

No. 16-13404

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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KATHLEEN N. PEDRO, on behalf of herself  
and all others similarly situated,

*Plaintiff-Appellant,*

v.

EQUIFAX, INC. and TRANSUNION LLC,

*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Northern District of Georgia, Atlanta Division,  
Case No. 1:15-cv-03735

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**BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF  
CONSUMER ADVOCATES**

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Rule 26.1-2, and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, undersigned counsel for Amicus Curiae, National Association of Consumer Advocates, certifies that it is a non-profit corporation, has no parent corporation, and has no stock. There is no person known to Amicus Curiae to have an interest in the outcome of this appeal other than those persons and entities named in the parties' Certificates of Interested Persons and Corporate Disclosure Statement.

Dated this 16<sup>th</sup> day of August, 2016

s/John S. Friend

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## **I. STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE***

The National Association of Consumer Advocates (“NACA”) is a nonprofit association of attorneys and consumer advocates committed to representing consumers’ interests. Its members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for consumers in an effort to curb unfair or abusive practices that affect consumers.

NACA has furthered this interest in part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States, including the Eleventh Circuit. *See e.g., Day v. Persels & Assocs., LLC*, 729 F.3d 1309 (11th Cir. 2013); *Harris v. Mexican Specialty Foods, Inc.*, 546 F.3d 1301 (11th Cir. 2009).

## **II. SUMMARY OF ARGUMENT**

The District Court granted Appellees’ Motion to Dismiss based on two flawed arguments. First, the district court reasoned that “technical accuracy” and “materially misleading” present two separate “approaches” for determining whether a defendant has complied with 15 U.S.C. § 1681e(b)’s mandate that credit reports



have “maximum possible accuracy.”<sup>1</sup> Second, the district court concluded that since there are “differing approaches” to the accuracy standard, the Appellees were not objectively unreasonable in their interpretation of accuracy for purposes of § 1681e(b) compliance when they provided technically accurate information on their consumer credit reports.<sup>2</sup>

The reality is that “technical accuracy” and “materially misleading” are not two separate approaches to determine liability under § 1681e(b). The accepted view is that a report may be a “technical truth” but still be “misleading as an outright untruth where it paints an incomplete picture.”<sup>3</sup> Technical accuracy is actually a flawed defense to a § 1681e(b) claim – a defense that has been consistently rejected.<sup>4</sup> As a result, Appellant’s FCRA claims should not have been dismissed.

### III. ARGUMENT

#### **A. “Technical accuracy” and “materially misleading” are not two separate approaches to determine liability under § 1681e(b).**

The district court’s ruling turns on the notion that, because the Eleventh Circuit has not yet ruled that a “technically accurate” report can also be “materially misleading,” the Appellee could not have committed a willful violation as a matter

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<sup>1</sup> *Pedro v. Equifax, Inc.*, 2016 U.S. Dist. LEXIS 62714, \*7 (N.D. Ga. May 11, 2016)

<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 976-977 (M.D. Fla. 1985).

<sup>4</sup> Elwin J. Griffith, *Credit Reporting, Prescreened Lists, and Adverse Action: The Impact of the Fair Credit Reporting Act and the Equal Credit Opportunity Act*, 46 Cal. W. L. Rev. 1 (2009)

of law for reporting technically accurate information.<sup>5</sup> However, “technical accuracy” and “materially misleading” are not two separate approaches to determining liability under § 1681e(b). On the contrary, technical accuracy is actually a flawed defense to a § 1681e(b) claim.

**1. The Majority of Courts Recognize that a Technically Accurate Report Can Still Be Materially Misleading.**

Every published Court of Appeals case to consider the issue has ruled, definitively, that a technically accurate report can be actionable if it is materially misleading.<sup>6</sup> This is in keeping with § 1681e(b)’s mandate of “maximum possible accuracy.”

For example, in *Cortez v. Trans Union, LLC*,<sup>7</sup> the Third Circuit noted that “the distinction between accuracy and maximum possible accuracy...is in fact quite dramatic.” The court then cited to an illustration used by the Fifth Circuit, which highlights the difference between simple technical accuracy and maximum possible accuracy:

Turning to liability under § 1681e(b), any person could easily have construed the notation "Litigation Pending" as an indication that the plaintiff was being sued by Sherwin-Williams, while the actual situation was the reverse...§ 1681e(b) does not require that a consumer reporting agency follow reasonable procedures to assure simply that the consumer report be accurate, but to assure maximum possible accuracy.

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<sup>5</sup> *Pedro, supra.*

<sup>6</sup> *Dalton v. Capital Associated Indus.*, 257 F.3d 409 (4th Cir. N.C. 2001); *Sepulvado v. CSC Credit Servs.*, 158 F.3d 890, 895 (5th Cir. 1998); *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009).

<sup>7</sup> 617 F.3d 688, 709 (3d Cir. 2010)

Otherwise it would seem that a consumer reporting agency could report that a person was involved in a credit card scam, and without regard to this section fail to report that he was in fact one of the victims of the scam. This result cannot have been contemplated under the Act.<sup>8</sup>

The reasoning is compelling. A technically accurate statement can still completely misrepresent a consumer's credit history. This is precisely the reason why the vast majority of courts hold that simple technical accuracy is not enough. *See e.g., Wenning v. On-Site Manager, Inc.*, 2016 U.S. Dist. LEXIS 81126, \*26 (S.D.N.Y. June 22, 2016) (noting that “the overwhelming weight of authority holds that a” materially misleading report is actionable and adopting this standard); *Shannon v. Equifax Info. Serv.*, 764 F. Supp. 2d 714 (E.D. Pa. 2011); *Dalton v. Capital Associated Indus.*, .257 F.3d 409 (4th Cir. N.C. 2001); *Sepulvado v. CSC Credit Servs.*, 158 F.3d 890, 895 (5th Cir. 1998); *Poore v. Sterling Testing Sys.*, 410 F. Supp. 2d 557, 570 (E.D. Ky. 2006)(“A report is inaccurate ... when it is misleading in such a way and to such an extent that it can be expected to have an adverse effect”); *Taylor v. Screening Reports, Inc.*, 2015 U.S. Dist. LEXIS 86262, \*12-14 (N.D. Ill. July 2, 2015) (“in light of the text of § 1681e(b) and the FCRA's concern for fairness to consumers, a defendant can be liable under § 1681e(b) for a technically accurate but materially misleading report”); *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009); *Fishback v. HSBC Retail*

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<sup>8</sup> *Id.* citing to *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986).

*Servs.*, 944 F. Supp. 2d 1098, 1111 (D.N.M. 2013).

**2. Technical Accuracy Is a Defense that Has Been Broadly Rejected.**

As discussed above, there is no technical accuracy “approach.” Rather, technical accuracy is a defense raised to avoid liability for § 1681e(b) violations. Nonetheless, the use of this defense has been rejected where it can be shown that the technically accurate information is potentially misleading or incomplete.

In *Koropoulos v. Credit Bureau, Inc.*,<sup>9</sup> the D.C. Court of Appeals recognized technical accuracy was a legally flawed defense:

First of all, we do not agree with the district court that section § 1681e(b) makes a credit reporting agency liable for damages only if the report contains statements that are technically untrue. Congress did not limit the Act's mandate to reasonable procedures to assure only technical accuracy; to the contrary, the Act requires reasonable procedures to assure "maximum accuracy." The Act's self-stated purpose is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . 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. § 1681e(b). Certainly reports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer who is the subject of the reports.

*The several district court cases adopting the technical accuracy defense to a section 1681e(b) claim fail to convince us that such a defense, applied to these facts, is in accord with congressional intent.*

The court went on to rule that granting summary judgment to the defendant

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<sup>9</sup> 734 F.2d 37, 40 (D.C. Cir. 1984) (emphasis supplied).

because the report was “technically accurate, regardless of any confusion generated in the recipients' minds as to what it meant, was improper.”<sup>10</sup> The *Koropoulos* court found there existed a “genuine issue of fact as to whether the report was sufficiently misleading so as to raise the issue” of whether CBI's procedures for assuring maximum possible accuracy were actionable.<sup>11</sup> The reasoning used by *Koropoulos* is widely accepted.<sup>12</sup>

### **3. The Case Law Relied on by the District Court Has Not Been Followed in Its Own Circuit.**

The district court cited to *Heupel v. Trans Union LLC*<sup>13</sup> to support its conclusion that a consumer reporting agency satisfies its duty under § 1681e(b) when it reports factually correct information about a consumer even when the information may be misleading or incomplete.<sup>14</sup> The court in *Heupel*, in turn, cited *Todd v. Associated Credit Bureau Services, Inc.*<sup>15</sup> when it concluded that technical accuracy defeated a claim under § 1681e(b). The *Todd* court found that the Plaintiff could not sustain its cause of action against Defendant for a § 1681e(b) claim, because the

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<sup>10</sup> *Id.* at 42.

<sup>11</sup> *Id.*

<sup>12</sup> See e.g., *Saunders v. Branch Banking and Trust Co. of VA*, 526 F.3d 142, 148 (4th Cir. 2008); *Palouian v. FIA Card Servs.*, 2013 U.S. Dist. LEXIS 61861, \*8 (E.D. Pa. Apr. 29, 2013); *Smith v. Hireright Solutions, Inc.*, 711 F. Supp. 2d 426, 434 (E.D. Pa. 2010); *Baker v. Trans Union LLC*, 2008 U.S. Dist. LEXIS 93266, \*14 (D. Ariz. Nov. 5, 2008).

<sup>13</sup> 193 F. Supp. 2d 1234, 1240 (N.D. Ala. 2002).

<sup>14</sup> *Pedro*, at 6.

<sup>15</sup> 451 F. Supp. 447 (E.D. Pa. 1977).

report was not inaccurate.<sup>16</sup> However, the *Todd* court never considered whether the report was misleading, and it additionally failed to provide any analysis regarding whether a misleading report would satisfy the “maximum possible accuracy” requirement under §1681e(b).

More importantly, *Todd* is no longer law in its own circuit. The Third Circuit rejected its ruling explicitly in *Seamans v. Temple University*<sup>17</sup> and implicitly in *Cortez v. Trans Union, LLC*.<sup>18</sup> Additionally, several Third Circuit district courts have refused to apply *Todd*. See *Shannon, supra*; *Krajewski v. Am. Honda Fin. Corp.*, 557 F. Supp. 2d 596, 614 (E.D. Pa. 2008)( denying summary judgment where there was “a genuine issue of material fact as to whether the report was . . . misleading”); *Evantash v. G.E. Capital Mortg. Servs.*, 2003 U.S. Dist. LEXIS 23131 (E.D. Pa. Nov. 25, 2003)

In *Seamans*, the panel considered the meaning of “accuracy” under the FCRA as a matter of first impression. The court’s discussion was simple and terse:

We agree . . . that even if the information is technically correct, it may nonetheless be inaccurate if, through omission, it create[s] a materially misleading impression. Whether technically accurate information was misleading in such a way and to such an extent that [it] can be expected to have an adverse effect is generally a question to be submitted to the jury. We agree with the three Courts of Appeals to have considered the question that even if the information is technically correct, it may

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<sup>16</sup> *Id.* at 449.

<sup>17</sup> 744 F.3d 853 (3d Cir. Pa. 2014).

<sup>18</sup> 617 F.3d 688, 706 (3d Cir. 2010).

nonetheless be inaccurate if, through omission, it create[s] a materially misleading impression.<sup>19</sup>

Prior to its decision in *Seamans*, the Third Circuit had already abandoned the reasoning in *Todd*. In *Cortez*,<sup>20</sup> the Third Circuit cited, with strong approval, a Fifth Circuit Court of Appeals case holding that a materially misleading report did not satisfy § 1681e(b), regardless of its technical accuracy.<sup>21</sup> The *Cortez* court declared “Congress surely did not intentionally weave an exception into the fabric of the FCRA that would destroy its remedial scheme by allowing a credit reporting agency to escape responsibility for its carelessness whenever misleading information finds its way into a credit report...”<sup>22</sup>

*Heupel*'s reasoning regarding technical accuracy, while possibly debatable in 2002, has since been rejected. The lower court's reliance on this decision to illustrate technical accuracy as a potential defense was legal error.

#### **4. Allowing a Technical Accuracy Defense Undercuts the FCRA's Purpose to the Detriment of Consumers and Damages the American Economy.**

The most obvious “purpose of the FCRA [is] to protect consumers against inaccurate and incomplete credit reporting.”<sup>23</sup> During initial debates over the

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<sup>19</sup> *Id.* at 857.

<sup>20</sup> *Cortez*, 617 F.3d at 709.

<sup>21</sup> *Pinner*, *supra*.

<sup>22</sup> *Id.* at 710.

<sup>23</sup> *Gorman*, *supra*.

FCRA's language, technical accuracy was a point of concern. Wisconsin Senator William Proxmire discussed a real world example during Senate hearings:

Well, here is a situation that has developed. One man's file had the charge in it that he had suffered a charge of assault. This was in the file. The information was not in the file that the charge had been dismissed because under the circumstances what had happened was that he had witnessed the mugging of an elderly person in the dark in the street and had gone to the elderly person's defense and in the course of doing this he had to assault the person who was mugging the elderly person. He was a hero. The person who had engaged in the mugging sued him for assault. Of course, it was dismissed.

*You can have a report which is accurate but not complete and not fair. I think this is one of the reasons why you have to go a little further than simple accuracy.*<sup>24</sup>

As a result of this type of testimony, Congress settled on the language "maximum possible accuracy," which encompasses far more than just simple accuracy.

If a technical accuracy defense is allowed, Senator Proxmire's aforementioned hero would have no recourse under the law. Consumer reporting agencies would bear no liability for the harm created by such a report. The technically accurate report would create the impression that our hero was the kind of person with whom a business would not want to associate. In reality, this man was a brave person who felt a moral imperative to do the right thing – exactly the

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<sup>24</sup>115 Cong. Rec. S2412 (1969).



kind of a person with whom a business would want to associate. It was not Congress' intent to sanction this result.

Certainly the inability to obtain financing and credit is the first thing that comes to mind regarding the impact of a bad report, but that is only the tip of the iceberg. Poor credit “has become a barrier to access to everything from a cell phone to an apartment to acceptance to the bar.”<sup>25</sup> In an era where a person's credit score impacts not only his or her ability to obtain financing, but how he or she can participate in the economy, a materially misleading consumer report can have enormous unforeseen consequences. Where, in 1969, Senator Proxmire's hero might not be able to obtain a credit card because he was falsely painted as a criminal, in 2016, he might not be able to rent an apartment or obtain employment.

Moreover, the long term benefits of consumer credit are critical to social mobility and the consumer's ability to contribute, long term, to the economy. Thomas Durkin, George Mason Professor and member of the Federal Reserve's Board of Governors, has noted that “[t]he importance of the borrowing/lending process for consumers is not that it adds resources but that it can increase the total *benefits* of spending for borrowers by providing an opportunity to make relatively large expenditures now that provide benefits over time and produce a

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<sup>25</sup> Luke Herrine, *Credit Reporting's Vicious Cycles*, 40 N.Y.U. Rev. L. & Soc. Change 305, 336 (2016).

positive return over cost.”<sup>26</sup> Moreover,

[E]vidence shows that most consumer credit is used to acquire consumer-oriented assets that provide their return not in the moment when they are purchased or soon afterward, but rather over a longer period. For instance, cars and light trucks can provide access to better employment choices and the opportunity to live in a preferred location, providing valuable services to the purchasers for a lengthy period. Higher education provides more remunerative and satisfying employment opportunities possibly over decades. Likewise, home repairs and modernization protect and improve investments in housing assets, and household appliances and related durable goods including furniture, carpeting, and fixtures all provide services over a sometimes lengthy life but often do not lend themselves to fitting within a weekly or monthly budget. Some durable goods like vehicles and boats are even usefully available as collateral, and lenders can then lend upon them as secured credit at lower risk and production cost per dollar, saving the buyer money and enhancing the net return on the items purchased.<sup>27</sup>

Another aspect that is often overlooked, but was presumably considered by Congress, is the impact that materially misleading information on consumer reports have on businesses that would otherwise lend to consumers. Matt Fellowes, a former expert for the Brookings Institute, delivered a speech at the Federal Reserve’s Forum on Consumer Credit where he discussed how important it is for American businesses to be able to identify profitable customers: “Once lenders could see more borrowers they saw millions of Americans that looked liked profitable customers for credit and

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<sup>26</sup> Todd Zwycki, Consumer Credit and the American Economy, Part I: Consumer demand for credit, THE WASHINGTON POST (August 15, 2016 10:25 am), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/13/consumer-credit-and-the-american-economy-part-i-consumer-demand-for-credit/?utm\\_term=.b44443a116f6](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/13/consumer-credit-and-the-american-economy-part-i-consumer-demand-for-credit/?utm_term=.b44443a116f6)

<sup>27</sup> *Id.*

loan products. That led to more businesses and consumers having access to more money, which meant more spending, more investing, more jobs... more economic growth.”<sup>28</sup> In 1971, Congress found that consumer reporting agencies had “grave responsibilities.”<sup>29</sup> Over the last 45 years, these “grave responsibilities” to both consumers and the economy have expanded.

Congress never intended to allow a consumer reporting agency to avoid its responsibilities under § 1681e(b) by claiming “technical accuracy” as a defense, and it is not a “separate approach” to determining a § 1681e(b) violation. A materially misleading report robs the consumer of the true benefit of their credit, and robs lenders of the ability to accurately assess risk. This seriously undermines the purposes of the FCRA and damages the American economy.

**5. The District Court Incorrectly Concluded that There Is No Authoritative Guidance that Technically Accurate Information Must Also Not Be Misleading.**

The district court stated that Appellees did not cite to any guidance from relevant federal agencies that warns against listing authorized user information on credit reports.<sup>30</sup> However, regulators have, in fact, established requirements relating to the furnishing of credit information to the consumer reporting agencies and that

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<sup>28</sup> Matt Fellowes, *The Economic Power of Uncertainty: The Role of Consumer Credit Bureaus* (August 15, 10:230 am), <https://www.brookings.edu/on-the-record/the-economic-power-of-uncertainty-the-role-of-consumer-credit-bureaus/>

<sup>29</sup> 15 U.S.C. § 1681(a)(4)

<sup>30</sup> *Pedro* at 10.

guidance adopts the misleading and completeness standards developed by case law. The reasoning regarding accuracy and reporting regulators provided to furnishers of credit information applies in turn to the consumer reporting agencies compiling the data reported by the furnishers.

The FCRA sets standards for the collection, communication, and use of information bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.<sup>31</sup> In 1996, the Consumer Credit Reporting Reform Act extensively amended the FCRA.<sup>32</sup> The FACT Act<sup>33</sup> further amended the FCRA for various purposes, including improved accuracy of consumer reports.

Section 1681s-2 of the FCRA describes the responsibilities of persons that furnish information about consumers (furnishers) to CRAs. Section 312 of the FACT Act amended Section 1681s-2 by, among other things, requiring the federal agencies responsible for enforcing the FCRA<sup>34</sup> to issue guidelines for use by furnishers regarding the accuracy and integrity of the information about consumers that they furnish to consumer reporting agencies and to prescribe regulations requiring

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<sup>31</sup> 15 U.S.C. § 1681.

<sup>32</sup> Public Law 104-208, 110 Stat. 3009 (Sept. 20, 1996).

<sup>33</sup> Public Law 108-159, 117 Stat. 1952 (Dec. 4, 2003).

<sup>34</sup> Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); National Credit Union Administration (NCUA); and Federal Trade Commission (FTC).

furnishers to establish reasonable policies and procedures for implementing the guidelines. The federal agencies issued those final accuracy and integrity regulations and guidelines to satisfy the requirements of section 312 of the FACT Act in July 2009.<sup>35</sup>

The Final Furnisher Rules include accuracy and integrity regulations, which contain definitions of key terms such as “accuracy” and “integrity” and require furnishers to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of consumer information provided to a consumer reporting agency. The final rules also include guidelines concerning the accuracy and integrity of information furnished to the consumer reporting agencies that furnishers must consider in developing their policies and procedures.

In order to be accurate, furnished information would have to reflect without error the terms of and liability for the account or other relationship and the consumer’s performance and other conduct with respect to the account or other relationship.<sup>36</sup> Furnished information would have “integrity” if it did not omit any term, such as a credit limit or opening date, of that account or other relationship, the absence of which could reasonably be expected to contribute to an incorrect

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<sup>35</sup> 16 CFR Part 660, Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act; Final Rule; Guidelines for Furnishers of Information to Consumer Reporting Agencies; Proposed Rule (the “Final Furnisher Rules”).

<sup>36</sup> Final Furnisher Rules, at 31487.

evaluation by a user of a consumer report about a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.<sup>37</sup>

Under the Final Furnisher Rules, the agencies ultimately defined accuracy as follows:

(a) Accuracy means that information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer correctly:

(1) Reflects the terms of and liability for the account or other relationship;

(2) Reflects the consumer's performance and other conduct with respect to the account or other relationship; and

(3) Identifies the appropriate consumer.<sup>38</sup>

The agencies defined "integrity" as follows:

(e) Integrity means that information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer:

(1) Is substantiated by the furnisher's records at the time it is furnished;

(2) Is furnished in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in a consumer report; and

(3) Includes the information in the furnisher's possession about the account or other relationship that the OCC has:

**(i) Determined that the absence of which would likely be materially misleading in evaluating a consumer's**

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<sup>37</sup> *Id.*

<sup>38</sup> 12 CFR 41, § 41.41(a); *see also* 16 CFR 660.2(a).

**creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living;**  
and

(ii) Listed in section I.(b)(2)(iii) of Appendix E of this part.<sup>39</sup>

These regulations which expressly adopt the misleading and completeness standards discussed above govern credit information given to the consumer reporting agencies. If information going into the agencies must be not misleading and complete then the information coming out of the agencies in the form of consumer reports should have the same attributes. The lower court ignored this highly relevant authority which alone belies the court's finding that there are "differing interpretations of inaccuracy."

**B. Since Technical Accuracy Is Not a Separate Approach under § 1681e(b), Dismissal of Appellant's Claims Was Improper.**

In *Safeco Ins. Co. of Am. v. Burr*,<sup>40</sup> the Supreme Court held that in order to properly plead a willful violation under § 1681e(b), a plaintiff must allege the defendant acted with "reckless disregard." The *Safeco* court specifically rejected the argument that only "knowing" violations satisfied the willfulness standard. The court stated that a defendant who acted "diligently and in good faith attempted to fulfill its statutory obligations" and came to a "tenable, albeit erroneous, interpretation of the statute" would not be acting with reckless disregard.<sup>41</sup>

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<sup>39</sup> 12 CFR 41, § 41.41(e); *see also* 16 CFR 660.2(e) (*emphasis added*).

<sup>40</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 60 (2007).

<sup>41</sup> *Id.* at 56-57 (internal citations omitted).

However, a defendant that failed “to determine the extent of its obligations” would not escape liability for a willful violation anymore than “creative lawyering that provides indefensible answers” would relieve a defendant of liability.<sup>42</sup> The Supreme Court further explained that a statutory reading is “objectively unreasonable” when the defendant “had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took.”<sup>43</sup>

**1. Given the Nearly Universal Rejection of a “Technically Accurate” Defense, the Appellee’s Reading of §1681e(b) Was Objectively Unreasonable.**

The Appellee argues that there are differing interpretations of inaccuracy and that its interpretation of the term “maximum possible accuracy” could not be “objectively unreasonable.”<sup>44</sup> As previously discussed, virtually every published court of appeals opinion addressing the issue of accuracy has ruled that even a technically accurate report can be materially misleading, and therefore, actionable under § 1681e(b). Appellees cannot disregard the weight of case law disapproving of technical accuracy as a defense. Since the Appellees do have the benefit of ample guidance from the courts of appeals that have warned it away from the view it took, they are not immunized from willfulness liability. Pursuant to those court decisions,

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<sup>42</sup> *Id.* at 56.

<sup>43</sup> *Id.* at 70.

<sup>44</sup> *Pedro, supra.*



the Appellees' interpretation of accuracy is objectively unreasonable.

The Supreme Court stated in *Safeco* that a statutory reading is “objectively unreasonable” when the defendant “had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took.” *Safeco*, 551 U.S. at 70. As previously discussed, virtually every published court of appeals opinion addressing the issue has ruled that technical accuracy is not a defense. The Appellees not justified in ignoring this guidance. Appellees are not immunized from willfulness liability in this way.

### **CONCLUSION**

In summation, the lower court erred when it dismissed Appellant's case on the basis of a technically accurate report. Technical accuracy is a legally flawed defense rejected by the overwhelming majority of courts, and the Appellees reading of § 1681e(b) was objectively unreasonable. For all of these reasons, *amicus curiae* the National Association for Consumer Advocates respectfully requests that the judgment of the District Court be reversed, and the case be remanded.

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 4,168 words, as determined by Microsoft Word 2010, including the headings and footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The text appears in 14-point Times New Roman, a proportionally spaced *serif* typeface.

*/s/ John S. Friend*

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John S. Friend

**CERTIFICATE OF SERVICE**

On August 16, 2016, I electronically filed this document through the ECF system, which will send a notice of electronic filing to all counsel of record.

Pursuant to Eleventh Circuit Rule 31-3, I also caused seven true and correct copies to be filed with the Court.

*/s/ Justin T. Holcombe*

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Justin T. Holcombe