Burdened by the Algorithm: Credit Reporting Agencies Should Bear the Burden of Proving Reasonable Procedures in the Age of AI

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ABSTRACT

Congress passed the Fair Credit Reporting Act to protect American credit consumers from abuses in the credit reporting industry. The Act requires credit reporting agencies to adopt reasonable procedures to ensure accuracy in credit reporting. As an enforcement mechanism, the Act grants credit consumers the right to sue credit reporting agencies that inaccurately report the consumer's credit.

A circuit split exists regarding which party bears the burden of proving the reasonableness of procedures employed in credit report production once plaintiffs submit evidence of an inaccurate credit report. Some circuits hold that plaintiffs must always prove a credit reporting agency's procedures were unreasonable. Other circuit courts require the agency to prove the reasonableness of its procedures once a plaintiff provides proof of an inaccurate report.

Artificial intelligence now plays a key role in generating consumer credit reports. The systems can produce inaccuracies due to biased training data and scant human oversight. Courts in the circuit split have not considered who should bear the burden of proving the reasonableness of procedures used while contemplating the agencies' artificial intelligence use. Nevertheless, widespread adoption of artificial intelligence in credit reporting makes which party bears the burden of proving the reasonableness of procedures used an even more pressing issue.

This Comment recommends resolving the circuit split in favor of credit reporting agencies bearing the burden of proving the reasonableness of procedures once a plaintiff proves a credit reporting agency produced an inaccurate report. Further, this Comment notes that artificial intelligence-driven errors in credit reporting threaten consumer rights,

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necessitating increased protections for American credit consumers. The recommended burden-shifting approach ensures accountability in credit reporting and remains consistent with both the legislative purpose of the Fair Credit Reporting Act and common law applications of the negligence standard.

Table of Contents

I.   INTRODUCTION

Creditworthiness dictates nearly every American's ability to participate in the national economy.[1] A consumer's creditworthiness is reflected in their credit report.[2] Credit reports are produced by credit

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1. *See* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 45 (2024).
2. *See id.*

reporting agencies.[3] In 1970, Congress passed the Fair Credit Reporting Act ("FCRA").[4] The FCRA statutorily imposes a duty on credit reporting agencies to adopt reasonable procedures to ensure the maximum possible accuracy of information contained in consumer credit reports produced by the agencies.[5] The FCRA also creates a private right of action for credit consumers to bring against credit reporting agencies who breach the duty imposed upon them by the FCRA.[6] Consumer negligence claims under § 1681 of the FCRA reflect a common law claim of negligence and require plaintiffs to prove four elements: duty, breach, causation, and damages.[7]

A circuit split exists over whether evidence of an inaccurate consumer credit report is prima facie evidence that a credit reporting agency failed to follow reasonable procedures.[8] The District of Columbia and Eighth Circuit Courts of Appeal hold that inaccurate credit reports cannot be considered prima facie evidence of a § 1681 violation.[9] Thus, the District of Columbia and Eighth Circuits refuse to shift the burden of proving the reasonableness of procedures employed by credit reporting agencies onto the agency when a plaintiff submits evidence of an erroneous credit report.[10] The Third, Fourth, and Ninth Circuit Courts of Appeal oppositely hold that inaccurate credit reports may be prima facie evidence of a credit reporting agency's failure to follow reasonable procedures.[11]

All three major credit reporting agencies now use artificial intelligence (AI) in applications, including in consumer data collection and analysis.[12] Despite the benefits of AI use by credit reporting agencies, AI

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3. *See id.*

4. *See id.*

5. *See* 15 U.S.C. § 1681e.

6. *See* 15 U.S.C. § 1681o.

7. *See* Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024) (Smith, C.J., dissenting).

8. *Compare* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51 (D.C. Cir. 1984) (per curiam), *and Lloyd*, 105 F.4th at 1031, *with Philbin*, 101 F.3d at 965–66, *and* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333–34 (9th Cir. 1995), *and* Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

9. *See Stewart,* 734 F.2d at 50–52; *see also Lloyd*, 105 F.4th at 1031.

10. *See Stewart,* 734 F.2d at 50–52; *see also Lloyd*, 105 F.4th at 1031.

11. *See Philbin*, 101 F.3d at 965–66; *see also Guimond*, 45 F.3d at 1333–34; *see also Ausherman*, 352 F.3d at 901–02.

12. *See* Charlotte Nan Jianf & Nadia Novik, *Leveraging Big Data and Machine Learning in Credit Reporting*, WORLD BANK BLOGS (Aug. 10, 2021), https://perma.cc/5AV9-5M8X; *see also Enabling New Financial Opportunity Through Responsible AI Innovation*, EQUIFAX (June 27, 2024), https://perma.cc/34NC-2WGS; *see also Target Unique or Industry Specific Fraud Through Custom Models, Superior Data and Analytic Expertise*, TRANSUNION, https://perma.cc/E55Z-JVNT (last visited Nov. 16, 2024); *see also* Kathleen Peters, *Live with Bloomberg – How Experian is Uniquely Positioned to Champion Generative A.I.*, EXPERIAN (Oct. 11, 2023), https://perma.cc/4CQ7-KXQ2.

use presents extensive risks to the fairness and accuracy of credit reporting.[13] The credit reporting agencies' uses of artificial intelligence are relatively new.[14] As a result, none of the circuit courts discussed in this Comment have addressed AI use in conjunction with negligence by credit reporting agencies under the FCRA.[15]

This Comment examines how courts should resolve this circuit split in light of the rise in AI use by credit reporting agencies.[16] First, this Comment will discuss the FCRA, including its origins, legislative history, and applications.[17] In addition, this Comment will outline § 1681 of the FCRA, which authorizes consumer negligence claims against credit reporting agencies.[18] Next, this Comment will discuss the holdings of each court in the circuit split.[19] Then, this Comment will explain credit reporting agencies' uses of artificial intelligence, an aspect of credit report production not considered by the courts in the circuit split.[20]

Finally, this Comment argues that the Third, Fourth, and Ninth Circuits correctly suggest that inaccurate credit reports are prima facie evidence of a credit reporting agency's failure to follow reasonable procedures to ensure the maximum accuracy of credit reports.[21] Further, this Comment argues that credit reporting agencies' use of AI increases the importance of the courts engaging in burden-shifting.[22] Accordingly, this Comment argues that when a plaintiff submits an inaccurate credit report, the burden of proving the reasonableness of procedures employed should shift to the credit reporting agency that produced the erroneous report.[23]

II. BACKGROUND

The FCRA protects American credit consumers by statutorily authorizing negligence claims against credit reporting agencies for failing

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13. *See, e.g.*, Andrew Smith, *Using Artificial Intelligence and Algorithms*, FTC BUS. BLOG (Apr. 8, 2020), https://perma.cc/PU6Q-J38N.

14. *See* Jianf & Novik, *supra* note 12.

15. *See* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 50–52 (D.C. Cir. 1984) (per curiam); Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024); Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333–34 (9th Cir. 1995); Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

16. *See infra* Section III.A.

17. *See infra* Section II.A.

18. *See infra* Section II.A.1; *see also* 15 U.S.C. § 1681e.

19. *See infra* Section II.B.

20. *See infra* Section II.C.

21. *See infra* Section III.A.

22. *See infra* Section III.A.

23. *See infra* Section III.B.

to follow reasonable procedures.[24] Five United States Circuit Courts have considered whether an inaccurate credit report is prima facie evidence of a credit reporting agency's failure to follow reasonable procedures under the FCRA.[25] None of these courts have addressed this issue in the context of AI use by credit reporting agencies.[26] This Comment will first discuss the FCRA, relevant circuit court rulings, and AI applications in credit reporting.[27]

A. The Fair Credit Reporting Act

Credit reports impact the financial health of nearly every American consumer.[28] Credit reports determine whether individuals may obtain credit cards, homes, jobs, or loans to start small businesses.[29] Congress recognized the importance of fair and equitable credit reporting in enacting the Fair Credit Reporting Act of 1970, codified in Title 15 of the United States Code.[30] The FCRA was Congress's first federal regulation of the consumer credit reporting industry.[31] The FCRA protects American consumers from the negative, and sometimes disastrous, effects of inaccurate credit reporting.[32]

The FCRA's congressional findings and statement of purpose reveal several motivations behind the FCRA's initial enactment.[33] Congress first enacted the FCRA because of concern over abuses in the credit reporting industry.[34] Congress noted the American banking system's dependence on fair credit reporting and recognized that improper methods of credit

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24. *See* 15 U.S.C. § 1681; *see, e.g.*, Austin H. Krist, *Note: Large-Scale Enforcement of the Fair Credit Reporting Act and the Role of State Attorneys General*, 15 COLUM. L. REV. 2311, 2319–20 (2015).

25. *See* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 50–52 (D.C. Cir. 1984) (per curiam); Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024); Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333–34 (9th Cir. 1995); Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

26. *See Stewart*, 734 F.2d at 50–52; *Lloyd*, 105 F.4th at 1031; *Philbin*, 101 F.3d at 962; *Guimond*, 45 F.3d at 1333–34; *Ausherman*, 352 F.3d at 901–02.

27. *See infra* Part II.

28. *See* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 45 (2024).

29. *See id.*

30. *See* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681(x).

31. *See* Tiffany George, *50 Years of the FCRA*, FTC BLOG (Oct. 27, 2020), https://perma.cc/44GK-ZRU4.

32. *See id. But see* Krist, *supra* note 24, at 2316–27 (arguing that consumers rarely enforce their rights under the FCRA by bringing negligence claims against credit reporting agencies because either (1) consumers do not realize when a violation occurs or (2) the costs of litigation outweigh the benefits).

33. *See* 15 U.S.C. § 1681.

34. *See* S. REP. NO. 91-517, at 3 (1969); *see also* 116 CONG. REC. 35941 (1970) (statement of Sen. Proxmire).

reporting may "undermine the public confidence" in the system.[35] Additionally, Congress aimed to protect credit consumers from suffering the consequences of inaccurate credit reporting.[36]

To fulfill Congress's purpose, the FCRA imposes a duty on credit reporting agencies to employ reasonable procedures to ensure the maximum accuracy of credit reports produced by the agencies.[37] The statute defines a credit reporting agency as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."[38]

The FCRA also imposes duties of care on furnishers and users of information generated by credit reporting agencies.[39] Furnishers, including financial institutions and creditors, have a duty to ensure they supply correct information to credit reporting agencies.[40] Credit report users, including employers and lenders, have a duty to notify consumers when using consumer credit reports.[41] Furnishers and credit report users may avoid liability by maintaining reasonable procedures to ensure compliance with their duties under the FCRA.[42] However, credit reporting agencies have a statutory duty under the FCRA to adopt reasonable procedures to ensure the maximum possible accuracy of the information contained in credit reports.[43]

Congress created multiple mechanisms to enforce the duties imposed by the FCRA.[44] Congress gave the Federal Trade Commission (FTC), and later the Consumer Financial Protection Bureau (CFPB), enforcement and rulemaking authority under the FCRA.[45] Originally, the FCRA authorized

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35. 15 U.S.C. § 1681.

36. *See* H.R. REP. NO. 91-1587, at 15–16.

37. *See* 15 U.S.C. § 1681e.

38. 15 U.S.C. § 1681a(f).

39. *See* 15 U.S.C. §§ 1681s-2, 1681m.

40. *See* 15 U.S.C. § 1681s-2. Furnishers of information to credit reporting agencies cannot furnish information they know, or should know, to be false. *See* FED. TRADE COMM'N, LAW, PRACTICE AND PROCEDURE § 9.06 (Law Journal Press, 2024). In addition, if a furnisher of information discovers information supplied to a credit reporting agency is inaccurate, the FCRA imposes a duty to update the information supplied. *See id.*

41. *See* 15 U.S.C. § 1681m. Credit report users have a duty under the FCRA to notify a credit consumer when the user requests a credit report, and the user must certify its compliance with this duty to the credit reporting agency. *See* FED. TRADE COMM'N, LAW, PRACTICE AND PROCEDURE § 9.06 (Law Journal Press, 2024).

42. *See* 15 U.S.C. §§ 1681e, 1681s-2, 1681m.

43. *See* 15 U.S.C. § 1681e.

44. *See* Krist, *supra* note 24, at 2316–27.

45. *See* Krist, *supra* note 24, at 2326. The FTC and CFPB may seek declaratory relief or civil penalties against credit reporting agencies found in violation of the FCRA. *See* 15 U.S.C. § 1681s(a)(1). Although the FTC has authority to bring enforcement actions against credit reporting agencies, and often does, historically the FTC has taken the position that

consumer claims against only credit reporting agencies and credit report users.[46] Today, the FCRA expressly authorizes a private right of action against any person or entity subject to the Act's requirements for willful or negligent noncompliance with the Act.[47] Thus, the FCRA establishes several causes of action against entities involved in the creation and use of consumer credit reports.[48] This Comment, however, focuses solely on negligence actions brought by consumers against credit reporting agencies under § 1681e of the Fair Credit Reporting Act.

Section 1681e of the FCRA requires credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[49] The Supreme Court has noted that the private rights of action created by the FCRA reflect common law causes of action.[50] Accordingly, the Court suggested that courts should construe the private rights of action created by the FCRA in accordance with their common law usages because Congress gave no indication of an intention otherwise.[51]

The negligence right of action created by the FCRA reflects a common law claim of negligence.[52] Like the common law negligence cause of action, a claim for negligent noncompliance with the FCRA consists of four elements:

"(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

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private litigation best enforces the FCRA. *See* Meredith Schramm-Strosser, Comment, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 DUQ. BUS. L.J. 165, 183 (2012).

46. *See* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 46–47 (2024). As initially enacted, the FCRA addressed only the preparation and disclosure of credit reports by credit reporting agencies. *See* FED. TRADE COMM'N, LAW, PRACTICE AND PROCEDURE § 9.06 (Law Journal Press, 2024). Congress significantly modified the FCRA with the Consumer Credit Reporting Reform Act of 1996, which added legal responsibilities for those who furnish and use the information reported by credit reporting agencies. *See id.*

47. *See* 15 U.S.C. § 1681n; *see also* 15 U.S.C. § 1681o.

48. *See id.*

49. 15 U.S.C. § 1681e(b).

50. *See* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007) (evaluating credit consumers' claims against insurance companies for willful noncompliance with the FCRA by the insurance companies and concluding that Congress knows that courts will construe common law terms used in statutes, such as willful noncompliance, in accordance with common law usages of the terms).

51. *See id.*

52. *See* Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024) (Smith, C.J., dissenting).

inclusion of the inaccurate entry."[53] This Comment focuses on the breach of duty element of an FCRA negligence claim. Regarding the breach of duty, "reasonable procedures" are defined as procedures that "a reasonably prudent person would [take] under the circumstances."[54]

B. Circuit Split and Procedural History

Several Circuit Courts of Appeal have split on the issue of whether evidence that a credit reporting agency produced an inaccurate credit report is prima facie evidence that the agency failed to follow reasonable procedures.[55] Courts that consider an inaccurate credit report prima facie evidence of the second element of negligence shift the burden of proof to the credit reporting agency when plaintiffs show that the agency produced an inaccurate report.[56] Then, the credit reporting agency must prove that the procedures employed were reasonable and therefore complied with the FCRA.[57]

In contrast, the District of Columbia and Eighth Circuits refused to shift the burden of proof to the defending parties when plaintiffs submitted evidence of erroneous credit reports.[58] These courts have reasoned that Congress never intended to shift the burden of proof when passing the FCRA.[59] The Third, Fourth, and Ninth Circuits suggest that inaccurate credit reports may be sufficient prima facie evidence of a credit reporting agency's failure to follow reasonable procedures.[60] This Comment will discuss the cases at the heart of the circuit split, including the parties' arguments and each courts' reasoning for its respective holding.

1. District of Columbia Circuit

In 1984, the District of Columbia Circuit Court of Appeals first tackled the issue of whether an inaccurate credit report is prima facie evidence of the second element of negligence under the FCRA.[61] In *Stewart v. Credit Bureau, Inc.*, the plaintiff brought a negligence claim against credit reporting agency CBI for failure to comply with the

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53. Philbin v. Trans Union Corp., 101 F.3d 957, 963 (3d Cir. 1996).

54. Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51 (D.C. Cir. 1984) (per curiam) (quoting Bryant v. TRW, Inc., 689 F.2d 72, 78 (6th Cir. 1982)) (alteration added).

55. *Compare Stewart,* 734 F.2d at 50–52, *and Lloyd*, 105 F.4th at 1031, *with Philbin*, 101 F.3d at 965–66, *and* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333–34 (9th Cir. 1995), *and* Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

56. *See Philbin*, 101 F.3d at 965.

57. *See id.*

58. *See Stewart*, 734 F.2d at 50–52; *see also Lloyd*, 105 F.4th at 1031.

59. *See id.*

60. *See Philbin*, 101 F.3d at 965–66; *see also Guimond*, 45 F.3d at 1333–34; *see also Ausherman*, 352 F.3d at 901–02.

61. *See Stewart*, 734 F.2d at 51.

requirements of § 1681e of the FCRA.[62] Stewart alleged that CBI reported inaccurate information to entities from which the plaintiff sought credit, causing the entities to deny him credit.[63] Stewart alleged his injury resulted from CBI breaching its duty to follow reasonable procedures to ensure the maximum accuracy of credit reports under the FCRA.[64] In support of his claims, Stewart submitted evidence of his inaccurate credit report prepared by CBI.[65] Moving for summary judgment, CBI argued that Stewart failed to present sufficient evidence demonstrating CBI's procedures were unreasonable.[66] The district court granted summary judgment, dismissing Stewart's § 1681e negligence claim under the FCRA because "Stewart did not intend to shoulder his burden of proof by presenting evidence on the reasonableness of CBI's procedures."[67] Stewart appealed to the D.C. Circuit Court of Appeals.[68]

The D.C. Circuit Court of Appeals held that "a plaintiff cannot rest on a showing of mere inaccuracy" to prove a credit reporting agency breached its duty of care under the FCRA.[69] The court reasoned that neither the FCRA's legislative history nor its statutory language revealed that Congress intended for the courts to engage in burden-shifting.[70] The court additionally found no case that directly addressed which party bears the burden of proving the reasonableness of procedures used by credit reporting agencies.[71] Subsequently, the court followed the common law rule for negligence and placed the burden on the plaintiff.[72] The court concluded that a plaintiff bringing a negligence claim under § 1681e of the FCRA must present at least some evidence that a credit reporting agency failed to follow reasonable procedures.[73] The court noted that an inaccurate credit report may sufficiently demonstrate the unreasonableness of procedures in some cases based on the egregiousness of the contents of the report.[74] However, the court declined to hold that inaccurate credit reports are prima facie evidence of a credit reporting agency's failure to follow reasonable procedures.[75]

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62. *See id.* at 49.

63. *See id.* at 50.

64. *See id.*

65. *See id.*

66. *See id.* at 50–51. CBI also argued it did not rely on the inaccurate credit report in denying Stewart credit, and, therefore, the inaccurate credit report did not cause Stewart's alleged injury. *See id.*

67. *Stewart*, 734 F.2d at 51.

68. *See id.*

69. *Id.*

70. *See id.*

71. *See id.*

72. *See id.* at 51, n.5.

73. *See Stewart*, 734 F.2d at 51.

74. *See id.* at 52.

75. *See id.*

In evaluating Stewart's § 1681e negligence claim, the court found a genuine issue of material fact remained about whether CBI followed reasonable procedures and remanded the case.[76] Because the fact finder must weigh the potential harm of credit report inaccuracies against the costs of protecting against inaccuracies, the court determined that the lower court erred by not engaging in such an analysis when evaluating the inaccurate credit report Stewart presented.[77]

2. Eighth Circuit

In 2024, the Eighth Circuit weighed in on the issue.[78] In *Lloyd v. FedLoan Servicing*, Lloyd sued credit reporting agency Experian for negligence under § 1681e of the FCRA.[79] Lloyd alleged that loan servicer FedLoan failed to properly investigate the financial information it provided to Experian and that Experian violated its duty to adopt reasonable procedures to discover FedLoan's mistakes.[80] Lloyd submitted evidence of an inaccurate credit report produced by Experian and a copy of the customer dispute she filed with the agency.[81] The evidence revealed that Lloyd sent screenshots of her transaction history with FedLoan to Experian as proof that her credit report contained inaccuracies.[82] However, the screenshots incompletely depicted Lloyd's loan status.[83] Still, Lloyd contended the screenshots should have alerted Experian that FedLoan had provided Experian with unreliable information.[84] Experian admitted that it investigated the alleged inaccurate report and erroneously determined that no inaccuracy existed.[85] The district court granted summary judgment to Experian, reasoning Lloyd failed to present evidence that Experian failed to adopt reasonable procedures.[86] Lloyd appealed.[87]

The Eighth Circuit held that Lloyd failed to identify any step in Experian's investigation process constituting unreasonable procedures.[88] The court reasoned that the screenshots Lloyd submitted failed to establish a basis by which Experian could reasonably deem FedLoan's information inaccurate.[89] The court also reasoned that Lloyd failed to submit sufficient

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76. *See id.* at 52, 56.
77. *See id.* at 51–52.
78. *See* Lloyd v. FedLoan Servicing, 105 F.4th 1020. 1023–26 (8th Cir. 2024).
79. *See id.* at 1023.
80. *See id.* at 1024.
81. *See id.*
82. *See id.*
83. *See id.* at 1025.
84. *See Lloyd*, 105 F.4th at 1024.
85. *See id.* at 1025.
86. *See id.* at 1024.
87. *See id.*
88. *See id.* at 1026.
89. *See id.* at 1025.

evidence of widespread inaccuracies across FedLoan's accounts or show that Experian knew, or should have known, that FedLoan had supplied them with unreliable information.[90] Thus, the court concluded that Lloyd's inaccurate credit report produced by Experian failed to prove that Experian breached its statutory duty to employ reasonable procedures.[91]

In a detailed dissent, Chief Judge Smith argued that Lloyd submitted sufficient evidence to survive summary judgment on her § 1681e negligence claim against Experian.[92] Chief Judge Smith argued that the majority erred in failing to apply the *res ipsa loquitor* doctrine to Lloyd's negligence claim against Experian.[93] Judge Smith reasoned that the FCRA should be construed using common law negligence doctrines, as directed by the Supreme Court.[94] Judge Smith noted that the *res ipsa loquitur* doctrine applies to common law negligence claims.[95] Accordingly, the dissent reasoned that courts should apply the res *ipsa loquitur* doctrine to negligence claims against credit reporting agencies brought under the FCRA.[96] Further, Judge Smith compared Lloyd's claim to the hypothetical claim the *Stewart* court discussed in dicta, where an inaccurate credit report sufficiently proves the unreasonableness of procedures.[97]

3.   Ninth Circuit

Unlike the District of Columbia and Eighth Circuits, the Ninth Circuit held that an inaccurate credit report alone was prima facie evidence of a credit reporting agency's failure to follow reasonable procedures.[98] In *Guimond v. Trans Union Credit Info. Co.*, the plaintiff alleged credit reporting agency TransUnion violated multiple provisions of the FCRA.[99] Specifically, Guimond alleged that TransUnion violated § 1681e by failing

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90. *See Lloyd*, 105 F.4th at 1026.

91. *See id.*

92. *See id.* at 1030–32 (Smith, C.J. dissenting).

93. *See id.* at 1032. Based in common law, the courts define the doctrine of *res ipsa loquitor* as a "type of circumstantial evidence which permits, but does not compel, an inference of negligence upon showing an injury would not have occurred absent some specified but impliedly negligent act." *Id.* (quoting Depositors Ins. Co. v. Wal-Mart Stores, Inc., 506 F.3d 1092, 1096 (8th Cir. 2007)).

94. *See Lloyd*, 105 F.4th at 1032 (Smith, C.J. dissenting).

95. *See id.* (citing Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007)).

96. *See Lloyd*, 105 F.4th at 1032 (Smith, C.J. dissenting).

97. *See id.* (citing Stewart v. Credit Bureau, Inc., 734 F.2d 47, 52 (D.C. Cir. 1984) (per curiam)).

98. *See* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1334 (9th Cir. 1995).

99. *See id*. at 1331–32. Guimond claimed that Trans Union negligently and willfully violated section 1681g, which requires a credit reporting agency to disclose the sources of its information, and section 1681i of the FCRA, which requires credit reporting agencies to investigate consumer disputes. *See id.* at 1334–36. Additionally, Guimond alleged that Trans Union violated the California Consumer Credit Reporting Agencies Act, which closely mirrors sections 1681e and 1681i of the FCRA. *See id.* at 1336.

to follow reasonable procedures to ensure the maximum accuracy of his credit report.[100] Guimond submitted an inaccurate credit report prepared by the agency as evidence supporting his allegation.[101] The district court granted TransUnion summary judgment because Guimond failed to allege damages caused by the inaccurate credit report.[102] Guimond appealed.[103]

The Ninth Circuit Court of Appeals reasoned that the "consumer oriented objectives of the FCRA support a liberal construction of [the Act]."[104] Accordingly, the court stated that, "[i]n order to make out a prima facie violation under 1681e(b) of the act, a consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information."[105] However, the court maintained that credit reporting agencies are not strictly liable under the act.[106] Further, the court explained that credit reporting agencies can defend against a prima facie violation by proving that the agency prepared the inaccurate report using reasonable procedures.[107] Because Guimond submitted an inaccurate credit report as evidence, the court determined that he established a prima facie case of negligence against TransUnion and reversed the grant of summary judgment.[108]

4. Third Circuit

In 1996, the Third Circuit similarly evaluated a case in which creditors denied a plaintiff credit because the defendant credit reporting agency provided creditors with an inaccurate credit report.[109] In *Philbin v. Trans Union Corp.*, plaintiff Philbin brought a negligence claim under § 1681e of the FCRA against TransUnion.[110] TransUnion confused Philbin with his father, causing the agency to produce an inaccurate credit report.[111] Philbin submitted evidence of his inaccurate credit report produced by TransUnion and letters from creditors denying him credit.[112] The district court dismissed Philbin's claim because none of the denial

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100. *See id.* at 1332–33.
101. *See id.*
102. *See id.* at 1332.
103. *See id.*
104. *Id.* at 1333 (citing Kates v. Crocker Nat'l Bank, 776 F.2d 1396, 1397 (9th Cir. 1985)).
105. *Guimond*, 45 F.3d at 1333.
106. *See id.*
107. *See id.*
108. *See id.* at 1333.
109. *See* Philbin v. Trans Union Corp., 101 F.3d 957, 960 (3rd Cir. 1996).
110. *See id.* at 962.
111. *See id.* at 960.
112. *See id.* at 962 (noting that Philbin alleged the inaccuracy caused multiple crediting agencies to deny him credit).

letters demonstrated that the inaccurate credit report actually caused the creditors to deny him credit.[113] Philbin appealed.[114]

On appeal, the Third Circuit stated that credit reporting agencies only face liability under § 1681e of the FCRA when "inaccuracies are the result of their failure to follow reasonable procedures."[115] The circuit court surveyed the case law relevant to determining which party bears the burden of proving the reasonableness of a credit reporting agency's procedures.[116] This survey included both *Stewart* and *Guimond*.[117] The Third Circuit noted the *Stewart* court's suggestion that, in some instances, inaccurate credit reports may sufficiently evidence unreasonable procedures were employed by a credit reporting agency.[118] However, the circuit court further noted that the *Stewart* court failed to clarify exactly what these instances may be.[119] The Third Circuit also cited a case from the Eleventh Circuit, which held that

> [i]n order to make out a prima facie violation of [§ 1681e(b)], the [FCRA] implicitly requires that a consumer must present evidence tending to show that a credit reporting agency prepared a report containing "inaccurate" information . . . . The Act, however, does not make reporting agencies strictly liable for all inaccuracies. *The agency can escape liability if it establishes that an inaccurate report was generated by following reasonable procedures*[.][120]

Finally, the Third Circuit referenced *Guimond*, which determined that the plaintiff established a prima facie case of a credit report's failure to follow reasonable procedures by submitting evidence of an inaccurate credit report.[121]

The Third Circuit determined that a court may interpret the existing case law in three different ways.[122] A broad reading of the cases suggested to the court that "once a plaintiff demonstrates inaccuracies in a credit report, the burden shifts to the [credit reporting agency] to prove as an affirmative defense the presence of reasonable procedures."[123] The court

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113. *See id.*
114. *See id.*
115. *Philbin*, 101 F.3d at 964.
116. *See id.* at 964–66.
117. *See id.*
118. *See Philbin*, 101 F.3d at 964 (citing Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51–52 (D.C. Cir. 1984) (per curiam)).
119. *See Philbin*, 101 F.3d at 964 (citing Stewart, 734 F.2d at 51–52).
120. *Philbin*, 101 F.3d at 964–65 (quoting Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1156 n.4 (11th Cir. 1991)) (alteration in original) (emphasis in original) (footnotes omitted).
121. *See Philbin*, 101 F.3d at 964 (citing Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995)).
122. *See Philbin*, 101 F.3d at 965.
123. *Id.*

stated that a narrower, and more plausible, reading of the cases suggested that plaintiffs bringing an action for negligence under § 1681e of the FCRA may present an inaccurate credit report to the factfinder as evidence of unreasonable procedures.[124] Based on the inaccurate credit report, the jury may determine the reasonableness of the procedures employed by the credit reporting agency.[125] As a third option, the court suggested plaintiffs may utilize the *res ipsa loquitur* doctrine, as discussed in *Lloyd*.[126] Employing *res ipsa loquitur* allows a jury to infer a credit reporting agency failed to follow reasonable procedures to ensure accurate information.[127] Discussing the *res ipsa loquitur* doctrine, the Third Circuit reasoned that because agencies exclusively control the production of credit reports, credit reporting agencies are in a better position to prove the reasonableness of their procedures.[128]

After analyzing the relevant case law, the Third Circuit ultimately found it unnecessary to determine which interpretation to use.[129] The court instead reasoned that each option requires that a plaintiff's claim survive summary judgment on the issue of whether the credit reporting agency followed reasonable procedures when a plaintiff presents evidence of an inaccurate credit report.[130] Accordingly, the court held that Philbin produced sufficient evidence to survive summary judgment and remanded the case.[131]

5. Fourth Circuit

Finally, the Fourth Circuit, in dicta, suggested a plaintiff credit consumer may prove the unreasonableness of a credit reporting agency's procedures by relying on the doctrine of *res ipsa loquitur*.[132] In *Ausherman v. Bank of America Corp*., the plaintiffs brought a negligence claim against Bank of America alleging the banking corporation improperly obtained the plaintiff's credit reports in violation of the FCRA.[133] The primary issue in the case was whether Bank of America had a duty and violated it.[134] Thus, the court did not directly address the issue of whether evidence of an inaccurate credit report is prima facie evidence of the second element

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124. *See id.*
125. *See id.*
126. *See id.*
127. *See id.*
128. *See Philbin*, 101 F.3d at 965.
129. *See id.* at 965–66.
130. *See id.* at 965.
131. *See id.* at 965–66.
132. *See* Ausherman v. Bank of Am. Corp., 352 F.3d 896, 900–02 (4th Cir. 2003).
133. *See id*. at 898–99. Bank of America is not a credit reporting agency, but rather a financial institution that sought to use the information contained on Ausherman's credit report allegedly without providing sufficient notice to the plaintiff. *See id.*
134. *See id.*

of negligence under § 1681e of the FCRA.[135] However, in dicta, the court discussed the findings of *Philbin* favorably and suggested that if an appropriate case arose, a consumer may prove the breach of duty element of a negligence claim under the FCRA by submitting evidence of an inaccurate credit report.[136]

C. Artificial Intelligence Applications, Concerns, and Guidance

While some forms of artificial intelligence have existed for over a decade, AI's rapidly increasing sophistication has caused governments and businesses to contemplate the implications of these developments.[137] In 2021, Congress amended Title 15 of the United States Code to define "artificial intelligence" as:

> a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.[138]

AI use by credit reporting agencies is relatively new.[139] As a result, none of the circuit courts discussed in this Comment have addressed AI use in conjunction with negligence by credit reporting agencies under the FCRA.[140] The three major American credit reporting agencies reported

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135. *See id.*

136. *See id.* at 901–02; *see also* Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1032 (8th Cir. 2024) (Smith, C.J., dissenting).

137. *See, e.g.*, U.S. DEPT. OF THE TREAS., MANAGING ARTIFICIAL INTELLIGENCE-SPECIFIC CYBERSECURITY RISKS IN THE FINANCIAL SERVICES SECTOR (2024), https://perma.cc/579M-H33B; *see also* Smith, *supra* note 13.

138. 15 U.S.C. § 9401(3). This amendment is also commonly referred to as the National Artificial Intelligence Initiative Act of 2020. P.L. 116-283, 134 Stat. Government entities and financial services market participants find difficulty in precisely defining "artificial intelligence." *See* U.S. DEPT. OF THE TREAS., *supra* note 137. This is partially due to the varying types, forms, and uses of AI. *See* U.S. DEPT. OF THE TREAS., *supra* note 137. In addition, some financial service participants express frustration with the government and public understanding of AI and its uses because some definitions of AI do not align with the AI uses of financial services providers, including credit reporting agencies. *See* U.S. DEPT. OF THE TREAS., *supra* note 137.

139. *See* Jianf & Novik, *supra* note 12.

140. *See* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 50–52 (D.C. Cir. 1984) (per curiam); Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024); Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333–34 (9th Cir. 1995); Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

using predictive AI in consumer data collection and analysis.[141] In response to increased AI use by financial institutions, the FTC and other federal government entities have issued press releases, guidance, and rules regarding AI use by credit reporting agencies and other financial institutions.[142] The following section discusses the different credit reporting agencies' AI uses and responses to increased AI usage by financial institutions, including credit reporting agencies.

1. Credit Reporting Agencies' Artificial Intelligence Uses

Frequently referred to as the "Big Three," Experian, Equifax, and TransUnion dominate the credit reporting industry in the United States.[143] These agencies compile information about credit consumers and create consumer credit reports.[144] The agencies then transmit the reports to credit report users, such as banks.[145] Experian, Equifax, and TransUnion have reported using AI in collecting, analyzing, and compiling data.[146] Indeed, Equifax reports having over 90 approved and 130 pending patents relating to its AI developments.[147] In 2018, Equifax obtained a utility patent for its NeuroDecision software.[148] Equifax touts NeuroDecision as the "first

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141. *See* Jianf & Novik, *supra* note 12; *see also Enabling New Financial Opportunity Through Responsible AI Innovation*, *supra* note 12; *see also Target Unique or Industry Specific Fraud Through Custom Models, Superior Data and Analytic Expertise*, *supra* note 12; *see also* Peters, *supra* note 12.

142. *See, e.g.*, U.S. DEPT. OF THE TREAS., *supra* note 137; *see also* Smith, *supra* note 13; *see also* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

143. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 419 (2021).

144. *See id.* Credit reporting agencies create consumer credit reports containing credit scores. *See* M. Greg Braswell & Elizabeth Chernow, *Consumer Credit Law & Practice in the U.S.*, FED. TRADE COMM'N, https://perma.cc/CN3Z-WYLG (last visited Feb. 23, 2025). Credit reporting agencies use complex mathematical formulas to calculate consumer credit scores. *See id.* These formulas use a consumer's reported credit history to mathematically summarize the consumer's creditworthiness into a credit score. *See id.* Consumers with better credit histories have higher credit scores as a result. *See id.*

145. *See TransUnion LLC*, 594 U.S. at 419. Creditors rely on credit scores to assess the creditworthiness of consumers who seek to borrow capital from them. *See* M. Greg Braswell & Elizabeth Chernow, *Consumer Credit Law & Practice in the U.S.*, FED. TRADE COMM'N, https://perma.cc/CN3Z-WYLG (last visited Feb. 23, 2025). Creditors view consumers with higher credit scores as being more likely to repay what they owe. *See id.* Thus, creditors are more likely to lend or offer more favorable lending terms to individuals with higher credit scores. *See id.*

146. *See* Jianf & Novik, *supra* note 12; *see also Enabling New Financial Opportunity Through Responsible AI Innovation*, *supra* note 12; *see also Target Unique or Industry Specific Fraud Through Custom Models, Superior Data and Analytic Expertise*, *supra* note 12; *see also* Peters, *supra* note 12.

147. *See Enabling New Financial Opportunity Through Responsible AI Innovation*, *supra* note 12.

148. *See Equifax Receives Utility Patent for Innovative NeuroDecision® Technology,* EQUIFAX INV. RELS. (Dec. 11, 2018, 8:00 AM), https://perma.cc/3DR8-NEEZ.

machine learning credit scoring methodology reviewed by regulators and credit scoring experts."[149] According to Equifax, this software increases accuracy and efficiency in credit reporting while ensuring explainability and predictability of the software outputs.[150] Experian and TransUnion also use AI to generate consumer credit reports.[151] All three agencies claim that they oversee AI use extensively and set AI governance as an important priority within their respective organizations.[152]

2. Government Responses to Increased Artificial Intelligence Usage

In recent years, many federal government entities have released compliance, guidance, and commentary on AI usage for credit reporting agencies and other financial institutions.[153] These agencies include the Treasury Department, the FTC, and the Executive Office of the President.[154] Each entity recognizes the benefits of AI but warns companies of the dangers posed by AI use.[155]

The Treasury Department, the FTC, and the Executive Office of the President have identified several benefits financial institutions, including credit reporting agencies, can gain by using AI.[156] These benefits include streamlined operations, enhanced customer experience, enhanced risk management, and improved credit risk modeling.[157] First, AI use may streamline operations by processing and analyzing large amounts of data

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149. *Id.*

150. *See id.* The terms explainability and predictability refer the AI output user's ability to explain the outputs produced by an artificial intelligence model and understand how the AI produced those outputs. *Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

151. *See* Jianf & Novik, *supra* note 12; *see also Target Unique or Industry Specific Fraud Through Custom Models, Superior Data and Analytic Expertise*, *supra* note 12; *see also* Peters, *supra* note 12.

152. *See Explainability and Artificial Intelligence,* EQUIFAX, https://perma.cc/AMU2-HGVM (Mar. 7. 2024); Joachim Bartels, *Gen AI and Data Governance: TransUnion's Blueprint for the Future of Data Platforms*, BUS. INFO. INDUS. ASS'N (AUG. 7, 2024), https://perma.cc/Z4GZ-J2NA; Julie Lee, *A Quick Guide to Model Explainability*, EXPERIAN (Jan. 11, 2024), https://perma.cc/D99N-DVU2.

153. *See, e.g.*, U.S. DEPT. OF THE TREAS., *supra* note 137; *see also* Smith, *supra* note 13.

154. *See* U.S. DEPT. OF THE TREAS., *supra* note 137; *see also* Smith, *supra* note 13.

155. *See* U.S. DEPT. OF THE TREAS., *supra* note 137; *see also* Smith, *supra* note 13; Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

156. *See* U.S. DEPT. OF THE TREAS., *supra* note 137; *see also* Smith, *supra* note 13; Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

157. *See, e.g.*, *Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

with minimal human intervention.[158] Streamlined operations may then contribute to a lower cost of credit for credit seekers by requiring less human capital.[159] Second, AI enhances consumer experience by offering tailored services and improving customer service through AI chatbots.[160] Third, AI strengthens risk management by using predictive analytics to identify fraudulent transactions and systematic weak spots and then notifying system operators of these threats.[161] Finally, AI improves credit scoring by enhancing the models used to identify credit risks.[162]

Despite the benefits of financial institutions' AI use, AI creates extensive risks.[163] Identified risks include issues with the explainability of AI outputs, data privacy concerns, cybersecurity risks, and bias or discrimination risks.[164] First, AI use poses explainability issues due to its inherent complexity.[165] Explainability issues cause AI output users to utilize the outputs without detailed knowledge of the information's sources or the calculation methods used to create the outputs.[166] Explainability issues pose greater risks when information sources or calculation methods used are biased against historically underrepresented or oppressed demographics.[167] Second, because AI tools require large datasets, AI use exacerbates the risks and impacts of cybersecurity breaches.[168] Third, rapid improvement and implementation of AI may lead to reduced staffing in institutions utilizing AI due to a decreased need for human capital.[169] Reduced staffing may then create shortages of personnel

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158. *See* Patrice Alexander Ficklin et al., *Innovation Spotlight: Providing Adverse Action Notices When Using AI/ML Models*, CONSUMER FIN. PROT. BUREAU (July 7, 2020), https://perma.cc/P34R-Z27T; *see also Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

159. *See* Ficklin, *supra* note 159; *see also* Courtney Dankworth et. al., *Adverse Action Notice Compliance Consideration for Creditors That Use AI*, AM. BAR ASS'N (Oct. 30, 2023), https://perma.cc/7T3B-LULU.

160. *See Chatbots in Consumer Finance*, CONSUMER FIN. PROT. BUREAU (June 6, 2023), https://perma.cc/LWX6-3JMC; *see also* Smith, *supra* note 13.

161. *See* Jianf & Novik, *supra* note 12; *see also Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

162. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); *see also* Jianf & Novik, *supra* note 12.

163. *See, e.g.*, Smith, *supra* note 13.

164. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*; U.S. DEPT. OF THE TREAS., *supra* note 137.

169. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); *see also* U.S. DEPT. OF THE TREAS., *supra* note 137.

equipped to oversee AI systems and further exacerbate the other risks posed by AI use.[170] Fourth, AI's ability to offer customer-tailored solutions may cause the systems to target consumers in a discriminatory or unfair manner.[171] Finally, AI systems generating data outputs using large data sets raises concerns about the systems' abilities to identify historically biased data and mitigate its effects on AI outputs.[172] This deficiency may lead to biased and discriminatory outputs not easily identified by the output's users.[173]

Despite the risks, financial institutions and credit reporting agencies continue to use AI.[174] In response to this continued use, government agencies, including the FTC and CFPB, issued guidance to combat AI-associated risks.[175] The FTC explained it has experience handling challenges presented by the use of big data and algorithms; therefore, it is equipped to handle challenges presented by AI use.[176] The FTC emphasized that AI use "should be transparent, explainable, fair, and empirically sound, while fostering accountability."[177] Similarly, the CFPB provided guidance stating that it will not permit the use of complex algorithms by financial institutions when the algorithms do not adequately explain their outputs.[178] Additionally, the American Bar Association (ABA) has warned legal professionals of the compliance risks associated with AI use.[179] Specifically, the ABA warns that unexplainable AI outputs pose legal risks to entities engaged in credit reporting or credit report use.[180] Finally, the United States Treasury Department identified a need

170. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); *see also* U.S. DEPT. OF THE TREAS., *supra* note 137.

171. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector,* 89 Fed. Reg. 50049 (June 12, 2024).

172. *See id.*; *see also* U.S. DEPT. OF THE TREAS., *supra* note 137.

173. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); *see also* U.S. DEPT. OF THE TREAS., *supra* note 137.

174. *See* Jianf & Novik, *supra* note 12; *see also Enabling New Financial Opportunity Through Responsible AI Innovation*, *supra* note 12; *see also Target Unique or Industry Specific Fraud Through Custom Models, Superior Data and Analytic Expertise*, *supra* note 12; *see also* Peters, *supra* note 12.

175. *See* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022); *see also* Smith, *supra* note 13.

176. *See* Smith, *supra* note 13.

177. *Id.*

178. *See* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

179. *See* Dankworth, et. al., *supra* note 160.

180. *See id.*

for both a common AI lexicon and increased AI regulation to protect American credit consumers from the risks posed by AI use.[181]

Despite the benefits of AI use by financial institutions, AI creates extensive risks for American credit consumers.[182] While AI applications in the financial industry continue to grow rapidly, the agencies tasked with rulemaking authority over the credit reporting industry have failed to enact strong regulations to mitigate the risks of credit reporting agencies' AI use. [183]

III. ANALYSIS

Credit reporting agencies should bear the burden of proving the reasonableness of their procedures after plaintiffs show an agency produced an inaccurate credit report.[184] Five circuit courts have weighed in on the issue of who bears the burden of proving the reasonableness of a credit reporting agency's procedures.[185] However, none of these courts considered the issue in light of AI use by credit reporting agencies.[186] This Comment argues that once a plaintiff submits an inaccurate credit report prepared by a defendant credit reporting agency, the burden of proving the reasonableness of procedures employed in its production should shift to the agency.[187]

A. Once Confronted with an Inaccurate Credit Report, Credit Reporting Agencies Should Bear the Burden of Proving the Reasonableness of Procedures Employed

This Comment argues that courts should consider inaccurate credit reports prima facie evidence of a defendant credit reporting agency's failure to follow reasonable procedures under § 1681e of the FCRA.[188] This assertion is supported by the effect of increased AI use by credit

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181. *See* U.S. DEPT. OF THE TREAS., *supra* note 137.

182. *See, e.g.*, Smith, *supra* note 13.

183. *See* Smith, *supra* note 13; *see also* Consumer Financial Protection Circular 2022–03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

184. *See infra* Section III.A.

185. *See* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 50–52 (D.C. Cir. 1984) (per curiam); Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024); Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333–34 (9th Cir. 1995); Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

186. *See Stewart*, 734 F.2d at 50–52; *Lloyd*, 105 F.4th at 1031; *Philbin*, 101 F.3d at 962; *Guimond*, 45 F.3d at 1333–34; *Ausherman*, 352 F.3d at 901–02.

187. *See infra* Section III.A.

188. *See infra* Sections III.A.1–3.

reporting agencies, the overall statutory scheme of the FCRA, and common law applications of the negligence standard.[189]

1. Artificial Intelligence Use Impacts Credit Report Production by Credit Reporting Agencies

The federal government's concerns about AI use reflect individuals' and businesses' attitudes about AI adoption in various industries.[190] AI's potential to increase efficiency in applications coincides with additional risks caused by its implementation.[191] Specifically, AI's ability to generate informational outputs based on inherently biased data sets increases the risks of AI producing results that are biased against historically disadvantaged groups.[192] With limited oversight by its users, AI use increases the risk of inaccurate results not easily identified by credit reporting agencies.[193]

The "Big Three" credit reporting agencies claim their AI applications increase efficiency and ensure that AI outputs remain explainable and predictable.[194] Although the credit reporting agencies claim they use AI safely, the agencies cannot mitigate all risks posed by AI use in credit reporting, especially during the early phases of AI implementation.[195] The impossibility of mitigating all risks caused by AI use is primarily due to varying AI applications and the varying risks posed by its use.[196] These variations create a lack of consensus on how risks of AI use should be mitigated.[197] As a solution, some commenters suggest an overlapping

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189. *See infra* Sections III.A.1–3.

190. *See* U.S. DEPT. OF THE TREAS., *supra* note 137; *see also* Smith, *supra* note 13; *see also* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022); *see also* Miray Salman et al., *Now We Know the Risks of AI, Here's How Policy Frameworks Can Mitigate Them*, WORLD ECON. F. (Sep. 10,2024), https://perma.cc/B2DB-XGYH.

191. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); *see also* U.S. DEPT. OF THE TREAS., *supra* note 137.

192. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

193. *See id.*

194. *See* Jianf & Novik, *supra* note 12; *see also Enabling New Financial Opportunity Through Responsible AI Innovation*, *supra* note 12; *see also Target Unique or Industry Specific Fraud Through Custom Models, Superior Data and Analytic Expertise*, *supra* note 12; *see also* Peters, *supra* note 12.

195. *See, e.g.*, Smith, *supra* note 13; *see also Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); *see also* Salman et al., *supra* note 191.

196. *See, e.g.*, Smith, *supra* note 13; *see also Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024); *see also* Salman et al., *supra* note 191.

197. *See* Salman et al., *supra* note 191.

system of technical, sociotechnical, and human-led risk mitigation.[198] However, these proposed solutions require significant time to create and implement.[199] In addition, solutions to the risks posed by AI use often lag behind AI's rapid and continuing development.[200]

In *Stewart,* the D.C. Circuit stated that a fact finder must weigh the potential harm of credit report inaccuracies against the costs of protecting against inaccuracies.[201] AI use by credit reporting agencies increases the risk of inaccuracies for American credit consumers.[202] Following the *Stewart* court's instructions, courts should consider the heightened risks of credit reporting agencies' AI use to American credit consumers.[203] The increased risks posed by credit reporting agencies' AI use necessitate increased protection for American credit consumers.[204]

Considering an inaccurate credit report prima facie evidence of a credit reporting agency's failure to follow reasonable procedures offers credit consumers increased protection from inaccurate credit reporting.[205] By lowering a plaintiff's burden of proof after showing a defendant credit reporting agency produced an inaccurate credit report, the courts can offer increased protection to credit consumers.[206] Permitting a less burdensome proof structure for plaintiffs also makes holding credit reporting agencies liable for credit report inaccuracies less burdensome and less costly for credit consumers.[207] Accordingly, the increased risks posed by credit reporting agencies' AI use necessitates courts considering an inaccurate credit report prima facie evidence of a credit reporting agency's failure to follow reasonable procedures.

The FTC and the CFPB claim they have experience regulating the use of big data and algorithms.[208] However, regulation is only a proactive

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198. *See id.*

199. *See id.*

200. *See id.*

201. *See* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 50–52 (D.C. Cir. 1984) (per curiam).

202. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

203. *See Stewart*, 734 F.2d at 50–52.

204. *See id.*; *see also Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

205. *See* Jennifer Cuculich, *Who Bears the Burden of Proof Under the Fair Credit Reporting Act, 15 U.S.C. s1681e(b) - Consumers May Bear the Biggest Burden in This Climate of Heightened National Security,* 14 Loy. Consumer L. Rev. 305, 323–24 (2002).

206. *See id.*

207. *See id.*

208. *See* Smith, *supra* note 13; *see also* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

measure in fighting the risks posed by AI use in credit reporting.[209] The FTC and CFPB have not offered strong solutions for consumers who have already suffered damages from inaccurate credit reporting.[210] Thus, the FTC and CFPB have failed to increase protections for credit consumers who have already suffered negative impacts from inaccurate credit reporting.[211]

In the absence of strong regulatory measures for consumers who have already suffered damages from inaccurate credit reporting, redress should be more readily available through the courts. Making redress more readily available by considering inaccurate credit reports prima facie evidence of a credit reporting agency's failure to follow reasonable procedures ensures the increased risk of AI use by credit reporting agencies is balanced with increased protections for American credit consumers.

2. Shifting the Burden of Proving the Reasonableness of Procedures to Credit Reporting Agencies Protects Consumers from Abuse

Congress intended to protect American credit consumers when it enacted the FCRA.[212] In enacting the FCRA, Congress was concerned about abuses in the credit reporting industry.[213] These abuses concern Congress because Americans depend on accurate credit reporting for their financial health and freedom.[214] The FCRA therefore serves to protect American credit consumers and the entire American banking system.[215]

Shifting the burden of proving the reasonableness of procedures employed in the production of credit reports to credit reporting agencies provides consumers with security against abuses from credit reporting agencies. This security includes protection against discriminatory outcomes produced by AI's use of historically discriminatory data.[216] Increased protection for American credit consumers also improves the

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209. *See* Smith, *supra* note 13; *see also* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

210. *See* Smith, *supra* note 13; *see also* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

211. *See* Smith, *supra* note 13; *see also* Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection With Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864 (June 14, 2022).

212. *See* Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996).

213. *See* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995).

214. *See* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 45 (2024).

215. *See id.*; *see also* Guimond, 45 F.3d at 1333.

216. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

public's confidence in the American banking system because protection ensures reliability in the lending process.[217] Congress cited increasing consumer protections and public confidence in the American banking system among its primary goals in enacting the FCRA.[218] Accordingly, shifting the burden of proving the reasonableness of procedures employed onto credit reporting agencies upon a showing of an inaccurate credit report advances the legislative purpose of the FCRA.[219]

3. Congress' Silence Regarding Which Party Bears the Burden of Proving the Reasonableness of Procedures

Congress failed to specify who bears the burden of proving the reasonableness of procedures employed by credit reporting agencies in § 1681e negligence claims.[220] Congress's silence regarding which party bears the burden of proving the reasonableness of procedures employed by credit reporting agencies may be interpreted in two ways.[221] In *Stewart,* the D.C. Circuit Court reasoned that Congress's silence demonstrates that Congress never intended to engage in burden-shifting.[222] The court reasoned that if Congress intended to shift the burden, it would have expressly stated this intention.[223] As a result, the *Stewart* court declined to shift the burden of proving the reasonableness of procedures onto credit reporting agencies.[224] Conversely, the Supreme Court noted that courts should construe the private rights of action created by the FCRA as consistent with common law usages.[225] The Supreme Court reasoned that because Congress did not indicate an intention otherwise, the common law terms in the Act should be interpreted in accordance with their common law meaning.[226]

Negligence actions brought under § 1681e of the FCRA reflect the common law negligence cause of action with four elements: duty, breach, causation, and damages.[227] As a default, plaintiffs must prove all four elements in common law negligence claims.[228] However, United States

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217. *See Guimond*, 45 F.3d at 1333.
218. *See id.*; *see also* Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996).
219. *See* 15 U.S.C. § 1681.
220. *See* 15 U.S.C. § 1681o; *see also* Stewart v. Credit Bureau, 734 F.2d 47, 51 (D.C. Cir. 1984) (per curiam).
221. *See Stewart,* 734 F.2d at 51–52; *see* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007).
222. *See Stewart*, 734 F.2d at 51–52.
223. *See id.*
224. *See id.* at 51.
225. *See Safeco Ins. Co. of Am.*, 551 U.S. at 57.
226. *See id.*
227. *See* Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024) (Smith, C.J., dissenting).
228. *See* RESTATEMENT (SECOND) OF TORTS § 328A (AM. L. INST. 1965).

courts commonly find a rebuttable presumption that damages caused by an instrumentality exclusively under the control of a defendant are due to a breach of the defendant's duty of care.[229] This practice is based in the common law of negligence.[230] Credit reporting agencies exclusively control the production of credit reports and have a duty to use reasonable procedures to ensure the accuracy of credit reports.[231] Thus, as the Third Circuit stated in *Philbin*, the agencies are in a better position to prove the reasonableness of the procedures employed.[232] Accordingly, deeming inaccurate credit reports prima facie evidence of a credit reporting agency's failure to follow reasonable procedures remains consistent with common law applications of the negligence standard.[233]

B. *Applying the Burden-Shifting Mechanism*

Considering inaccurate consumer credit reports prima facie evidence of the second element of negligence shifts the burden of proof to the credit reporting agency.[234] This creates a rebuttable presumption that the credit reporting agency failed to follow reasonable procedures in producing the credit report.[235] Using this approach, a plaintiff bringing a § 1681e negligence claim must survive summary judgment on the breach of duty element of negligence claims when the plaintiff submits evidence of an inaccurate credit report.[236] However, the plaintiff credit consumer must still prove the other three elements of negligence to survive summary judgment.[237] Then, the credit reporting agency must prove the reasonableness of its procedures, and, therefore, its compliance with the FCRA to escape liability.[238]

Because credit reporting agencies have exclusive control over the production of credit reports, they are better positioned than plaintiff credit consumers to prove the reasonableness of the procedures employed in credit report production.[239] This approach does not subject credit reporting agencies to strict liability for producing inaccurate credit reports.[240] The

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229. *See* RESTATEMENT (SECOND) OF TORTS § 328D (AM. L. INST. 1965); *see also* Philbin v. Trans Union Corp., 101 F.3d 957, 965 (3d Cir. 1996).

230. *See* RESTATEMENT (SECOND) OF TORTS § 328D (AM. L. INST. 1965); *see also* Philbin v. Trans Union Corp., 101 F.3d 957, 965 (3d Cir. 1996).

231. *See* Philbin v. Trans Union Corp*.,* 101 F.3d 957, 965 (3d Cir. 1996).

232. *See id.*

233. *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 328D (AM. L. INST. 1965).

234. *See Philbin,* 101 F.3d at 965.

235. *See id*.

236. *See id*. at 965–66.

237. *See* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995); *see also Philbin*, 101 F.3d at 964–66.

238. *See Guimond*, 45 F.3d at 1333–34; *see also Philbin*, 101 F.3d at 964–65.

239. *See Philbin*, 101 F.3d at 965.

240. *See id.* at 964–65; *Guimond*, 45 F.3d at 1333–34.

proposed burden-shifting approach provides more protection to credit consumers whom Congress intended the FCRA to protect and remains consistent with common law applications of the negligence standard.[241]

IV. CONCLUSION

Congress sought to increase consumer protections and public confidence in the United States banking system when enacting the FCRA.[242] Over the past four decades, a circuit split has arisen over which party bears the burden of proving the reasonableness of procedures employed by credit reporting agencies upon a plaintiff demonstrating that a credit reporting agency produced an inaccurate credit report.[243] However, none of the circuit courts at the heart of the split considered this issue in light of AI use by credit reporting agencies.[244]

Credit reporting agencies should bear the burden of proving the reasonableness of their procedures after a plaintiff shows the agency produced an inaccurate credit report.[245] AI's ability to generate inaccurate information outputs due to inherently biased data inputs and limited oversight by its users creates increased risks to American credit consumers.[246] The increased risk to American credit consumers necessitates increased protections, including considering an inaccurate credit report prima facie evidence of a credit reporting agency's failure to employ reasonable procedures.[247]

Considering inaccurate consumer credit reports prima facie evidence of the second element of negligence creates a rebuttable presumption that the credit reporting agency failed to employ reasonable procedures in producing the credit report.[248] Using this approach, a plaintiff bringing a § 1681e negligence claim must survive summary judgment on the breach of duty element of a negligence claim upon submitting evidence of an inaccurate credit report.[249] Finally, considering inaccurate credit reports

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241. *See supra* Section III.A.2.

242. *See Guimond*, 45 F.3d at 1333; *see also Philbin*, 101 F.3d at 962.

243. *Compare* Stewart v. Credit Bureau, Inc., 734 F.2d 47, 50–53 (D.C. Cir. 1984) (per curiam), *and* Lloyd v. FedLoan Servicing, 105 F.4th 1020, 1031 (8th Cir. 2024), *with Philbin*, 101 F.3d at 965–66, *and Guimond*, 45 F.3d at 1333–34, *and* Ausherman v. Bank of Am. Corp., 352 F.3d 896, 901–02 (4th Cir. 2003).

244. See *Stewart*, 734 F.2d at 50–52; *Lloyd*, 105 F.4th at 1031; *Philbin*, 101 F.3d at 962; *Guimond*, 45 F.3d at 1333–34; *Ausherman*, 352 F.3d at 901–02.

245. *See supra* Section III.A.

246. *See Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

247. *See supra* Section III.A.1; *see also Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector*, 89 Fed. Reg. 50049 (June 12, 2024).

248. *See* Philbin v. Trans Union Corp., 101 F.3d 957, 965–66 (3d Cir. 1996).

249. *See id.*

prima facie evidence of the second element of negligence protects American credit consumers and comports with the FCRA's legislative intent and controlling judicial interpretation by the Supreme Court.[250]

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250. *See supra* Section III.A.