing *Todd v. Associated Credit Bureau Servs., Inc.*, 451 F. Supp. 447, 449 (E.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1376 (3<sup>rd</sup> Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979). However, as the panel majority also stated, that "defense was then 'universally criticized by commentators for taking an unjustifiably narrow view of 'maximum accuracy.''" 165 F.3d at 645 n.3, quoting *Koropoulos*, 734 F.2d at 41 n.7. Indeed, it seems questionable that *Todd* would even be decided the same way today, given the Third Circuit's more recent treatment of the issue. See *Philbin v. Trans Union Corp.*, 101 F.3d 957, 965-66 (3d Cir. 1996).

person who is the subject of the report. 165 F.3d at 644-45. A report about somebody else cannot, by definition, be accurate as to the person “about whom the report relates.” Nor can it be made accurate by the simple expedient of warning that the report may not be about the person who is the subject of the report. Such reasoning could be used to excuse the inclusion of *any* derogatory information in a consumer report on the strength of a disclaimer that such information “might not” pertain to the subject of the report. Such a cavalier approach to report accuracy is flatly at odds with the statutory goal of assuring “maximum possible accuracy” in such reports.

As the panel majority further recognized, adoption of the “technical

report. The very structure of the statute, as described above, is based on Congress's understanding that such harms may be effectively irremediable, and therefore that consumer files must be as accurate as is reasonably possible at each and every stage – from their initial creation by a consumer reporting agency through their continual updating as additional information is received, or revised, or supplementary reports are prepared. As the Fifth Circuit has commented, the duty under Section 607(b) “extends to updating procedures, because ‘preparation’ of a consumer report should be viewed as a continuing process and the obligation to insure accuracy arises with every addition of information.” *Thompson v. San*



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<sup>6</sup>In *Thompson*, the court held that it could not “conclude that the district court was clearly erroneous” in finding negligence when the consumer reporting agency “had no way of knowing if the information supplied by the subscriber was correct.” 682 F.2d at 513. By comparison, the defendant here had no way of knowing if the information supplied by the court database even pertained to the subject of the report. In this regard, we thus agree with the panel majority’s view

assure only technical accuracy.” *Koropoulos*, 734 F.2d at 40. The panel majority was correct in adopting this view. 165 F.3d at 645 n.3; *see also Cushman v. Trans Union Corp.*, 115 F.3d 220 (3<sup>rd</sup> Cir. 1997); *Cahlin*, 936 F.2d at 1156-57.

## **2. Rental Research’s Procedures Do Not Appear to Be at All Reasonable.**

The essential inquiry under Section 607(b) is whether the consumer reporting agency used “reasonable procedures” to achieve the statutory goals of ensuring accuracy “to the maximum extent possible.” As the panel majority recognized, this is necessarily a *factual* inquiry, turning on the circumstances presented in individual cases.

The *FTC Commentary* on the FCRA offers guidance to the industry by articulating the following standard of reasonable procedures:

The section [607(b)] does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate. However, when a consumer reporting agency learns or should reasonably be aware of errors in its reports that may indicate systematic problems . . . it must review its procedures for assuring accuracy.

16 C.F.R. Part 600 App. (emphasis added). A consumer reporting agency initially satisfies its obligations if it relies upon a source that “is credible on its face.”

However, once an agency knows (or should know) that it is systematically

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<sup>7</sup>Except in cases where there is either a failure of proof by the plaintiff or the absence of a cognizable defense by the defendant, the question of “reasonableness” is inherently one for a “trier of fact,” and is not an appropriate issue to be resolved on summary judgment. *See Pinner*, 805 F.2d at 1263 (In action under Section 607(b), the appellate court’s “assigned role is neither to re-try the case de novo nor to supplant the jury verdict so long as it is supported by substantial evidence.”); *Hauser v. Equifax*, 602 F.2d 811, 814 (8<sup>th</sup> Cir. 1979) (discussing standards for a directed verdict).

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<sup>8</sup>Some Circuits have gone further than *Stewart* by allowing a plaintiff to rest

While this Court has not spoken to the issue directly, its decisions appear to take the same general approach as that of the D.C. Circuit in *Stewart*. See *Hauser*, 602 F.2d at 814-15 (“There must be a showing that the inaccuracy resulted from the agency’s failure to follow ‘reasonable procedures to assure maximum possible accuracy’”). Indeed, that Circuit in *Stewart* drew on case law from this Circuit as further support for its conclusion that “[i]n certain instances, inaccurate credit reports by themselves can fairly be read as evidencing unreasonable procedures, and . . . in such instances plaintiff’s failure to present direct evidence will not be fatal to his claim.” 734 F.2d at 52, citing, *inter alia*, *Millstone v. O’Hanlow Reports, Inc.*, 383 F. Supp. 269, 275 (“egregiousness of report’s inaccuracy was evidence of ‘willful non-compliance’ with section 1681e(b)”), *aff’d*, 528 F.2d 829 (8<sup>th</sup> Cir. 1976). Under these decisions, there is no room for Rental Research’s argument that it followed reasonable procedures as a matter of law.

As the panel majority correctly observed, “Rental Research’s practices . . . will lead to inaccuracies any time there is another person in the housing court database with a name similar to that of the subject of the report.” 165 F.3d at 646. Rental Research issued a report that purported to be about Ms. Wilson. Yet, that report contained information that, on its face, could not possibly have related to Ms. Wilson, even though Section 607(b) expressly requires that the information

*about the subject of the report* must be as accurate as is reasonably possible. That Rental Research was aware of this deficiency in its report is made manifest by its “disclaimer,” which not only warned the landlord that the report “about” Ms. Wilson might not actually be about her at all; but it also asked the landlord to let Rental Research know if the landlord was able to verify any of the information as actually pertaining to Ms. Wilson.

The record here suggests that Rental Research has not established *any*

at least omitted the detainer records that did not correspond to any of Ms. Wilson's known addresses. As the panel majority stated, whether the agency followed reasonable procedures "will be a jury question in the overwhelming majority of cases." 165 F.3d at 646, quoting *Cahlin*, 936 F.2d at 1156; *Guimond*, 45 F.3d at 1333. This is clearly such a case.

**B. The Pre-1996 Version of the FCRA Required Rental Research to Reinvestigate the Asserted Inaccuracies In the Report It Obtained From TRW.**

While the panel correctly resolved the issues regarding plaintiff's claim under Section 607(b), it erred in holding that Rental Research was not obliged to reinvestigate the disputed information that TRW provided. This holding conflicts with the plain language of Section 611(a), which, in both its pre- and post-amended versions, requires a consumer reporting agency to whom a consumer complained to reinvestigate disputed information.

Pre-amendment Section 611(a) provided, in part:<sup>9</sup>

If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to *the consumer reporting agency* by the consumer, *the consumer reporting agency shall* within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant.

(emphasis added). The statute plainly requires a consumer reporting agency to reinvestigate disputed information when a consumer directly conveys a dispute to the agency.

The panel expressly recognized Rental Research’s status as a consumer reporting agency.<sup>10</sup> 165 F.3d at 643; *see* n.2, *supra*. Also, Ms. Wilson made her

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<sup>9</sup>While it was renumbered from Section 611(a) to Section 611(a)(1)(A) in the amendments, the language remained essentially the same. The amended language provides, in relevant part, as follows:

If the completeness or accuracy of any item of information contained in a consumer’s file at a *consumer reporting agency* is disputed by the consumer and the consumer notifies *the agency* directly of such dispute, *the agency* shall reinvestigate free of charge and record the current status of the disputed information, or delete the item from the file . . .

(emphasis added).

<sup>10</sup>The panel also observed that, when a consumer reporting agency is “asked to reinvestigate by an individual about whom they have issued a report, *such as Rental Research was asked by Wilson in this case,*” the 1996 amendments require it to “provide notification of the dispute to any person who provided any item of information in dispute.” 165 F.3d at 648.



objections known directly to Rental Research. The panel nevertheless held that under the pre-amendment FCRA “*Rental Research was not the consumer*”

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<sup>11</sup>Section 623, 15 U.S.C. 1681s-2 (Supp. II 1996), applies to creditors and other entities that furnish information to consumer reporting agencies. Section 623(b) requires these furnishers, when they receive a notice of dispute from a reseller, such as Rental Research, to investigate the disputed information just as they would do if they received a notice of a dispute from one of the three national credit repositories – Equifax, Experian, or Trans Union – and report the results of the investigation to the reseller.

While this addition to the statute indeed provides specific direction as to the steps a consumer reporting agency must now take when faced with the sort of situation Rental Research faced in the present case, this directive is subsidiary to the basic statutory requirement that was already contained in the statute, and which was *unchanged* by the 1996 amendments – *i.e.*, the requirement that “the consumer reporting agency” to which the consumer disputes an item of information “shall \* \* \* reinvestigate \* \* \* .” 15 U.S.C. § 1681i(a) (1994); *compare* 15 U.S.C. § 1681i(a)(1)(A) (pertinent language unchanged). In other words, although the 1996

## CONCLUSION

## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with Fed. R. App. P. 29(b) and 31(a)(7)(B). It contains 6383 words.

## **CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 1999, I served two copies of the Brief on Rehearing En Banc of the Federal Trade Commission on:

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