GABRIEL FELIX MORAN,
Plaintiff-Appellant,

v.

THE SCREENING PROS, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Hon. Stephen V. Wilson
Case No. 2:12-cv-05808-SVW-AGR

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The Consumer Financial Protection Bureau (Bureau), an agency of the United States, files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

The Bureau is the federal agency charged, under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), with "regulat[ing] the offering and provision of consumer financial products and services under Federal consumer financial law." 12 U.S.C. § 5491(a). The Fair Credit Reporting Act (FCRA), as amended by the Dodd-Frank Act, authorizes the Bureau generally to enforce the FCRA, 15 U.S.C. § 1681s(b)(1)(H), and to "prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives" of the FCRA, *id*. § 1681s(e)(1). At issue in this case is § 605(a) of the FCRA, 15 U.S.C. § 1681c(a), a provision that is critical for fulfilling the objective of preserving consumers' privacy. The Bureau seeks to assist the Court by providing the Bureau's interpretation of that provision.

The Bureau is joined in this brief by the Federal Trade Commission (FTC or Commission). The Commission is the federal

agency with primary responsibility for the protection of consumers from unfair and deceptive trade practices, including through enforcement of the FCRA, 15 U.S.C. § 1681s(a). Additionally, the Commission issued both the *Commentary on the Fair Credit Reporting Act* (1990) and *40 Years of Experience with the Fair Credit Reporting Act* (2011), on which the District Court relied in this case. The Commission thus has an interest in the Court's resolution of the issues presented in this case.

Consumer reporting agencies play a “vital role” in our economy by providing “[t]hose who extend cre

2004. The District Court concluded that the drug charge could be reported for seven years from the date the charge was dismissed. That was error. As a result of a 1998 amendment to the FCRA, the seven-year reporting period for the dismissed drug charge commenced on the date of the charge and therefore ended in 2007.

The District Court's dismissal of Plaintiff's § 605(a) claim thus should be reversed.

and promotion of employees,[5] access to rental housing,[6] and more. For example, a landlord considering a prospective tenant may often obtain a background screening report.[7]

Consumer reporting agencies are central to this system. A consumer reporting agency typically assesses the reliability of various sources of information; gathers information from those sources; collates the information; and assigns the collected information to the files of different individuals. Whether a consumer does or does not get a loan, a job, or an apartment can depend on a piece of information that a consumer reporting agency includes in a report about the person.

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[4] Federal Trade Commission, *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance, A Report to Congress* (July 2007), available at http://www.ftc.gov/os/2007/07/P044804FACTA_Report_Credit-Based_Insurance_Scores.pdf.

[5] According to one report, forty-seven percent of firms used credit checks to select job candidates, while thirteen percent used credit checks for all job candidates. *See* The Society for Human Resource Management, *SHRM Research Spotlight: Credit Background Checks, Society Human Resource Management* (2010), available at http://bit.ly/rZozFC.

[6] *See, e.g.*, Experian ConnectSM, available at http://ex.pn/16tHGGb.

[7] *See* Nat'l Consortium for Justice Info. & Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*, p. 20 (2005).

The FCRA, enacted in 1970,[8] regulates consumer reporting. The statute was designed to ensure that consumer reporting agencies provide 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."[9] A primary purpose of the FCRA is "to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment."[10] *Porter v. Talbot Perkins Children's Servs.*, 355 F. Supp. 174, 176 (S.D.N.Y. 1973).

The FCRA fosters this purpose through a set of interlocking requirements, including restrictions on the dissemination of consumer reports, procedures for disputing accuracy, and limitations on the information to be contained in consumer reports. 15 U.S.C. § 1681b; *id.* § 1681i; *id.* § 1681c. Most relevant for this case, the FCRA restricts a

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[8] Pub. L. 91-508, title VI, 84 Stat. 1128.

[9] 15 U.S.C. § 1681(b).

[10] This purpose extends to information used for other purposes—besides assessing eligibility for credit, insurance, or employment—that are also permissible under the FCRA, *see* 15 U.S.C. § 1681b(a) (listing permissible uses of consumer reports).

consumer reporting agency from including obsolete information in a consumer report. Section 605(a) generally prohibits the reporting of "[a]ny . . . adverse item of information . . . which antedates the report by more than seven years," *id*. § 1681c(a)(5).[11] For certain types of information, Congress modified the general rule by adjusting either the starting point or the length of the reporting period. For example, the reporting period for bankruptcy cases is 10 years. *Id*. § 1681c(a)(1). The reporting period for a tax lien is seven years from the date the lien is paid off. *Id*. § 1681c(a)(3).

In the original FCRA, "[r]ecords of arrest, indictment, or conviction of crime" were reportable for seven years, starting at the "date of disposition, release, or parole." *Id*. § 1681c(a)(5) (1996). A 1998 amendment to the FCRA deleted this paragraph. Consumer Reporting Employment Clarification Act, Pub. L. 105-347, § 5(2), 112 Stat. 3211. The amendment moved "records of arrest" to pre-existing paragraph (a)(2), which now limits the reporting of "[c]ivil suits, civil judgment, ich now limit19

and records of arrest" to seven years "from date of entry," 15 U.S.C. § 1681c(a)(2). *See* Pub. L. 105-347, § 5(1), 112 Stat. 3211.[12] The 1998 amendment also removed criminal convictions altogether from the restriction on reporting obsolete information. *Id*. § 5(3), codified at 15 U.S.C. § 1681c(a)(5) (prohibiting reporting, past seven years, of "any other adverse item of information, other than records of convictions of crimes").

Congress originally designated the Commission as the primary agency responsible for enforcing the FCRA. 15 U.S.C. § 1681s (2008). In 1990, the Commission issued a compilation of its interpretations and guidance regarding the FCRA, including § 605(a). FTC, *Commentary on the Fair Credit Reporting Act*, 55 Fed. Reg. 18,804 (May 4, 1990) (hereinafter *1990 Commentary*).

In the Dodd-Frank Act, Congress granted the Bureau authority to enforce the FCRA, along with the Commission and other agencies, and also granted the Bureau authority to issue rules to implement the

[12] Information of this type can be reported "until the governing statute of limitations has expired," if that period is longer. 15 U.S.C. § 1681c(a)(2).

FCRA. *See* Dodd-Frank Act, Pub. L. 111-203, § 1088(a)(10), 124 Stat. 2088, codified at 15 U.S.C. § 1681s. The Bureau is the first agency to have general rulemaking authority with respect to the FCRA.[13] To coincide with the transfer of authority to the Bureau, the Commission's staff published an updated compilation of past interpretations of the FCRA by the Commission and its staff. FTC Staff Report, *40 Years of Experience with the Fair Credit Reporting Act* (July 2011), available at http://www.ftc.gov/os/2011/07/110720fcrareport.pdf (hereinafter "*40 Years Report*"). In approving the issuance of the staff's *40 Years Report*, the Commission withdrew the *1990 Commentary*. FTC, *Commentary on the Fair Credit Reporting Act*, 76 Fed. Reg. 44,462 (July 26, 2011).

This case arises from the dismissal, by the U.S. District Court for the Central District of California, of Plaintiff's complaint against TSP.

[13] The Commission and other agencies have had the authority to issue rules under several specific provisions of the FCRA, such as § 615(e). 15 U.S.C. § 1681m(e) (authorizing various agencies to prescribe regulations regarding the prevention of identity theft). From 1997 to 2011, the Board of Governors of the Federal Reserve System had authority to "issue interpretations" of the FCRA as it applied to various kinds of banking organization. 15 U.S.C. § 1681s(e) (2008); *see* Pub. L. 111-203, § 1088(a)(10)(E), 124 Stat. 2090 (striking FCRA § 621(e) and replacing it with provision authorizing Bureau rulemaking under FCRA).

According to the complaint, Plaintiff applied for housing at Maple Square, an affordable housing development. ER 55.[14] In assessing Plaintiff's application, the property manager obtained a consumer report on Plaintiff from TSP on February 5, 2010. *Id*.

TSP's report recited four criminal cases against Plaintiff: a May 16, 2000 misdemeanor drug charge, dismissed on March 2, 2004; two June 2006 charges, for burglary and forgery, dismissed that same month; and a June 2006 conviction for misdemeanor embezzlement from an older adult.[15] ER 67.

Plaintiff claims the FCRA prohibits the reporting of the 2000 drug charge, which antedated TSP's report by nearly 10 years. He sued TSP under the FCRA and under various California statutes, including those regulating consumer reporting. ER 57–65. At first the District Court concluded that the drug charge was an "adverse item of information" that could not be reported for more than seven years from the date of the charge. ER 40. The District Court therefore denied TSP's motion to

[14] This brief uses the citation "ER" to refer to the Appellant's Excerpts of

dismiss Plaintiff's claim under § 605(a). *Id*. On reconsideration, the District Court reversed itself.

necessarily revealed the existence of the charge—generally could not be reported after 2007.

This conclusion follows from the text and from considering the purposes of § 605(a), as well as from the 1998 amendment to the provision. Before 1998, § 605(a) explicitly made disposition of a charge the trigger for the seven-year reporting period. The 1998 amendment deleted that provision. The District Court, ignoring the amendment, incorrectly relied on pre-1998 FTC commentary that was based on the old provision.

Section 605(a)(5) restricts the reporting of an "adverse item of information . . . which antedates the report by more than seven years." 15 U.S.C. § 1681c(a)(5). That TSP reported adverse information for Plaintiff that was more than seven years old in 2010 is apparent from the face of the report. The report lists several criminal cases. For each, the report first provides the "filing date" and the "offense type" (for the drug charge, a misdemeanor); next, the "charge/offense"; and finally, the disposition and its date. ER 67. In light of how TSP presented the

information, the "adverse item of information" that TSP reported was evidently—in TSP's understanding, and presumably as understood by users of the report—a "charge/offense." The most natural reading of § 605(a)(5) would limit reporting of the "charge" to the seven years after it occurred. The drug charge, as the report noted, was filed in 2000.

TSP has maintained, and the District Court held, that the drug charge could instead be reported for seven years from the date it was dismissed. ER 10. But § 605(a) does not permit such reopening of the seven-year reporting period.

The dismissal of the drug charge is not adverse information in itself, for purposes of § 605(a). "Courts have found 'adverse information' to mean 'information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualifications for credit, insurance, employment, or other benefit.'" *Seamans v. Temple Univ.*, 901 F. Supp. 2d 584, 593 n.4 (E.D. Pa. 2012); *cf. 40 Years Report* at 55, Comment 605-4 ("The seven-year reporting period applies only to 'adverse' information that casts the consumer in a negative or unfavorable light."). The dismissal of a charge, standing 1Puismissal I2

alone, does not ordinarily reflect negatively on a consumer, nor would it reasonably be expected to bear unfavorably on the consumer's eligibility for credit or other benefits. A dismissal is simply a development, ordinarily positive for the charged consumer, in the history of a criminal charge. To the extent a dismissal reflects negatively on a consumer, it does so because it reveals the existence of the criminal charge, the truly adverse information.

That is not to say the dismissal by itself could be reported indefinitely. It has been a longstanding principle in the application of § 605(a) that "a [consumer reporting agency] may not furnish a consumer report referencing the existence of adverse information that predates the times set forth" in § 605. *40 Years Report* at 55, Comment 605-1. Otherwise the FCRA's clear limitations on the use of obsolete information would be vulnerable to easy evasion. Except in cases of convictions, § 605(a) limits the time for reporting the entire criminal case, including the dismissal.

But the fact that reporting of a dismissal is restricted under § 605(a) because it reveals the existence of the underlying indictment does not mean that the dismissal initiates its own seven-year reporting

new holder or transfer it to another collection agency. These subsequent developments—which are not adverse items of information in themselves— do not trigger new seven-year reporting periods for the debt in collection.[18]

The Bureau agrees with these views regarding obsolete debts, and *amici* believe the same principles apply for obsolete criminal matters under § 605(a)(5). The provision does not, on its face, distinguish criminal cases (aside from those resulting in convictions) from other kinds of adverse information.

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Before 1998, the FCRA expressly distinguished criminal records from other adverse information. "Records of arrest, indictment, or conviction of crime," originally were reportable for seven years from "the date of disposition, release, or parole." 15 U.S.C. § 1681c(a)(5) (1996). This special rule for criminal records departed from the general rule that "any other adverse item of information" was reportable only for seven years. 15 U.S.C. § 1681c(a)(6) (1996). It follows that the general rule, had it applied to criminal-record information, would not have made the seven-year reporting period start at the date of disposition of a charge. Congress need not have enacted the special provision for criminal records merely to achieve the same result as would have occurred under the general rule. *Cf. Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. __, 182 L. Ed. 2d 678, 132 S. Ct. 1670, 1685, (2012) (disfavoring interpretation that would render part of statute "insignificant, if not wholly superfluous"). Now that, as a result of the 1998 amendments, the general provision does cover criminal records (aside from convictions and records of arrest), this same original understanding applies.

Instead, the 1998 amendment deleted the criminal-records paragraph entirely. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258–59 (2004).

40 Years Report

The District Court's decision reconsidering the motion to dismiss the complaint did not grapple with statutory interpretation issues like those discussed above. Instead, the District Court relied on the FTC's *1990 Commentary* to conclude that a criminal charge can be reported for seven years from the date of its dismissal. The District Court believed that the *40 Years Report*

examples of dispositions that would trigger seven-year reporting periods under that version of the statute. *See id.* (reciting statutory language).

The statutory text on which 1990 Comment 605(a)(5)-2 was based was deleted in 1998 and is no longer the law.

The *40 Years Report* faithfully reflects the change effected by the 1998 amendment. The portion of the report describing the limitations on reporting of criminal records says the reporting period "runs from the date of the reported event," *40 Years Report* at 57, rather than from "the date of disposition" as the *1990 Commentary* had said.

What led the District Court astray was that the *40 Years Report* referred to 1990 Comment 605(a)(5)-2 on this point. That reference, however, did not indicate that the 1990 comment accurately reflected current law. Indeed, the introduction to the *40 Years Report* noted that the 1990 Commentary had become partially obsolete "[t]hrough the passage of time and the adoption of significant amendments to the FCRA." *40 Years Report* at 7. And FTC staff alerted readers that, relative to the *1990 Commentary*, they had modified some comments "to account for post-1990 FCRA amendments." *Id.* at 16 n.60. By withdrawing the *1990 Commentary*, the Commission intended for it to

have no legal effect. Nonetheless, the report noted that references to the *1990 Commentary* are provided "[f]or the convenience of readers" as the source of interpretations. *Id*. at 16. The Commission reiterates here, as stated in the *40 Years Report*, that references to the *1990 Commentary* do not incorporate that withdrawn interpretation. To the extent there is any ambiguity, the Commission now clarifies that the *40 Years Report* referred to 1990 Comment 605(a)(5)-2 merely to flag the previous interpretation for an interested reader, not to suggest that Comment 605(a)(5)-2 articulated the governing standard notwithstanding the change in the statute.

For the above reasons, the District Court's dismissal of Plaintiff's claim that TSP violated § 605(a) of the FCo7tA,5.4 U.S.C.247 601eal7 15.n5te,d14sr

Respectfully submitted,

Dated: October 4, 2013 /s/ Keith Bradley

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This brief complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7) in that it contains 4,232 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: October 4, 2013 /s/ Keith Bradley

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