IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 97-4386

____

DEBORAH WILSON,
Plaintiff-Appellant

v.

RENTAL RESEARCH SERVICES, INC.,
Defendant-Appellee

____

On Appeal from the
United States District Court for
the District of Minnesota

____

BRIEF ON REHEARING EN BANC OF AMICUS CURIAE FEDERAL TRADE COMMISSION SUPPORTING REVERSAL OF LOWER COURT'S DECISION

____

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STATEMENT OF INTEREST OF THE FEDERAL TRADE COMMISSION

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

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

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

STATEMENT OF ISSUES

The Commission addresses the following two issues in this brief:

1. Whether a consumer raises triable issues of fact as to the reasonableness of a consumer reporting agency's procedures when the consumer shows that much of the information contained in the agency's report about the consumer was plainly not about the consumer.

2. Whether the FCRA requires a consumer reporting agency to reinvestigate information in its file that a consumer disputes if the consumer reporting agency obtained the information from another consumer reporting agency.

STATEMENT OF THE CASE

Section 607(b) of the FCRA, 15 U.S.C. § 1681e(b), requires consumer reporting agencies to "follow reasonable procedures" in preparing consumer reports "to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[1] Defendant-Appellee, Rental Research Services, Inc. ("Rental Research"), is a consumer reporting agency that provides information about prospective tenants to subscribing landlords.[2] The information that Rental Research sells comes from multiple data bases, including housing court records and credit reports from TRW Inc., which, like Equifax and Trans Union Corporation, is a national consumer reporting agency that serves as a repository for

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

[2]Section 603(f) of the FCRA, 15 U.S.C. § 1681a(f), defines "consumer reporting agency" to include:

> [A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

credit information.[3] Thus, TRW sells information to "resellers" like Rental Research, which then include the information in reports to such end users as mortgage companies, banks, and landlords. *See* FTC Commentary on the FCRA § 604 (*"FTC Commentary"*), 55 Fed. Reg. 18817 (1990), 16 C.F.R. Part 600 App., *Section 604-General.*

In February 1996, Plaintiff-Appellant, Deborah Wilson, applied for an apartment rental, and the landlord paid Rental Research to prepare a consumer report on Ms. Wilson. 165 F.3d at 643. Based on public records of the housing courts for Minneapolis and St. Paul, Rental Research issued a report that identified twelve "possible" unlawful detainer actions against people with the names Debra Wilson or Deborah Wilson. *Id.* All twelve detainer actions had been filed in a period of less than three years. Two had been filed on the same day in different counties and two others had been filed within two weeks of each other in different counties. *Id.* Rental Research included a disclaimer, warning the landlord that it based its report on Ms. Wilson on a name review of public records. Rental Research thus alerted the landlord that the reported information might not pertain to Ms. Wilson, the intended subject of the report, and it asked the landlord to

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[3]After this law suit was filed, TRW Inc. sold its consumer reporting business to Experian Information Solutions, Inc.

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

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

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

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

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

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

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

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

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

165 F.3d at 647.

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

ARGUMENT

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

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

1. Rental Research's Reports Are Not Accurate as to the Subject of the Report.

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

Section 607. The panel, however, was right: the FCRA imposes a higher standard of accuracy on consumer reporting agencies than the district court has applied here. The FCRA expresses Congress' awareness that consumer reports play a vital role in the economy and that "[a]n elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers." 15 U.S.C. § 1681(a)(2). The Act thus recognizes the "'needs of commerce' for accurate credit reporting." *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1158 (11th Cir. 1991); *see* 15 U.S.C. § 1681, *et seq.* The Act also recognizes the serious harm that can befall consumers who are the subject of inaccurate adverse credit reports. *Id.*

Those serious consequences are evident in this case. As the panel majority commented:

> The importance of housing and the nature of the rental housing market intensify the damage done to consumers who are the victims of an inaccurate report. Because landlords need to fill units promptly, by the time a tenant screening report is corrected, the unit is often rented. Landlords have little incentive to verify "possible" negative information, since they have the option of simply choosing another prospective tenant who has no negative information. This is particularly true in metropolitan areas such as the Twin Cities where vacancy rates are approximately one to two percent.

165 F.3d at 646. The record here shows that for a $15 fee, Rental Research provides reports that landlords can use to evaluate applicants. These reports often

indicate, incorrectly, that the subjects of the report have been listed in housing court records. *See id.* at 643. As the panel majority observed:

> Wilson and others like her, particularly those with common names, face a potentially costly delay in obtaining housing when they are unfairly taken out of consideration for an apartment due to inaccurate information in a credit report. Not only must they find housing for themselves and their families during the delay, they may also lose multiple application fees when landlords deny their applications based on the incorrect report generated by Rental Research.

Id. at 647.

Congress enacted the FCRA to address its "concern over abuses in the credit reporting industry." *Guimond v. Trans Union Info. Corp.*, 45 F.3d 1329, 1333 (9th Cir. 1995). As several courts have noted, "[t]he legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them" in a consumer report. *Id.*, citing *Kates v. Crocker Nat'l Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985); *see also Pinner v. Schmidt*, 805 F.2d 1258, 1261 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987); *see Millstone v. O'Hanlon Reports*, 383 F. Supp. 269, 275 (E.D. Mo. 1974) (consumer reporting agency's methods "were so slipshod and slovenly as to not even approach the realm of reasonable standards of care as imposed by the statute"), *aff'd,* 528 F.2d 829 (8th Cir. 1976). To accomplish this goal, Congress

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

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

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

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

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

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

version at 15 U.S.C. §§ 1681g, 1681h (Supp. II, 1996)). It also imposes on credit reporting agencies an affirmative obligation to reinvestigate the information in their reports, when that information is challenged by the subject of the report. *See* 15 U.S.C. § 1681i (current version at 15 U.S.C. § 1681i (Supp. II 1996)). Significantly, both pre-amendment and amended Section 611(a) expressly require consumer reporting agencies to delete from consumers' files all information that cannot be verified on reinvestigation. 15 U.S.C. § 1681i (current version at 15 U.S.C. § 1681i(a)(5)(A)(Supp. II 1996)).

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

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

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

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

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

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

As the panel majority further recognized, adoption of the "technical accuracy" standard advocated by Rental Research would subject consumers to adverse and arbitrary consequences, on the basis of information that does not pertain to them. 165 F.3d at 645. Regardless of whether reports containing such information would literally "mislead" landlords (*cf.* dissenting opinion, 165 F.3d at 650), they would nevertheless lead to harmful results, by prompting landlords (at least those able to choose among multiple applicants) to turn down rental applications on the basis of the *possibility* that the reported adverse information actually pertains to the subject of a report. It is no answer to point out that a consumer denied housing (or credit) in this manner could seek correction of his

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

Antonio Retail Merchants Ass'n., 682 F.2d 509, 513 (5th Cir. 1982).[6] The FCRA does not sanction the result that Rental Research seeks here.

Given the purpose of the FCRA and the statutory provisions that give effect to that purpose, "section 607(b) requires a consumer reporting agency to do more than correctly report the information supplied to it by creditors." *Bryant v. TRW, Inc.*, 689 F.2d at 77. A consumer reporting agency may not satisfy its statutory obligation to report accurate information by merely reporting information that is "technically" accurate, however misleading. As the District of Columbia Circuit has held, "Congress did not limit the Act's mandate to reasonable procedures to

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[6]In *Thompson*, the court held that it could not "conclude that the district court was clearly erroneous" in finding negligence when the consumer reporting agency "had no way of knowing if the information supplied by the subscriber was correct." 682 F.2d at 513. By comparison, the defendant here had no way of knowing if the information supplied by the court database even pertained to the subject of the report. In this regard, we thus agree with the panel majority's view that there is no conflict between its decision and the decision in *Henson v. CSC Credit Services*, 29 F.3d 280 (7th Cir. 1994). That case involved a consumer reporting agency's reliance on a single court record that mistakenly reported a money judgment against the plaintiff. As the panel majority here commented:

> The *Henson* court was faced with a singular clerical error, not the core practice at issue in this case, which is Rental Research's practice of including all records corresponding to permutations of a certain name without verifying that they pertain to the individual who is the subject of the report.

165 F.3d at 645.

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

2. Rental Research's Procedures Do Not Appear to Be at All Reasonable.

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

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

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

16 C.F.R. Part 600 App. (emphasis added). A consumer reporting agency initially satisfies its obligations if it relies upon a source that "is credible on its face." However, once an agency knows (or should know) that it is systematically producing inaccurate reports, it must take some action to rectify that situation. As the *Bryant* court indicated, the agency may not simply rely on its ability to report verbatim information that it obtains from others. 689 F.2d at 77.

In assessing the reasonableness of a consumer reporting agency's actions, courts have attempted to strike a balance between the harm to injured consumers and the cost of developing accurate reports.[7] As the District of Columbia stated in a companion case to *Koropoulos*:

> "The standard of conduct by which the trier of fact must judge the adequacy of [consumer reporting] agency procedures is what a reasonably prudent person would do under the circumstances." . . . Judging the reasonableness of an agency's procedures involves weighing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.

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

Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51 (D.C. Cir. 1984) (*per curiam*). The D.C. Circuit has thus held that "a plaintiff cannot rest on a showing of mere inaccuracy, shifting to the defendant the burden of proof on the reasonableness of procedures for ensuring accuracy . . . a plaintiff must minimally present some evidence from which a trier of fact can infer that the consumer reporting agency failed to follow reasonable procedures in preparing a credit report." *Stewart*, 734 F.2d at 51. The *Stewart* court further commented, however, that "[i]n certain instances, inaccurate credit reports by themselves can fairly be read as evidencing unreasonable procedures, and . . . in such instances plaintiff's failure to present direct evidence will not be fatal to his claim." *Id.* at 52.[8]

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[8]Some Circuits have gone further than *Stewart* by allowing a plaintiff to rest his or her case upon a mere showing of inaccuracy. For example, the Ninth Circuit has written that "a consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information" (*Guimond*, 45 F.3d at 1333) and held that the plaintiff there "made out a prima facie case under § 1681e(b) by showing that there were inaccuracies in her credit report." *Id.* at 1334. Both the Ninth and the Eleventh Circuits have employed nearly identical language to observe that "an agency can escape liability if it establishes that an inaccurate report was generated despite the agency's following reasonable procedures." *Guimond*, 45 F.3d at 1333; *compare Cahlin*, 936 F.2d at 1156. In surveying the decisional law, without taking a final position on the issue, the Third Circuit has commented that the decisions of the Ninth and the Eleventh Circuits can be read in either of two ways: (1) to shift the burden of proof to the defendant whenever a plaintiff shows that the agency prepared an inaccurate report; or (2) more reasonably, to allow a jury to "infer from the inaccuracy that the defendant failed to follow reasonable procedures." *Philbin,* 101 F.3d at 965.

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

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

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

The record here suggests that Rental Research has not established *any* procedures, much less reasonable ones, to ensure the accuracy of its reports. Its disclaimer is tantamount to an admission that it does not take any steps to ensure accuracy, much less maximum possible accuracy. At a minimum, this raises a factual question about whether its procedures were reasonably designed to "assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

To the extent that Rental Research argues that a more accurate report would be too expensive to prepare, we submit that this is a factual question for a jury. For example, the record here shows that Rental Research obtained a consumer report about Ms. Wilson from TRW. Presumably that report (or other sources readily available to Rental Research) included Ms. Wilson's recent addresses. Perhaps a jury would find that Rental Research could have, at very little or no cost,

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

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

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

Pre-amendment Section 611(a) provided, in part:[9]

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

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

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

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

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

(emphasis added).

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

objections known directly to Rental Research. The panel nevertheless held that under the pre-amendment FCRA "*Rental Research was not the consumer reporting agency obligated to reinvestigate TRW's information.*" *Id.* at 648 (emphasis added). However, Rental Research was the consumer reporting agency that produced Ms. Wilson's consumer report. Once Ms. Wilson contacted Rental Research directly, the FCRA made it the consumer reporting agency responsible for conducting the reinvestigation.[11] Thus, the plain language of the pre-amended FCRA required Rental Research to conduct a reinvestigation. It refused to do so, and it therefore violated the Act.

In reaching a contrary conclusion, the panel relied on a provision of the 1996 FCRA amendments that elaborates on the obligations of consumer reporting agencies respecting disputed information. That new section specifically obligates the agency to "provide notification of the dispute to any person who provided any item of information in dispute." 15 U.S.C. § 1681i(a)(2)(A); see 165 F.3d at 648.

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

While this addition to the statute indeed provides specific direction as to the steps a consumer reporting agency must now take when faced with the sort of situation Rental Research faced in the present case, this directive is subsidiary to the basic statutory requirement that was already contained in the statute, and which was *unchanged* by the 1996 amendments – *i.e.*, the requirement that "the consumer reporting agency" to which the consumer disputes an item of information "shall * * * reinvestigate * * * ." 15 U.S.C. § 1681i(a) (1994); *compare* 15 U.S.C. § 1681i(a)(1)(A) (pertinent language unchanged). In other words, although the 1996 amendment provides important guidance as to *how* a consumer reporting agency in Rental Research's position must conduct its reinvestigation, it does not alter the requirement that the agency conduct a reinvestigation. The panel's holding that Rental Research had *no* duty to reinvestigate under the pre-amendment FCRA is squarely contrary to the statutory obligations expressly placed on any consumer reporting agency that issues a consumer report regarding a consumer, maintains a file on the consumer, and subsequently receives a notification from the consumer disputing one or more items in the report.

CONCLUSION

For the above-stated reasons, the district court's decision granting summary judgment in favor of Rental Research should be reversed, and the case should be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

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

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