RECORD NOS. 08-13510-BB and 08-13616-BB (consolidated)

In The
United States Court of Appeals
For The Eleventh Circuit

BOBBIE HARRIS,

Plaintiff – Appellant,

UNITED STATES OF AMERICA,

Intervenor – Plaintiff – Appellant,

v.

MEXICAN SPECIALTY FOODS, INC.,

Defendant – Appellee.

JULIE BEST GRIMES,

Plaintiff – Appellant,

UNITED STATES OF AMERICA,

Intervenor – Plaintiff – Appellant,

v.

RAVE MOTION PICTURES, BIRMINGHAM, LLC, *et al.*,

Defendants – Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA**

**BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER,
THE NATIONAL ASSICIATION OF CONSUMER ADVOCATES, AND
U.S. PUBLIC INTEREST RESEARCH GROUP
IN SUPPORT OF PLAINTIFFS – APPELLANTS**

Richard J. Rubin
ATTORNEY AT LAW
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

Counsel for Amici Curiae

Chi Chi Wu
NATIONAL CONSUMER LAW CENTER
7 Winthrop Square
Boston, Massachusetts 02110
(617) 542-8010

Counsel for Amici Curiae

Elizabeth D. De Armond
CHICAGO-KENT COLLEGE OF LAW
Illinois Institute of Technology
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5172

Counsel for Amici Curiae

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

Nos. 08-13510-BB and 08-13616-BB

***Bobbie Harris v. Mexican Specialty Foods, Inc.* and**
Julie Best Grimes v. Rave Motion Pictures B'ham

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1-1, counsel for *Amici Curiae* certify that the following persons and entities have an interest in the outcome of these appeals:

1. Acker, Honorable William M. Jr., United States District Judge;
2. Angwin Law Firm, trial counsel for Harris;
3. Angwin, Edward E., trial counsel for Harris;
4. Aughtman, Jay, trial counsel for Grimes and Long;
5. Butler, Thomas J., counsel for Mexican Specialty Foods;
6. Crane-Hirsch, Daniel K., trial counsel for United States;
7. De Armond, Elizabeth D., counsel for *Amici Curiae*;
8. Friesen, Joletta M., counsel for Rave Motion Pictures;
9. Grimes, Julie Best, Plaintiff-Appellant;
10. Gupta, Deepak, appellate counsel for Harris and Grimes;
11. Harris, Bobbie, Plaintiff-Appellant;
12. Hood, Jack B., trial counsel for United States;

13. Jones, Alexander W., Jr., trial counsel for Grimes and Long;

14. Jones, Joshua J., counsel for Mexican Specialty Foods;

15. Letter, Douglas N., appellate counsel for United States;

16. Long, Nimrod W.E., III, Plaintiff;

17. Martin, Alice H., United States Attorney; counsel for United States;

18. Maynard, Cooper & Gale, P.C., counsel for Mexican Specialty Foods;

19. McIntosh, Scott, appellate counsel for United States;

20. Pritchard, McCall & Jones, L.L.C., trial counsel for Grimes and Long;

21. Pritchard, William S., III, trial counsel for Grimes and Long;

22. Rave Motion Pictures, Birmingham II, L.L.C., Defendant-Appellee;

23. Rave Motion Pictures, Birmingham III, L.L.C., Defendant-Appellee;

24. Rave Motion Pictures, Birmingham, L.L.C., Defendant-Appellee;

25. Rave Review Cinemas, L.L.C., Defendant-Appellee;

26. Rubin, Richard J., counsel for *Amici Curiae*;

27. Selden, A. Inge, III, counsel for Boston Ventures;

28. Tuley, Scarlett M., trial counsel for Grimes;

29. United States of America, Plaintiff-Intervenor;

Nos. 08-13510-BB and 08-13616-BB

***Bobbie Harris v. Mexican Specialty Foods, Inc.* and**
Julie Best Grimes v. Rave Motion Pictures B'ham

30. Vance, Joyce White, appellate counsel for United States;

31. Wu, Chi Chi, counsel for *Amici Curiae*.

/s/ Richard J. Rubin
Richard J. Rubin
Attorney for *Amici Curiae*

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF CONTENTS.. i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE ISSUE... 3

SUMMARY OF ARGUMENT 3

ARGUMENT 7

A. Private Enforcement is Essential to Ensuring Compliance With the FCRA 7

1. The Decision Below Weakens Private Enforcement Remedies at the Very Moment When Congress Has Strengthened Them.................................. 7

2. The FCRA's Private Remedies Are Often a Consumer's Only Recourse When Information Is Misused or Erroneously Reported 12

B. The Card Number Truncation Rule is an Essential Weapon in Addressing the Current Identity Theft Crisis 15

CONCLUSION.. 20

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Boca Ciega Hotel, Inc. v. Bouchard Transportation Company, Inc.,

51 F.3d 235 (11th Cir. 1995) 15

Bruce v. City of Gainesville, Ga.,

177 F.3d 949 (11th Cir. 1999) 8

Bryant v. TRW Inc.,

689 F.2d 72 (6th Cir. 1982) 13

**Cable/Home Communications Corp. v. Network Productions, Inc.*,

902 F.2d 829 (11th Cir. 1990) 13

Califano v. Yamasaki,

442 U.S. 682, 99 S. Ct. 2545 (1979) 11

California Bankers Ass'n v. Shultz,

416 U.S. 21, 94 S. Ct. 1494 (1974) 16

**Douglas v. Cunningham*,

294 U.S. 207, 55 S. Ct. 365 (1935) 13

Ferron v. RadioShack Corp.,

886 N.E.2d 286 (Ohio App. 2008) 14

Frio Ice, S.A. v. Sunfruit, Inc.,

918 F.2d 154 (11th Cir. 1990) 11

Jianqing Wu v. Trans Union,

2006 WL 4729755 (D.Md.) 9

Nelson v. Chase Manhattan Mtg. Corp.,

282 F.3d 1057 (9th Cir. 2002) 10, 15

Sarver v. Experian Info. Solutions,

390 F.3d 969 (7th Cir. 2004) 9

Saunders v. Branch Banking and Trust Co. of Va.,

526 F.3d 142 (4th Cir. 2008) 13

**Sosa v. Fite*,

498 F.2d 114 (5th Cir. 1974) 8

Stevenson v. TRW, Inc.,

987 F.2d 288 (5th Cir. 1993) 12

TRW Inc. v. Andrews,

534 U.S. 19, 122 S. Ct. 441 (2001) 16

Washington v. CSC Credit Servs, Inc.,

199 F.3d 263 (5th Cir. 2000) 11

STATUTES

15 U.S.C. § 1635 7

15 U.S.C. § 1640 7

15 U.S.C. § 1640(a)(2)(A) 8

15 U.S.C. § 1667d 7

15 U.S.C. § 1679g 7

15 U.S.C. § 1681(a)(4) 16

15 U.S.C. § 1681(b) 16

15 U.S.C. § 1681a(d) 16

15 U.S.C. § 1681c(a) 11

15 U.S.C. § 1681c(g) 18, 19

15 U.S.C. § 1681c(g)(3) 18

15 U.S.C. § 1681c-1 11

15 U.S.C. § 1681e(b) 11

15 U.S.C. § 1681h(e) 14

15 U.S.C. § 1681i(a) 11

15 U.S.C. § 1681n 7, 18, 19

15 U.S.C. § 1681n(a) 11, 12

15 U.S.C. § 1681n(a)(1) 10

15 U.S.C. § 1681n(a)(1)(A) 3

15 U.S.C. § 1681o 7

15 U.S.C. § 1681q 12

15 U.S.C. § 1681r 12

15 U.S.C. § 1681s 9

15 U.S.C. § 1681s-2(b) 10, 11

15 U.S.C. § 1681t 14

15 U.S.C. § 1681t(b)(5)(A) 14

15 U.S.C. § 1691e 7

15 U.S.C. § 1692k 7

15 U.S.C. § 1692k(a)(2) 8

15 U.S.C. § 1693m 7

15 U.S.C. § 1693m(a)(2)(A) 8

RULE

Fed. R. App. P. 29(a) 1

OTHER AUTHORITIES

116 Cong. Rec. 36570 (1970) 13

Brief of *Amicus Curiae* Trans Union, LLC,

2006 WL 3355849, filed in *Safeco Ins. Co. of America v. Burr*,

__ U.S. __, 127 S. Ct. 2201 (2007) 9

*Credit and Debit Card Receipt Clarification Act of 2007,

Pub. L. 110-241, 122 Stat. 1565 (June 3, 2008).................. 5, 7, 18, 19

Council of Better Business Bureaus and Javelin Strategy & Research,

2006 Identity Fraud Survey Report, available at

http://www.bbbonline.org/idtheft/safetyQuiz.asp.............................. 13

Fair and Accurate Credit Transactions Act,

Pub. L. No. 108-159 (2003).. 15

Fair Credit Reporting Act (6th ed. 2006 & Supp. 2007)............................ 1-2

H.R. Rep. No. 108-263 (Sept. 4, 2003) 15

National Consumer Law Center,

Unfair and Deceptive Acts and Practices, § 8.4.1 (6th ed. 2004)........ 8

S. Rep. No. 103-209, 103d Cong., 1st Sess. (1993) 10

Synovate,

2006 Identity Theft Survey Report 4 (Nov. 2007), available at

http://www.ftc.gov/2007/11/SynovateFinalReportIDTheft2006.pdf .. 16

Gary M. Victor,

Identity Theft, Its Environment and Proposals for Change,

18 Loyola Consumer L. R. 273 (2006) 17

*Citations upon which *Amici* primarily relies.

INTEREST OF *AMICI CURIAE*[1]

Amici are public interest organizations with long-standing experience with the consumer reporting and privacy issues implicated by this case. *Amici* submit this brief to discuss the detrimental effects that affirming the lower court's decision inevitably would have on (1) the private attorney general model that Congress chose as the primary enforcement mechanism for the Fair Credit Reporting Act (FCRA), and (2) the important role of the credit and debt card number truncation requirement in the war on identity theft and credit card fraud.

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 38 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of eighteen practice treatises and annual supplements. One volume, *Fair Credit Reporting Act* (6th ed. 2006

---

[1] All parties have consented to the filing of this brief. *See* FRAP 29(a).

& Supp. 2007), is a standard resource on privacy and the FCRA. Among the authors of this treatise are undersigned counsel.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Compliance with federal consumer protection laws in general and the FCRA in particular has been a continuing concern of NACA since its inception.

The U.S. Public Interest Research Group serves as the federation of, and the national advocacy office for, state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental, and government research and advocacy organizations with one million members around the country. Since 1991, U.S. PIRG and the state PIRGs have published seven investigative reports and surveys on credit bureau errors and identity theft problems, including one joint report with the Privacy Rights Clearinghouse. Congress and state legislatures have used the reports in the

development of legislation ranging from 25 state credit report security freeze laws to pro-consumer Congressional amendments enacted in 1996, 1998, and 2003, including the right to a free credit report on request and others responding to accuracy and identity theft problems.

STATEMENT OF THE ISSUE

Whether the district court erred in striking down the statutory damages provision in 15 U.S.C. § 1681n(a)(1)(A) as unconstitutional on its face.

SUMMARY OF ARGUMENT

Congress's findings and statement of purpose when it enacted the FCRA, its ongoing oversight, and its recent amendments demonstrate the significance it rightly placed on the integrity and confidentiality of the nation's consumer reporting system. Congress also recognized that public enforcement agencies do not have the capability to enforce the FCRA by themselves. Congress instead gave primary responsibility to the persons with the greatest interest in accomplishing such a task – individual consumers policing their own files, protecting their own privacy and financial interests, and when necessary, enforcing the FCRA's private statutory remedies.

Affirming the opinion below would seriously undermine these objectives. The lower court's decision weakens the means chosen by Congress to combat the theft of identity epidemic plaguing the credit reporting system and debilitates the private enforcement mechanism that is essential to both waging that battle and ensuring compliance with the FCRA in general.

The lower court's summary invalidation of the statutory damage provision that Congress adopted as a centerpiece of its 1996 FCRA overhaul is a devastating blow to the statute's private attorney general scheme. The modest statutory damages available as a remedy for willful FCRA noncompliance demonstrate Congress's determination to encourage private FCRA enforcement and deter the type of deliberate noncompliance that apparently occurred here. Without even a factual record on which to anchor its rush to judgment, the district court simply condemned as unconstitutional this reasonable legislative response to the Herculean task of promoting FCRA compliance.

The breadth of the decision below is unrestrained. The ruling eliminates statutory damages with regard to all FCRA violations, including failing to comply with such core credit reporting functions as following

reasonable procedures to ensure maximum possible accuracy, conducting a reasonable investigation of a consumer's dispute, placing fraud alerts on a credit report, or deleting obsolete information older than the FCRA's statutory limitations. The scope of the ruling below is extraordinary.

The context within which the lower court acted is the enforcement of Congress's 2003 credit and debit card number truncation provision. This provision bars printing more than the last five digits of the card or account number on the cardholder's receipt. This prohibition is a significant weapon in combating theft of identity. Removing these numbers from card receipts eliminates the opportunity for identity thieves to "harvest" essential information that then facilitates entry into the victims' private financial records maintained by the Big Three nationwide consumer reporting agencies (CRAs) and others.[2]

Congress dramatically re-emphasized the importance it places on compliance with the card number truncation rule with its recent enactment of the Credit and Debit Card Receipt Clarification Act of 2007. Principally, the Clarification Act terminated litigation throughout the country (including a

[2] The Big Three nationwide consumer reporting agencies, commonly referred to as credit bureaus, are Trans Union, Equifax, and Experian, f/k/a TRW.

portion of these cases and the entirety of the two additional cases dismissed by the district court's ruling) addressing less egregious noncompliance with the rule, where merchants have failed to eliminate the expiration date from credit/debit card receipts. However, Congress left undisturbed the card number truncation requirement at issue here, and in fact expressly highlighted it and the critical role that it plays to prevent identity theft and credit card fraud.

Defendants' alleged violation of the card number truncation rule appears particularly indefensible. The record is silent as to the underlying circumstances, but the unrebutted evidence below suggests systemic noncompliance that, if true, would require conscious disregard of what has become an established industry standard. The rules requiring card number truncation are widely publicized, universally known, and routinely followed. Accordingly, continued noncompliance, years after the 2003 enactment, if not done purposefully, would require maintaining a degree of self-induced ignorance that constitutes intentional misconduct.

One reason that Congress in 2008 eliminated liability for the mere failure to suppress the expiration date was its formal finding that the publicity surrounding the adoption of the account number truncation rule was so extensive that it misled some merchants into believing that limiting

the information on receipts to the last five account numbers was sufficient, at the expense of understanding the expiration date suppression rule. Pub. L. 110-241, 122 Stat. 1565, § 2(a)(3). In fact, Congress used the occasion of adopting the Clarification Act to further stress the significance of suppressing the full card number in the continuing war on identity theft and credit card fraud. *Id.* at § 2(a)(6). The lower court's refusal to allow effective enforcement of the card number truncation rule is directly contrary to both the 2003 and the 2008 Congressional mandates.

ARGUMENT

A. Private Enforcement is Essential to Ensuring Compliance With the FCRA

1. The Decision Below Weakens Private Enforcement Remedies at the Very Moment When Congress Has Strengthened Them

Congress recognized the crucial role that consumers play in enforcing the Federal Consumer Credit Protection Act (CCPA) when it adopted six titles, including the FCRA, with private attorney general enforcement provisions.[3] Several of these important consumer protection statutes contain statutory damages formulations similar to the one the lower court found void

[3] *See* 15 U.S.C. §§ 1635, 1640, and 1667d (Truth in Lending Act); § 1679g (Credit Repair Organizations Act); § 1681n and 1681o (FCRA); § 1691e (Equal Credit Opportunity Act); § 1692k (Fair Debt Collection Practices Act); and § 1693m (Electronic Funds Transfer Act).

for vagueness.[4] Affirming the district court's decision would cast doubt on the constitutionality of these consumer protection statutes as well as on many other federal and state laws that provide statutory damages with a minimum floor and maximum ceiling.[5]

This Court itself has commented on the importance of this CCPA enforcement feature. *Sosa v. Fite*, 498 F.2d 114, 121 (5th Cir. 1974) ("[W]e begin with the settled proposition that congressional goals underlying the Truth-in-Lending Act include the creation of a system of private attorney generals who will be able to aid the effective enforcement of the Act") (citations and internal quotation marks omitted); *see generally Bruce v. City of Gainesville, Ga.*, 177 F.3d 949, 591-92 (11th Cir. 1999) ("[T]he enforcement of civil rights statutes by plaintiffs as private attorneys general is an important part of the underlying policy behind the law").

---

[4] 15 U.S.C. § 1640(a)(2)(A) ("liability under this subparagraph shall not be less than $100 nor greater than $1,000"); 15 U.S.C. § 1692k(a)(2) ("such additional damages as the court may allow, but not exceeding $1,000"); and 15 U.S.C. § 1693m(a)(2)(A) ("an amount not less than $100 nor greater than $1,000"). While these statutes do not state a minimum for statutory damages in a class action, that difference would not affect the vagueness analysis espoused by the district court.

[5] *See*, *e.g*., National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 8.4.1, p. 754 (6th ed. 2004) ("About half the states authorize private litigants who have proven a[n unfair or deceptive acts or practices] violation to obtain minimum damage awards ranging from $25 to $5000….")

No one has a greater stake in the accuracy or privacy of personal and financial information than the consumer to whom it relates. While the Federal Trade Commission (FTC) deals as best it can with systemic issues (*see* § 1681s), Congress has not funded the army of regulators that would be necessary to monitor the six hundred million files that the Big Three CRAs maintain and the related functions under the FCRA.[6] Congress gave that role to each of the individuals whose tranquility and material well-being are so greatly affected by industry's compliance with the FCRA's enumerated duties.

Congress and the FTC both have reaffirmed the FTC's own limitations and the critical role played by consumers in enforcing the FCRA. During the legislative hearings that culminated in the 1996 amendments to the FCRA, the FTC acknowledged that the FCRA "was designed to be

[6] Each of the Big Three CRAs currently maintains 200 million individual consumer files. *See Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (documenting that Experian processes over 50 million updates daily on approximately 200 million individual consumer files); *Jianqing Wu v. Trans Union*, 2006 WL 4729755, * 7 (D.Md.) (same regarding Equifax); Brief of *Amicus Curiae* Trans Union, LLC, 2006 WL 3355849, * 1, filed in *Safeco Ins. Co. of America v. Burr*, __ U.S. __, 127 S. Ct. 2201 (2007) (stating that Trans Union's database contains approximately 3.7 billion items of information associated with approximately 200 million consumers and receives over 2 billion pieces of data per month from approximately 85,000 furnishers).

largely self-enforcing" and urged Congress that any amendments maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. No. 103-209, 103d Cong., 1st Sess. at 6 (1993). Congress's response was to strengthen private enforcement and encourage consumers to act to protect their own rights by adopting the minimum statutory damages provision that was struck down by the decision below (§ 1681n(a)(1)). Congress also created for the first time a private right of action allowing a consumer to sue furnishers of information for failing to meet their duties in the reinvestigation process. § 1681s-2(b); *see Nelson v. Chase Manhattan Mtg. Corp*., 282 F.3d 1057 (9th Cir. 2002).

The opinion below eviscerates a significant remedy that Congress provided to consumers to insure that the FCRA is enforced as intended. The lower court did not purport to limit its ruling to expiration date cases or even account number truncation cases in general, nor could it in light of the scope of its opinion. Accordingly, affirming the district court opinion, and thus establishing its constitutional ruling as precedent in this Circuit, would undermine FCRA enforcement on a wholesale basis. It would eliminate a key mechanism that enables private enforcement of critical FCRA provisions unrelated to the truncation duty, including requirements, for

example, to follow reasonable procedures to ensure maximum possible accuracy (§ 1681e(b)), to conduct a reasonable investigation of a consumer's dispute (§§ 1681i(a) and 1681s-2(b)), to place fraud alerts on a credit report (§ 1681c-1), and to delete obsolete information older than the FCRA's statutory limitations (§ 1681c(a)).

Congress enacted § 1681n(a) to allow statutory and punitive damages for willful noncompliance as a device that might provide an incentive to defendants to comply with the FCRA. Even if one might disagree with the wisdom of this decision, Congress exercised its prerogative and chose the award of money damages as its preferred private compliance instrument. While in some cases, including perhaps even in this case, injunctive relief might be preferable to a suit for statutory or punitive damages, Congress did not explicitly provide for this remedy in the statutory language.[7]

---

[7] The one Circuit Court to directly address the issue unfortunately concluded from this silence, together with the express grant of injunctive power to the FTC, that the FCRA does not permit consumers to seek injunctive relief. *Washington v. CSC Credit Servs, Inc*., 199 F.3d 263, 268-69 (5th Cir. 2000); *but see Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S. Ct. 2545, 2559 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction"); *Frio Ice, S.A. v. Sunfruit, Inc*., 918 F.2d 154, 157-59 (11th Cir. 1990) (finding private injunctive relief available where statute granted injunctive power to the government and was otherwise silent or ambiguous as to private parties).

2. The FCRA's Private Remedies Are Often a Consumer's Only Recourse When Information Is Misused or Erroneously Reported

In many circumstances, the § 1681n(a) statutory damages remedy that the lower court struck down is the only effective remedy against noncomplying CRAs, furnishers, users, or others subject to the FCRA's requirements. If affirmed, the impact of the lower court opinion would be that these entities could act with impunity, knowing that they will not be subject to FCRA enforcement, public or private.[8]

Even where actual damages are available, they are often minimal or difficult to establish under either the FCRA or available state laws. In many cases the aggravation and time spent fixing the persistent, sometimes devastating, consequences of credit reporting violations are the greatest adverse impacts that consumers suffer. *See*, *e.g.*, *Stevenson v. TRW, Inc.*, 987 F.2d 288, 297 (5th Cir. 1993) (detailing the consumer's "mental anguish over his lengthy dealings with TRW after he disputed his credit report" and

[8] Criminal liability is virtually nonexistent, except under § 1681q (knowingly and willfully obtaining information from a consumer reporting agency under false pretenses) and § 1681r (applying only to the CRA's employees). And of course, criminal penalties could only be sought by a government agency, which is subject to the resource limitations discussed in the last section.

discussing representative cases). A 2006 Better Business Bureau study reported that the "vast majority of identity fraud victims (68%) incur no out-of-pocket expenses."[9]

Congress understood when it adopted the FCRA that often the greatest losses cannot be easily translated into a set dollar amount and therefore cannot be compensated adequately with actual damages. *See Bryant v. TRW Inc.*, 689 F.2d 72, 79 (6th Cir. 1982) (quoting 116 Cong. Rec. 36570 (1970)) ("[A]s Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed"); *see also Saunders v. Branch Banking and Trust Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008) (affirming FCRA jury award of "no compensatory damages [but] maximum statutory damages of $1,000 and punitive damages of $80,000"). The statutory damage provision represents Congress's answer to that limitation. *Douglas v. Cunningham*, 294 U.S. 207, 209, 55 S. Ct. 365, 366 (1935) (statutory damages provide "recompense" "where the rules of law render difficult or impossible proof of damages"); *Cable/Home Communications Corp. v. Network Productions, Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) ("Generally, statutory damages are

[9] Council of Better Business Bureaus and Javelin Strategy & Research, 2006 Identity Fraud Survey Report, available at http://www.bbbonline.org/idtheft/safetyQuiz.asp (hereinafter "2006 BBB Study").

awarded when no actual damages are proven, or actual damages and profits are difficult or impossible to calculate”).

It is also significant that consumers may not be able to redress these privacy injuries under the traditional remedies available in state tort law because Congress granted CRAs, users, and furnishers qualified immunity from most such state-law causes of action. Section 1681h(e) eliminates defamation, invasion of privacy, and negligence actions except as “to false information furnished with malice or willful intent to injure such consumer.” In addition, § 1681t preempts a comprehensive list of state laws, including state laws with respect to the credit and debit card truncation requirements at issue here. § 1681t(b)(5)(A); s*ee Ferron v. RadioShack Corp.*, 886 N.E.2d 286, 292 (Ohio App. 2008) (applying FCRA truncation preemption). The lower court’s complete elimination of statutory damages here illustrates the wisdom expressed by the Ninth Circuit in advising judicial restraint in the face of a similar attack on the FCRA:

> The statute has been drawn with extreme care, reflecting the tug of the competing interests of consumers, CRAs, furnishers of credit information, and users of credit information. It is not for a court to remake the balance struck by Congress, or to introduce limitations on an express right of action where no limitation has been written by the legislature.

Nelson, 282 F.3d at 1060; *accord Boca Ciega Hotel, Inc. v. Bouchard Transportation Company, Inc.*, 51 F.3d 235, 238 (11th Cir. 1995) ("In short, we will not attempt to adjust the balance between competing goals that the text adopted by Congress has struck") (citation and internal quotation marks omitted).

B. The Card Number Truncation Rule is an Essential Weapon in Addressing the Current Identity Theft Crisis

In 2003, Congress amended the FCRA by enacting the Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159 (2003) (FACTA). Title I of FACTA, entitled Identity Theft Prevention and Credit History Restoration, addresses the identity theft crisis that in Congress's judgment has "reached almost epidemic proportions in recent years." H.R. Rep. No. 108-263 at 25 (Sept. 4, 2003).

The evidence since FACTA was enacted shows that identity theft continues to run rampant. For example, according to the 2006 BBB Study, while the number of victims has "declined marginally," the adverse impacts have increased: 8.9 million Americans were victims of identity theft in the last year surveyed, and the one-year cost of identity theft rose to $56.6 billion. These figures are consistent with conclusions reached in the authoritative report prepared for the FTC in 2007 showing that "approximately 8.3 million U.S. adults discovered that they were victims of

some form of ID theft in 2005" and that the small decrease from 2003 data "is not statistically significant."[10]

"[R]espect for the consumer's right of privacy" and "confidentiality" have been hallmarks of the FCRA since its adoption. § 1681(a)(4) and (b); *TRW Inc. v. Andrews*, 534 U.S. 19, 23, 122 S. Ct. 441, 444 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy"). Information about one's finances is of course particularly sensitive. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79, 94 S. Ct. 1494, 1526 (1974) ("Financial transactions can reveal much about a person's activities, associations, and beliefs") (Powell, J., concurring). In enacting the FCRA, Congress intended to regulate the disclosure of a vast amount of personal information bearing not only on consumers' "credit worthiness, credit standing, [and] credit capacity," but also on their "character, general reputation, personal characteristics, or mode of living." § 1681a(d) (defining "consumer report").

Theft of identity is a phenomenon of more recent vintage. Theft of identity occurs when an impostor poses as someone else and applies for and

---

[10] Synovate, *2006 Identity Theft Survey Report* 4, n.3 and accompanying text (Nov. 2007), available at http://www.ftc.gov/2007/11/SynovateFinalReport IDTheft2006.pdf.

receives credit on the basis of another's good credit standing. The impostor then makes purchases, acquires credit cards, and takes out loans using the dishonestly obtained credit approvals and leaves the victim facially responsible for the resulting financial obligations. Worse yet, the scam saddles victims with the arduous process of ascertaining what happened to them and of obtaining information to prove their innocence and to restore their good names. Aside from the dollar costs to businesses and individuals, one scholar estimates that consumers lost nearly 600 million hours resolving identity theft problems in a recent two year period, contributing to the crime's "drag on the economy." Gary M. Victor, *Identity Theft, Its Environment and Proposals for Change*, 18 Loyola Consumer L. R. 273, 279 & n.34 (2006). FACTA represents Congress's plenary effort to join the public and private forces now mobilized to fight identity theft.

Knowing a victim's credit card number greatly increases the ease of stealing a person's identity. Each piece of identifying information in the hands of fraudsters makes their task that much easier. Names and addresses that are generally available in the public realm are among the identifiers that the CRAs use to match information to individuals, but unique identifiers – social security and existing credit and debit card accounts numbers – are the gold standard of the identity theft scam. Armed with a unique identifier,

even an unsophisticated but dedicated thief can steal any identity or make charges on an existing account with relative ease.

FACTA's card number truncation rule is a straightforward, inexpensive, and effective means of eliminating fraudsters' access to one category of private information that provides the gateway to theft of identity. The simplicity and clarity of the FACTA enactment (§ 1681c(g)) is exemplary. Congress took the measured and judicious approach of delaying its effective date, giving merchants up to three years to comply. § 1681c(g)(3). In contrast to their spotty compliance with the expiration date suppression rule, industry members appear to have adopted the card number truncation protocol successfully, and *Amici* candidly were surprised to learn of the alleged noncompliance here at such a late date.

Significantly, recent Congressional activity specifically impacts this case. Early last summer, and only days after the lower court ruled, Congress adopted the Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. 110-241, 122 Stat. 1565 (June 3, 2008) ("Clarification Act"). The Clarification Act eliminates any remedy under § 1681n, including statutory and punitive damages, as to "any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and the date of the enactment of this

subsection but otherwise complied with the requirements of section 605(g) [§ 1681c(g)]." Clarification Act, § 3. *Amici* trust that the elimination of the expiration date controversy from this case and from the national debate can focus attention instead on the scope and pervasive negative impacts that the ruling below promises to have on the entirety of the FCRA.

Also significant is that Congress reaffirmed in the Clarification Act the vital role of the card number truncation rule in the ongoing war against identity theft. In a formal finding, Congress declared, "Experts in the field agree that proper truncation of the card number, by itself as required by the amendment made by the Fair and Accurate Credit Transactions Act, regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud." Clarification Act, § 2(a)(6). Congress's continuing commitment to eradicating identity theft and credit card fraud – including its endorsement in the Clarification Act of continued § 1681n private enforcement of the card number truncation rule – stands in stark contrast to the opinion below.

A separate Clarification Act finding in § 2(a)(3) also reaffirms that widespread publicity within the industry and elsewhere has been successful in providing notice of the change in the law and the requirements of truncating the card number. Contrary to the allegations here, this

Congressional finding establishes that compliance with the card number truncation rule should by now have been routine. Still, whether the defendants in this case even violated the FCRA was apparently unimportant to the district court before it took definitive action to decimate the remedies available for violating not just the truncation requirement, but the entire FCRA.

CONCLUSION

For the foregoing reasons, the opinion below should be reversed.

Respectfully submitted,

/s/ Richard J. Rubin
Richard J. Rubin
1300 Canyon Road
Santa Fe, NM 87501
(505) 983-4418

Chi Chi Wu
National Consumer Law Center
7 Winthrop Square
Boston, MA 02110-1245
(617) 542-8010

Elizabeth D. De Armond
Chicago-Kent College of Law
Illinois Institute of Technology
565 W. Adams Street
Chicago, IL 60661
(312) 906-5172

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), because it contains 4,203 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief 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), because it has been prepared in a proportionally spaced typeface using Microsoft Office XP Word 2003 in Times New Roman 14.

/s/ Richard J. Rubin
Richard J. Rubin
Attorney for *Amici Curiae*

October 17, 2008

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of October, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit, via UPS Second Day Air, the required number of copies of this Brief of *Amici Curiae*, and further certify that I served, via UPS Ground, the required copy of said brief to the following:

Deepak Gupta
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-7739

Counsel for Appellants
Bobbie Harris and
Julie Best Grimes

Scott R. McIntosh
DEPARTMENT OF JUSTICE
Appellate Staff, Civil Division
950 Pennsylvania Avenue, N.W.
Room 7259
Washington, DC 20530
(202) 514-4052

Counsel for Appellant
United States of America

Joshua D. Jones
MAYNARD COOPER & GALE, P.C.
1901 6th Avenue, North
AmSouth Harbert Plaza, Suite 2400
Birmingham, Alabama 35203
(205) 254-1000

Counsel for Appellee
Mexican Specialty Foods, Inc.

W. Perry Brandt
Heather Esau Zerger
BRYAN CAVE LLP
One Kansas City Place
1200 Main Street, Suite 3500
Kansas City, Missouri 64105
(816) 374-3200

Counsel for Appellees
Rave Motion Pictures Birmingham, LLC; Rave Motion Pictures Birmingham, II, LLC; Rave Motion Pictures Birmingham, III, LLC; Rave Reviews Cinemas, LLC; and Boston Ventures LP

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Jay L. Goldschmidt
THE LEX GROUP[VA]
1108 East Main Street, Suite 1400
Richmond, Virginia 23219
(804) 644-4419