SAUNDERS SKEPTICISM: RETHINKING FURNISHERS' DUTY TO REPORT CONSUMER DISPUTES

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I. INTRODUCTION

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In *Saunders v. BB&T*, the Fourth Circuit in 2008 held that furnishers could be held liable under the Fair Credit Reporting Act ("FCRA") for failing to report an account as "disputed" if failing to do so would make the reporting misleading in such a way and to such an extent that it can be expected to have an adverse effect.[1] Since *Saunders*, some courts have followed its reasoning, while others have rejected the claim altogether.[2] Furnishers, in turn, have no method under industry guidance to report accounts as disputed, so they are left with defending these cases on other bases.[3] This Article explores the caselaw and argues that *Saunders* and its followers are wrong.

The foundation of the claim created by *Saunders* is flawed.[4] The doctrine also raises significant questions about its practical implications for furnish-

1. *See* Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 150 (4th Cir. 2008).
2. *See infra* Part V.B (reviewing the caselaw that rejects *Saunders* or avoids applying it through procedural methods).
3. *See infra* Part V.A.4 (explaining the contradictory caselaw and industry guidance).
4. *See infra* Part III.C.2 (describing the *Saunders* court's conflation of the duties and requirements in § 1681s-2(a) and § 1681s-2(b)).

ers.[5] While the courts have addressed some outstanding questions raised in *Saunders*, many remain.[6] *Saunders* and the cases that extend it create an unworkable standard for furnishers, forcing institutions to bear the investigatory burden or face defending lawsuits involving technical inaccuracies.[7]

This Article proceeds in four Parts. Part II provides a brief background on the relevant law before the *Saunders* decision, including an explanation of the applicable FCRA sections and definitions. Part III reviews *Saunders* and the analytical framework it created. Part IV explains the expansion of the *Saunders* doctrine through subsequent case law. Part V discusses the disconnect between the legal doctrine and its practical implications and addresses remaining open questions as courts face the decision of whether to reject or adopt the *Saunders* standard.

II. THE LAW PRE-*SAUNDERS*

This Part explains the applicable statutory sections of the FCRA that the Fourth Circuit considered in *Saunders*. It then surveys the relevant cases the court relied on to fashion new duties with which furnishers must comply.

A. The FCRA.

"Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy."[8] In enacting the FCRA, Congress required "reasonable procedures" of Consumer Reporting Agencies ("CRAs") to facilitate fair and equitable reporting for consumers.[9] As part of the 1996 amendments to the FCRA, Congress expanded the duties of "furnishers of information," who "regularly and in the ordinary course of business furnish[] information to one or more consumer reporting agencies about [a] person's transactions or experiences with any consumer."[10] The 1996 amendment imposed liability on furnishers and provided consumers with a private remedy against furnishers for FCRA violations.[11]

Generally, a furnisher must investigate consumer disputes and ensure that the furnished information is accurate.[12] This Article will focus primarily on two subsections of § 1681s-2, which address the responsibilities of

5. *See infra* Part V.A (outlining the issues *Saunders* creates).
6. *See infra* Part V.A.
7. *See infra* Part V.A.
8. Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 147 (4th Cir. 2008) (quoting Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52 (2007)); 15 U.S.C. § 1681.
9. 15 U.S.C. § 1681(b) (congressional findings and statement of purpose).
10. *Id*. § 1681s-2(a).
11. *See* 15 U.S.C. § 1681n; *see also* Nelson v. Chase Manhattan Mortg. Co., 282 F.3d 1057, 1060–61 (9th Cir. 2002).
12. *See* 15 U.S.C. § 1681s-2.

furnishers.[13] Subsection (a) addresses duties of furnishers to provide accurate information, and subsection (b) summarizes furnishers' duties triggered by notice of a dispute from a CRA.[14]

A furnisher's duties under subsection (b) are relevant to consumer disputes made to CRAs, known as indirect disputes.[15] "When a consumer files a dispute with a CRA as to how a lender is reporting a line on a credit history, the CRA generates an Automated Consumer Dispute Verification ("ACDV") for this indirect dispute that it then sends along to the furnisher of the disputed information."[16] The ACDV process requires a furnisher to investigate a consumer dispute and respond to the CRAs about whether the tradeline has been verified through the investigation.[17]

In contrast, a direct dispute arises when a consumer contacts the furnisher and challenges the account through the furnisher's internal processes.[18] Industry guidance from the Consumer Data Industry Association ("CDIA") recommends that furnishers use Compliance Condition Codes ("CCCs") to verify a dispute received directly from a consumer.[19] The Credit Reporting Reference Guide ("Metro-2 Manual" or "CCRG") defines CCCs for furnishers' use each month as long as the condition applies.[20] Three CCCs are relevant to this Article:

> XB—Account information has been disputed by the consumer directly to the data furnisher under the Fair Credit Reporting Act (FCRA); the data furnisher is conducting its investigation.[21]
>
> XC—FCRA direct dispute investigation completed–consumer disagrees with the results of the data furnisher's investigation.[22]

13. *See id*. §§ 1681s-2(a), (b).
14. *See id*.
15. *See* Consumer Data Indus. Ass'n (CDIA), Credit Reporting Resource Guide (2022) [hereinafter CDIA].
16. Sherman v. Sheffield Fin., LLC, 627 F. Supp. 3d 1000, 1006 (D. Minn. 2022).
17. *See* CDIA, *supra* note 15, at 354.
18. *See id*. at 72.
19. *See id*. (emphasis added) (authorizing the use of CCCs for "the *direct* dispute provisions of the Fair Credit Reporting Act (FCRA) and its implementing rules"). Note that the Metro-2 Manual condones the use of CCCs only for direct disputes raised by the consumer, and not for indirect disputes through CRAs.
20. *See id*.
21. *Id*. at 141 ("Definition: Reported when the completeness or accuracy of the account information is disputed directly to the data furnisher by the consumer under the FCRA and investigation of the dispute is in progress by the data furnisher.").
22. *Id*. ("Definition: Reported when the investigation of an FCRA dispute made by the consumer directly to the data furnisher has been completed by the data furnisher; however, the consumer disagrees with the outcome of the investigation.").

> XH—Account previously in dispute; the data furnisher has completed its investigation. (To be used for direct disputes under the FCRA, FDCPA disputes or FCBA disputes).[23]

B. Foundational Cases.

In *Saunders*, the court's reasoning relied mainly on the holdings of four prior cases.[24] This Section summarizes these cases for context preceding the *Saunders* decision.[25]

Dalton involved a background search agency's erroneous report to Dalton's prospective employer that he had been convicted of a felony.[26] The Fourth Circuit addressed the reasonable procedures necessary to ensure maximum possible accuracy in compliance with the FCRA.[27] There, the court held that "[a] report is inaccurate when it is 'patently incorrect' or when it is 'misleading in such a way and to such an extent that it can be expected to have an adverse' effect."[28] That reasoning in *Dalton* relied on the Fifth Circuit's 1998 decision in *Sepulvado*.[29] *Sepulvado*, in turn, built on the doctrine from *Pinner v. Schmidt*.[30]

In *Sepulvado*, the plaintiffs claimed that erroneous credit reporting caused lenders to deny them a mortgage.[31] The suit arose under 15 U.S.C. § 1681e(b), which "provides that a consumer reporting agency must use 'reasonable procedures to assure maximum possible accuracy' when preparing a consumer report."[32] The court quoted *Pinner*, noting that inaccuracy can arise from a report being patently incorrect or misleading.[33] The Fifth Circuit in *Pinner* also addressed a CRA's duty of reasonable care in preparing a consumer report.[34] In this case, the court found a violation of that duty where the CRA noted an account as "litigation pending" and did not indicate that it was the plaintiff/obligor who initiated suit.[35]

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23. CDIA, *supra* note 15, at 143 ("Definition: Reported when the investigation of a dispute by the data furnisher was completed.").
24. *See generally* Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 148 (4th Cir. 2008) (citing Dalton v. Cap. Associated Indus., Inc., 257 F.3d 409 (4th Cir. 2001)); Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984); Sepulvado v. CSC Credit Servs., 158 F.3d 890 (5th Cir. 1998)); Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986)).
25. *See infra* Part II.B.
26. *See Dalton*, 257 F.3d at 412.
27. *See id*. at 415.
28. *See id*. (quoting *Sepulvado*, 158 F.3d at 895–96).
29. *See id*.
30. *See Sepulvado*, 158 F.3d at 895–96 (quoting *Pinner*, 805 F.2d at 1258).
31. *See id*. at 891.
32. *See id*. at 895 (emphasis omitted) (quoting 15 U.S.C. § 1681e(b)).
33. *See id*. at 895–96 (quoting *Pinner*, 805 F.2d at 1258).
34. *See Pinner*, 805 F.2d at 1261–62.
35. *See id*. at 1258.

Koropoulos, a 1984 D.C. Circuit case, involved a plaintiff who sued a CRA alleging that his loan was characterized misleadingly because it was written off as a total loss when he had paid the loan in full.[36] In the trial court, defendants prevailed on an "accuracy defense."[37] The circuit court disagreed, finding that "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.'"[38] Together, these cases provided the backdrop for *Saunders* to impute similar duties not only to CRAs, but also to furnishers of credit information.[39]

III. The *Saunders* Framework

In 2008, the Fourth Circuit's decision in *Saunders* fundamentally altered furnishers' responsibilities under 15 U.S.C. § 1681s-2(b). This Part will provide an in-depth analysis of *Saunders* and address an underlying flaw in its premise.

A. Facts.

Saunders bought an automobile, and his loan was assigned to BB&T.[40] A few months later, because of mechanical trouble, Saunders traded the vehicle in for a new one.[41] As part of the trade-in, the dealer paid the debt on the original loan.[42] The new loan for the second car was also assigned to BB&T.[43] Saunders contacted BB&T many times to ask about the status of the new loan.[44] On telephone calls and in person, BB&T representatives told Saunders that he owed nothing on the loan.[45]

Later, however, Saunders received a letter from BB&T accelerating the loan and demanding the total balance, which included interest and late fees.[46] BB&T had delayed booking the second loan into its computer system, at which point it provided Saunders with an account number.[47] In fact, BB&T only learned of the second automobile loan through Saunders' continued contact and attempts to pay the loan.[48] Saunders disputed the pen-

36. *See Koropoulos*, 734 F.2d at 38.
37. *See id*. at 39.
38. *See id*. at 40.
39. *See* discussion *supra* Part III.B (imputing the duties under the FCRA section 1681s-2(b) to require furnishers to report omissions that create misleading information).
40. *See Saunders*, 526 F.3d at 145.
41. *See id*.
42. *See id*.
43. *See id*.
44. *See id*.
45. *See id*.
46. *See Saunders*, 526 F.3d at 145.
47. *See id*. at 146.
48. *See id*.

alties and late fees, which BB&T refused to waive under the circumstances.[49]

BB&T then repossessed the second vehicle and reported Saunders' loan in repossession status to the CRAs.[50] Saunders' credit score dropped, and he struggled to obtain a new loan, prompting him to dispute the status of his debt with TransUnion.[51] In response to the ACDV from TransUnion, BB&T updated the status of Saunders' loan to reflect a write-off, which resulted in an even worse credit score for Saunders.[52] The write-off status indicated that Saunders made no payments.[53] In the dispute verification process, BB&T did not report that Saunders had disputed the debt.[54] BB&T's election not to flag Saunders' account as disputed in the dispute verification process led to the reporting of a lower credit score for Saunders than if the dispute were noted.[55]

Saunders sued BB&T, asserting that it violated 15 U.S.C. § 1681s-2(b) by failing to report his loan as disputed in the dispute verification process.[56] At trial, the jury found that BB&T willfully violated the FCRA and awarded damages.[57] BB&T appealed arguing that Saunders failed to prove a willful FCRA violation and therefore, the trial court erred in denying BB&T's motion for judgment as a matter of law.[58]

B. Arguments & Analysis.

The court analyzed BB&T's FCRA duties under § 1681s-2, beginning with a furnisher's obligation to provide accurate information under § 1681s-2(a).[59] It then turned to a furnisher's "additional duties" under § 1681s-2(b):[60]

> If a consumer notifies a CRA that he disputes the accuracy of an item in his file, FCRA requires the CRA to notify the furnisher of the dispute. § 1681i(a)(2). Upon receipt of this notice, a furnisher must:
>
> (A) conduct an investigation with respect to the disputed information;

49. *See id*. at 145–46.
50. *See id*. at 146.
51. *See id*.
52. *See Saunders*, 526 F.3d at 146.
53. *See id*. at 147 (describing BB&T's reporting that Saunders had made no payments as factually accurate, but failing to capture that Saunders was refusing to make payments due to the penalties and late fees that accrued because of BB&T's error in booking the loan).
54. *See id*. at 146.
55. *See id*. at 146–47.
56. *See id*. at 147.
57. *See id*. (explaining that though the jury did not award compensatory damages, it awarded statutory damages of $1,000 and accompanying punitive damages of $80,000).
58. *See Saunders*, 526 F.3d at 147.
59. *See id*. at 147–48.
60. *See id*. at 148.

> (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;
>
> (C) report the results of the investigation to the consumer reporting agency; and
>
> (D) if the investigation finds that the information is *incomplete or inaccurate*, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis . . . § 1681s-2(b)(1).[61]

Focusing on the "incomplete or inaccurate" language from § 1681s-2(b), the court determined that "Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for omissions that render the reported information misleading."[62] Relying primarily on *Dalton* and *Pinner*, the court emphasized that a consumer report of "technically accurate information" can be inaccurate when "presented in such a way that it creates a misleading impression."[63]

BB&T advanced several arguments on why the district court erred in denying its motion for judgment as a matter of law.[64] For this Article, BB&T's defense was that its ACDV responses were not "incomplete or inaccurate."[65] BB&T asserted that its reporting to CRAs accurately reflected the status of Saunders' debt and it need not report the debt's disputed nature or report affirmative defenses raised by consumers.[66] By highlighting the distinctions between § 1681s-2(a) and § 1681s-2(b), BB&T contended that Congress did not intend for furnishers to report consumer disputes to CRAs through the verification process.[67]

The distinctions in the FCRA statutory subsections did not persuade the court.[68] In reaching its holding, the court emphasized two limitations on a furnisher's obligation to report debt disputes to CRAs—the merit of the

61. *Id*. (alteration in original) (emphasis added).
62. *Id*.
63. *See id*. (relying on a similar Fifth Circuit decision to support that "technically accurate information" may be inaccurate when misleading in such a way to create an adverse effect).
64. *See Saunders*, 526 F.3d at 149.
65. *See id*. (explaining how BB&T also argued that Saunders failed to prove a willful FCRA violation, and that Saunders did not have a legitimate excuse for nonpayment).
66. *See id*.
67. *See id*. Section 1681s-2(a) imposes a duty on furnishers to provide accurate information and to report consumer disputes. *See Saunders*, 526 F.3d at 149 (citing § 1681s-2(a)(3)).
68. *See id*. at 149–50 ("This argument ignores the interplay of § 1681s-2(a) and § 1681s-2(b). . . . No court has ever suggested that a furnisher can excuse its failure to identify an inaccuracy when reporting pursuant to § 1681s-2(b) by arguing that it should have *already* reported the information accurately under § 1681s-2(a).").

dispute and the misleading effect of the dispute.[69] The Fourth Circuit upheld the district court, finding that BB&T's decision to report the debt without mentioning Saunders' dispute was misleading in such a way and to such an extent that it could be expected to have an adverse effect.[70]

C. Framework & Initial Flaws.

1. *In Saunders, the court developed a framework for causes of action against furnishers for technically accurate but materially misleading reporting.*

Building primarily on language from *Dalton*, the *Saunders* court rejected a *per se* rule that furnishers need not report consumer disputes.[71] Instead, the court determined that a furnisher incurs the additional duty, under § 1681s-2(b), to report when a consumer disputes the accuracy of the information from the furnisher.[72] If a furnisher fails to report a consumer dispute of an account, it may provide materially misleading but technically correct information, which undermines the purpose of the FCRA.[73]

2. *Based on the FCRA alone, the origin of the* Saunders *claim is flawed.*

When viewed only through a statutory lens, the *Saunders* framework is flawed. The court invokes a furnisher's duty arising from § 1681s-2(a) but couches the duty within § 1681s-2(b).[74] Importantly, § 1681s-2(b) provides a private right of action to consumers, while § 1681s-2(a) does not.[75] The court explicitly acknowledged this discrepancy between the subsections but ultimately brushed past the distinction.[76] Though the court addressed this discrepancy only in passing, the difference between the statutory subsections has greater significance that goes to the core of whether a consumer can rightfully sue a furnisher for a violation under the *Saunders* framework.

69. *See id.* at 150 ("Certainly, if a consumer has a meritorious dispute . . . the consumer's failure to pay the debt does not reflect financial irresponsibility.") The court reasoned that the rule "suggested by BB&T would result in numerous reports with omissions that are 'misleading in such a way and to such an extent that [they] can be expected to have an adverse effect.'" *Id.* (quoting *Dalton*, 257 F.3d at 415).
70. *Id.*
71. *See id.*
72. *See id.* at 148.
73. *See Sherman*, 627 F. Supp. 3d at 1011 (citing 15 U.S.C. § 1681; Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1163 (9th Cir. 2009); *Saunders*, 526 F.3d at 150).
74. *See Saunders*, 526 F.3d at 149 (citing §§ 1681s-2(a)–(c)).
75. *See* 15 U.S.C. §§ 1681s-2(a)–(c).
76. *See Saunders*, 526 F.3d at 149 ("FCRA explicitly bars private suits for violations of § 1681s-2(a), but consumers can still bring private suits for violations of § 1681s-2(b).") (citing § 1681s-2(c); Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 431–32 (4th Cir. 2004)).

(a) While there is a requirement to report a loan as disputed under subsection (a), there is no private right of action under subsection (a). The language from *Saunders* derives a duty for furnishers from § 1681s-2(b).[77] In actuality, the most applicable statutory language is under § 1681s-2(a):[78]

> (3) Duty to provide notice of dispute. If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.[79]

Under the plain language of § 1681s-2(a), furnishers have a duty to provide notice of a consumer dispute to CRAs.[80] However, § 1681s-2(a) squarely provides no private right of action.[81] Enforcement of subsection (a) is left to "Federal agencies and officials and the State officials."[82] In sum, § 1681s-2(a) provides the right at issue in *Saunders*, but leaves enforcement of that right to federal and state agencies rather than individual consumers.[83]

(b) There is no requirement to report a loan as disputed under subsection (b), but there is a private right of action for violating this subsection. Consumers have a private right of action to sue furnishers for violations arising under § 1681s-2(b).[84] However, the right at issue in *Saunders* comes from subsection (a).[85] Subsection (b) describes the "[d]uties of furnishers of information upon notice of dispute" from a CRA.[86] The subsection details the process

77. *See id*. at 148 ("At issue in this appeal are the additional duties a furnisher incurs under § 1681s-2(b) if a consumer disputes the accuracy of information that the furnisher reports.").
78. *See* 15 U.S.C. § 1681s-2(a)(3).
79. *Id*.
80. *See id*.
81. *See* 15 U.S.C. § 1681s-2(c) (Limitation on liability); *see e.g.,* Chiang v. Verizon New Eng., Inc., 595 F.3d 26, 35 (1st Cir. 2010) ("Although a consumer may dispute credit information directly to a furnisher, . . . , the consumer has no private right of action if the furnisher does not reasonably investigate the consumer's claim after direct notification"); Longman v. Wachovia Bank, N.A., 702 F.3d 148, 150 (2nd Cir. 2012) (affirming "that there was no private right of action for violations of § 1681s-2(a)"); Harris v. Pa. Higher Educ. Assistance Agency, 696 Fed. Appx. 87, 89 (3rd Cir. 2017) (finding "no private right of action under § 1681s-2(a)" against furnishers of information); Lovegrove v. Ocwen Home Loans Servicing, L.L.C., 666 Fed. Appx. 308, 313 (4th Cir. 2016) ("There is no private right of action under § 1681s-2(a)").
82. 15 U.S.C. § 1681s-2(d) (Limitation on enforcement).
83. *See* discussion *supra* Part III.C.2.a (highlighting the discrepancy between § 1681s-2(a) action and § 1681s-2(b)).
84. *See* 15 U.S.C. §§ 1681s-2(c)–(d).
85. *See* 15 U.S.C. § 1681s-2(b); *see also* discussion *supra* Part III.C.1.
86. *See* 15 U.S.C. § 1681s-2(b).

triggered by a furnisher's receipt of notice of a dispute and the investigation procedures a furnisher must follow.[87] Subsection (b) is silent on a furnisher's affirmative duty to report any dispute received from a consumer directly.[88] While this subsection does provide a right of action for consumers to sue, it does not address a furnisher's duty to report consumer disputes.[89] Given this statutory framework, the court in *Saunders* drew on the "incomplete or inaccurate" language from § 1681s-2(b)(1)(D) to fashion a new private right of action for a furnisher's failure to report a consumer dispute.[90]

Because of the marked distinctions between the FCRA subsections (a) and (b), the court's inference in *Saunders* was flawed.[91] *Saunders* also did not address what constitutes a "meritorious dispute," and failed to provide practical guidance to furnishers as to the required method for reporting consumer disputes to CRAs.[92]

IV. Developing Framework Post-*Saunders*

The previous Part shows that *Saunders* left open questions as to its legal framework and practical implications, including what qualifies as a bona fide or potentially meritorious dispute and how furnishers must report a disputed account to CRAs. This Part will explain how the *Sherman* and *Wood* cases expanded *Saunders*' analytical framework and attempted to answer the questions raised in *Saunders*, but created more questions of their own.[93]

A. Bona Fide or Potentially Meritorious Disputes.

Notably absent from the court's decision in *Saunders* was an analysis of the court's limitation to the applicability of its holding to meritorious disputes.[94] In 2022, the District of Minnesota addressed this question in *Sher-*

87. *See id*.
88. *See id*.
89. *See id*.
90. *See* discussion *supra* Part III.C.2.b (explaining the *Saunders* court's holding that required the duty from subsection (a) to be enforced through the private right of action in subsection (b)).
91. *See* discussion *supra* Part III.C.2 (conflating the two subsections leads to practical issues when applying the *Saunders* holding).
92. *See* Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 151 (4th Cir. 2008) ("[W]e assume without deciding that a furnisher incurs liability under § 1681s-2(b) only if it fails to report a meritorious dispute.").
93. *See generally Sherman*, 627 F. Supp. 3d at 1000 (determining the contours of a bona fide or meritorious dispute); Wood v. Credit One Bank, 277 F. Supp. 3d 821 (E.D. Va. 2017) (emphasizing the importance of using proper Compliance Condition Codes in reporting consumer disputes).
94. *See Saunders*, 526 F.3d at 151.

man v. Sheffield Financial, LLC.[95] This case involved Sherman, who had taken out a joint loan from Sheffield with his then-spouse in 2016 and set up automatic payments on the loan.[96] The couple divorced in 2018.[97] In 2019, Sherman's ex-wife filed for Chapter 7 bankruptcy.[98] When Sheffield received notice of the bankruptcy filing, it cancelled the automatic payments and monthly statements on the account without notifying Sherman.[99] Sherman then missed two required payments on the loan.[100] After the missed payments, Sheffield charged off the loan because Sherman's former spouse was in bankruptcy, and payments on the account were past due.[101] After Sheffield reported the charged-off account to the CRAs, Sherman noticed his credit score lowered.[102] Sherman called Sheffield to pay the past due amounts, and paid the full balance of the loan soon after.[103] He later contacted Sheffield multiple times on the phone and in writing, requesting that Sheffield remove the negative information from his credit report.[104] The line items documenting the late payments and charge off remained on his credit history, which eventually led him to file suit.[105]

The court began its analysis by reciting a furnisher's duty to avoid "omitting material information" that renders a consumer's report "incomplete or inaccurate."[106] In doing so, the court emphasized that "[f]urnishers have no duty to report wholly meritless, frivolous disputes."[107] Then the court addressed an open question remaining from *Saunders*—the definition of bona fide or potentially meritorious.[108] The court developed a three-part test to determine the meritoriousness of a consumer dispute: (1) "the dispute must be relevant to the information provided by the furnisher to whom the dispute is directed"; (2) "the dispute must be factually correct in general and provide sufficient information for the furnisher to undertake a reasonable investigation"; and (3) "noting the existence of the dispute must suggest that a borrower is less financially irresponsible than the un-

95. *See generally Sherman*, 627 F. Supp. 3d at 1013 (determining a framework for analyzing whether a consumer dispute is bona fide or potentially meritorious).
96. *See id*. at 1004.
97. *See id*. at 1005.
98. *See id*.
99. *See id*.
100. *See id*. at 1006.
101. *Sherman*, 627 F. Supp. at 1006.
102. *See id*.
103. *See id*.
104. *See id*.
105. *See id*. at 1006–08.
106. *Id*. at 1010–11 ("The omission of a potentially meritorious dispute thus fails the furnisher's duty of completeness.").
107. *Sherman*, 627 F. Supp. at 1011 (citing *Saunders*, 526 F.3d at 151).
108. *See id*. at 1012 ("The [c]ourt must determine what it means for a dispute to be bona fide or potentially meritorious.").

disputed report tends to suggest."[109] In applying this test to Sherman's situation, the court found that his indirect disputes sent to the CRAs from his attorney were bona fide and potentially meritorious as a matter of law because the disputes were relevant to the credit line at issue, factually correct and provided sufficient information for Sheffield to investigate, and would have shown he was less financially irresponsible than the credit report suggested.[110] The court further determined that the omission of Sherman's dispute was materially misleading.[111] This analysis expanded the *Saunders* framework by specifying the test to determine whether a consumer's dispute is bona fide or potentially meritorious.[112]

Sherman created a flawed test that is practically impossible for furnishers to execute.[113] Determining whether a dispute is meritorious under this test competes with a furnisher's duty to accurately report under § 1681s-2(a).[114] Further, the test has murky boundaries as to how far a furnisher must go in determining whether a consumer disputes the tradeline.[115]

B. Reporting the Dispute.

The Fourth Circuit's decision in *Saunders* did not focus on practical aspects of how a furnisher should report consumer disputes to CRAs. With limited guidance, suits arose over the way that furnishers reported consumer disputes.[116] *Wood v. Credit One Bank* is an example.[117] This type of case is different from *Saunders* in that the dispute does not involve a furnisher's failure to report the underlying account in dispute, but rather, whether the furnisher's *method* of reporting the dispute violated the FCRA.[118]

Wood brought this suit, arguing that Credit One failed to correctly report the results of its investigation to the CRAs in violation of 15 U.S.C. §§ 1681s-2(b)(1)(C) and (D).[119] Wood claimed that an unauthorized third party opened a credit card account with Credit One in his name.[120] In disputing

109. *Id*. at 1012–13.
110. *See id*. at 1013–14.
111. *See id*. at 1016 ("Although it is undisputed that Sheffield's information was technically accurate, technical accuracy is not always sufficient as a matter of law. Sheffield had a duty to, at a minimum, note the existence of Sherman's dispute.").
112. *See* discussion *supra* Part IV.A.
113. *See infra* Part V.A.3 (outlining problems raised by the lack of guidance for furnishers on when to report).
114. *See infra* Part V.A.3.a.
115. *See infra* Part V.A.3.b.
116. *See e.g.*, *Wood* 277 F. Supp. 3d at 821 (discussing the use of compliance condition codes to report consumer disputes to CRAs).
117. *See id*.
118. *See id*.
119. *See id*. at 827.
120. *See id*.

the account, Wood contacted Credit One around thirty times.[121] Credit One responded to each ACDV on the account by updating the CCC to XH, indicating that the account was previously in dispute, but was now resolved.[122] The court found that Credit One's practice of reporting a CCC of XH after each ACDV was materially misleading under *Saunders*.[123] According to the court, Woods' behavior showed he continued to dispute the validity of the account, so a CCC reflecting the investigation was now resolved, creating a materially misleading impression in violation of the FCRA.[124]

Wood, and other cases that approve of the use of CCCs for reporting consumer disputes to CRAs, ignore industry guidance.[125] After *Wood*, the CDIA issued a CCRG Supplement to more clearly instruct furnishers not to use CCCs "in response to a consumer dispute investigation request from the consumer reporting agencies."[126] Whether in response to *Wood* or not, the guidance clarified for furnishers the proper uses of CCCs, i.e., for direct disputes only.[127] This made sense as a CRA has no way of knowing about a direct dispute unless the furnisher reports it somehow. Thus, the CCCs address the situation and instruct furnishers how to report on direct disputes. Conversely, a furnisher reporting a CCC on an indirect dispute serves no purpose as the CRA already knows about the dispute. Yet, *Wood* demands that furnishers use specific CCCs for indirect disputes based on the CCRG's definitions.[128] *Wood* provided no practical guidance to furnishers on how to report consumers' disputes as *Saunders* mandates.

C. Summary of Doctrine.

To summarize key aspects of the preceding sections, the *Saunders* framework, augmented by *Sherman* and *Wood*, provides the standard for claims against furnishers under § 1681s-2(b) for failure to properly report a consumer dispute of an account.[129] According to *Saunders*, a report by a furnisher is inaccurate not only when it is patently incorrect, but also when it is misleading in such a way and to such an extent that it can be expected

121. *See id*. at 838.
122. *See Wood*, 277 F. Supp. 3d at 839–41.
123. *See id*. at 854 (reasoning that XH was a misleading CCC for the furnisher to use under the circumstances based on the plain language definition).
124. *See id*. at 855 (citing *Saunders*, 526 F.3d at 148).
125. *See* discussion *supra* Parts II.A. and IV.B.
126. *See* Consumer Data Indus. Ass'n (CDIA), Data Furnisher Announcement Reporting of Compliance Condition Codes (2017). The revised language instructing furnishers not to use CCCs for indirect disputes was not present in the 2017 Metro-2 Manual pre-*Wood*.
127. *See* CDIA, *supra* note 15, at 72 (advising that furnishers use CCCs for "the direct dispute provisions of the Fair Credit Reporting Act (FCRA) and its implementing rules.").
128. *See Wood*, 277 F. Supp. 3d at 854.
129. *See* discussion *supra* Parts III.C.1, IV.A, and IV.B.

to have an adverse effect.[130] Under § 1681s-2(b), a furnisher has a duty to report a consumer dispute of an account where the credit information without notation of the dispute would be materially misleading.[131] A report is misleading when it omits the context necessary to evaluate the debt.[132] It is material if it can be expected to have an adverse effect on the consumer.[133] *Sherman* created no requirement for furnishers to use CCCs.[134] *Wood*, in contrast, required that furnishers use certain CCCs based on the codes' definitions (ignoring the instruction not to report CCCs for indirect disputes) to report a consumer dispute to the CRAs.[135]

A furnisher's obligation to report a dispute is limited to those that are bona fide or potentially meritorious.[136] For a dispute to be bona fide or potentially meritorious, it must be "relevant to the disputed credit line provided by the furnisher, generally factually correct and sufficiently complete to provide the furnisher notice of the nature of the dispute, and suggest[] that a borrower is less financially irresponsible than the undisputed report tends to suggest."[137]

V. The Legal and Practical Disconnect

This Part argues that the *Saunders* framework, set forth in the previous Section, is the wrong approach from a practical and theoretical standpoint. *Saunders* leaves open questions on the applicability of the doctrine—some courts have followed the Fourth Circuit, while some have rejected the claim. This Article aims to emphasize that *Saunders* creates untenable responsibilities on furnishers, forcing institutions to consider alternative defenses to suits brought under this framework.

A. *Saunders*' Flaws.

1. *The statutory foundation of Saunders is based on a flawed premise.*

The court in *Saunders* focused on the interplay between the statutory subsections § 1681s-2, rather than acknowledging the fundamental distinctions between (a) and (b).[138] Importantly, *Saunders* creates a cause of action from a furnisher's duties under § 1681s-2(a) but allows consumers a private

130. *See Saunders*, 526 F.3d at 148 (quoting *Sepulvado*,158 F.3d at 895).
131. *See id.* (citing *Dalton*, 257 F.3d at 409; *Koropoulos*, 734 F.2d at 37).
132. *See Sherman*, 627 F. Supp. 3d at 1015 (citing *Saunders*, 526 F.3d at 148).
133. *See id*.
134. *See id*. at 1016 n.15 ("The FCRA does not require the use of—or even mention—these codes. Therefore, Sheffield need not have used these codes specifically.").
135. *See generally Wood*, 277 F. Supp. 3d at 821 (holding that CCCs must reflect the nature of the consumer dispute to ensure compliance with § 1681s-2(b)).
136. *See Sherman*, 627 F. Supp. 3d at 1012–13.
137. *Id.* at 1013.
138. *See* discussion *supra* Part III.C.2 (describing the holding that combines the duties in subsection (a) and the private right to action in subsection (b)).

right of action available only under § 1681s-2(b).[139] For this reason, some courts do not acknowledge the cause of action.[140]

2. *The ACDV process itself indicates the consumer disputes the tradeline.*

Saunders overlooks an obvious duplication of disputes in its framework. It requires furnishers to report consumer disputes to CRAs as part of the indirect dispute process.[141] Yet the CRRAs already know the consumer has made a dispute because the consumer initiated the dispute to the CRA.[142] The CRA, in turn, notifies the furnisher of the dispute.[143] It is at this point where *Saunders* requires a furnisher to somehow notify the CRA of any consumer dispute on the tradeline.[144] Requiring the furnisher to notify the CRA (again) is superfluous because clearly the account is disputed by the consumer. Naturally, if a customer initiates an indirect dispute, the tradeline is disputed. *Saunders* fails to address the duplicative duty it imposes on furnishers.

3. *Determining whether a dispute is meritorious subjects furnishers to uncertainty.*

One of the most confusing and problematic aspects of the *Saunders* doctrine is the *Sherman* test to determine whether a dispute is bona fide or meritorious.[145] The *Sherman* test introduces significant uncertainty into the furnisher's reporting process. Furnishers face the difficult decision of exposure to liability on a nebulous doctrine, or to consistently report accounts as in dispute. If furnishers combat the complicated test by overreporting accounts as in dispute, this violates furnishers' accurate reporting duties under § 1681s-2(a).[146] Further, this practice could encourage frivolous disputes. At the same time, applying the *Sherman* test could be just as difficult and costly because it (a) cuts against a furnisher's confidence in its own reporting, and (b) requires furnishers to opine on the merits of every dispute.

(a) The question of whether a dispute is bona fide or meritorious cuts against a furnisher's confidence in its reporting. Technically accurate reporting creates challenges for furnishers in balancing the FCRA duty to accurately report with the duties from *Saunders* and its progeny. Take, for example, a consumer who missed a payment because he was in the hospital. The con-

139. *See* discussion *supra* Part III.C.2.
140. *See infra* section Part V.B (reviewing cases that reject the *Saunders* holding or avoid applying it through procedural methods).
141. *See Saunders*, 526 F.3d at 150.
142. *See* discussion *supra* Part II.A.
143. *See* discussion *supra* Part II.A.
144. *See Saunders*, 526 F.3d at 150.
145. *See Sherman*, 627 F. Supp. 3d at 1013.
146. *See* 15 U.S.C. § 1681s-2(a).

sumer contacted the furnisher, identifying that he was in the hospital, which caused the missed payment. The furnisher is bound to accurately report. An accurate report would necessarily include that the consumer missed a payment. In conforming with *Sherman*, the furnisher must question whether the consumer raises a meritorious dispute. In addition, the supposed dispute calls into question the furnisher's confidence in its reporting. Accurate reporting by a furnisher is not merely an aspiration, it is a duty mandated by § 1681-2(a). The *Saunders* framework undermines confidence in furnishers' reporting, which cuts against actual duties imposed on furnishers by the FCRA.[147]

(b) Furnishers are not factfinders. Sherman sets forth a three-part test to determine whether a consumer dispute is bona fide or meritorious.[148] Generally, it is difficult for furnishers to truly identify whether a consumer disagrees with the furnisher's reporting of the account. Sherman does not answer practical questions about making this determination. For example, how many times must a consumer disagree before the account is in dispute? Similarly, how is the furnisher to know that the consumer is telling the truth? In other words, how can a furnisher draw the line between what is a meritorious dispute and what is not? Further, when a furnisher completes an investigation and the consumer simply does not respond, should the furnisher assume the consumer disputes the account? These practical questions remain unanswered by the three-part test in *Sherman*. A furnisher can never be certain whether a consumer disagrees with its reporting absent clear and obvious communication from the consumer.

Barnes v. USAA illustrates these issues well.[149] In *Barnes*, the plaintiff's ex-husband racked up significant loans on the former spouses' HELOC, which was attached to the former marital home.[150] Even though the former marital home was the plaintiff's sole property post-divorce, the plaintiff's ex-husband routed account statements to his private residence.[151] Plaintiff did not know that her ex-husband was accumulating this debt.[152] When the plaintiff requested that USAA send her monthly statements, USAA referred her to the information in the online portal.[153] The HELOC balance appeared on Plaintiff's credit reports, which she disputed with USAA.[154]

147. *See id*. § 1681s-2(a).
148. *See* discussion *supra* Part IV.A.
149. *See generally* Barnes v. USAA F.S.B., No. 3:23-cv-51, 2024 WL 2724186 (W.D. Va. May 28, 2024) (finding that under the *Sherman* three-part test, the plaintiff's dispute was bona fide or meritorious).
150. *See id*. at *1.
151. *See id*.
152. *See id*.
153. *See id*. at *2.
154. *See id*.

When the plaintiff made an indirect dispute with the CRAs, USAA did not indicate the account was disputed.[155] In applying the *Sherman* three-part test, the court found that the plaintiff's dispute was meritorious.[156]

Overlooked in *Barnes*, but relevant to this Article, is how far USAA was required to go in determining whether Barnes' dispute had merit. For example, should USAA have acquired a copy of the plaintiff's divorce decree to verify whether the plaintiff's dispute was factually correct? Was USAA required to contact the ex-husband to verify his identity to ensure the factual correctness of the plaintiff's dispute? The bounds of this doctrine leave questions that remain unanswered.

In determining whether a dispute is bona fide or meritorious, *Sherman* requires that a furnisher wade through potentially frivolous disputes by a consumer, making factual determinations on information beyond the four corners of a disputed account. How far a furnisher must go to determine whether a dispute is meritorious remains unclear. At present, furnishers must expend significant resources to make this determination, or alternatively, assume every account is disputed. The *Sherman* test requires that a furnisher act as factfinder in intuiting the bona fide nature of a dispute to avoid liability.

4. *The cases provide no answer for how furnishers should report consumer disputes*.

While cases like *Wood* require furnishers to use CCCs to report consumer disputes to CRAs, industry guidance clearly states the opposite.[157] The Metro-2 Manual explicitly instructs furnishers to use CCCs only for direct disputes.[158] Guidance for furnishers is inherently contradictory, with *Woods* requiring furnishers to adhere to the CCC definitions in the Metro-2 Manual, which advises furnishers not to use CCCs in *Saunders* scenarios at all.[159] Furnishers are left with no practical guidance for complying with *Saunders* and must speculate about how to avoid liability in executing day to day procedures.[160] The lack of direction for furnishers is a major flaw in the current *Saunders* doctrine.

155. *See Barnes*, 2024 WL 2724186, at *2.
156. *See id*. at *4.
157. *See* discussion *supra* Part IV.B.
158. *See* discussion *supra* Part IV.B.
159. *See* discussion *supra* Part IV.B.
160. *See Wood*, 277 F. Supp. 3d. at 854. In fact, courts have doubled down, continuing to require use of CCCs to report consumer disputes to CRAs post-*Wood* against industry guidance. *See*, *e.g*., Gissler v. Pa. Higher Educ. Assistance Agency, No. 16-cv-1673-PAB-MJW, 2017 WL 4297344, at *5 (D. Colo. Sept. 28, 2017) ("Defendant's use of the 'XH' code, without noting plaintiff's continuing dispute of the accuracy of the reporting, could create a materially misleading impression to a credit reporting agency or a lender.").

5. *The* Saunders *framework presupposes causation.*

Fair credit reporting provides lenders with valuable information to determine consumers' creditworthiness.[161] Some aspects of a *Saunders*-type case would not affect a consumer's creditworthiness.[162] For example, the XC and XH CCCs do not suppress credit reporting and do not affect a consumer's credit score.[163] Despite this, *Saunders* imposes liability on furnishers for failing to report consumer disputes without requiring any analysis of causation.[164] A furnisher's failure to report a consumer dispute to a CRA will likely have no ultimate impact on a consumer's credit reporting. *Saunders* is flawed because it requires no causation analysis. A consumer still needs to show a causal link between some ascertainable damages and the furnisher's failure to report a disputed tradeline to prevail. Courts have just assumed, without citing any evidence, that a meritorious or bona fide dispute without marked as disputed will automatically mislead a lender.

B. Rejecting the Doctrine.

This Article demonstrates that *Saunders* is fundamentally flawed and should be overruled in the Fourth Circuit and ignored elsewhere.[165] The only appropriate path forward is to follow cases that do not recognize the doctrine. For example, in *Flanders v. Navy Federal Credit Union*, Flanders claimed that Navy Federal failed to report her debt as in dispute.[166] In analyzing the allegations of her amended complaint, the court noted that Flanders, at best, attempted to raise a claim under § 1681s-2(a).[167] Noting that no private right of action exists under this statutory subsection, the court found that Flanders could not state a viable FCRA claim.[168] Other

161. *See generally*, *What is a Credit Report?*, Consumer Fin. Prot. Bureau (Jan. 29, 2024), https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-report-en-309 ("Lenders use these reports to help them decide if they will loan you money, what interest rates they will offer you.").

162. *See* Jena M. Valdetero & Matthew M. Petersen, *Use of Compliance Condition Codes: Recent Developments and Unanswered Questions Under the Fair Credit Reporting Act*, Colo. Bar Ass'n, https://www.bclplaw.com/a/web/101932/Use-of-Compliance-Condition-Codes.pdf.

163. *See id*.

164. *See Saunders*, 526 F.3d at 150.

165. *See* discussion *supra* Part V.A.

166. *See* Flanders v. Navy Fed. Credit Union, No. 1:22-cv-2877-WMR-CMS, 2023 WL 11926564, at *2 (N.D. Ga. Apr. 17, 2023).

167. *See id*. at *4 ("These allegations indicate that Navy Federal may have, at most, failed to submit accurate information to consumer reporting agencies under Section 1681s-2(a).").

168. *See id*. ("There is no private right of action for an alleged violation of Section 1681s-2(a), and Flanders therefore cannot state a viable FCRA claim based on a violation of that statute") (citing Felts v. Wells Fargo Bank, N.A., 893 F.3d 1305, 1312 (11th Cir. 2018)).

cases have similarly relied on the absence of a cause of action under subsection (a) to reject *Saunders*.[169] The Eleventh Circuit commits to the holding "that consumers cannot sue furnishers for providing inaccurate information—only for conducting unreasonable investigations."[170]

As another example, in a case where a plaintiff argued that the furnisher's false reporting of the tradeline violated the FCRA, the court emphasized that "consumers do not have a private right of action against furnishers for reporting inaccurate information to CRAs regarding consumer accounts."[171] The court granted a motion to dismiss.[172] Similarly, the court granted a motion to dismiss in *Prosser*, noting that the plaintiff failed to state a claim against Capital One when he alleged that he instituted a direct dispute and claimed Capital One violated its FCRA duties.[173] The court found that to have a claim, Capital One would have had to receive notice from a CRA to investigate.[174] Finally, in *Martinez*, the court found that because there is no private right of action under § 1681s-2(a), the consumer could not maintain her action based on the furnisher's failure to "report the dispute."[175] The court dismissed her claim with prejudice.[176]

The above cases easily dispense with the *Saunders* problem by avoiding recognition of the cause of action. While this list of cases is not necessarily exhaustive, it exemplifies some courts' resistance to *Saunders* given its flawed foundation. While the *Saunders* doctrine creates complicated issues, these cases and this Article present a simple solution: courts should not follow *Saunders*.

VI. Conclusion

Inaccurate credit reporting is a real problem, but *Saunders* does not provide a solution. Though fairness to the consumer is an appropriate goal, it

169. *See, e.g.*, Milgram v. Chase Bank USA, N.A., 72 F.4th 1212, 1218 (11th Cir. 2023).
170. *See id*. (citing *Felts*, 893 F.3d at 1312) ("Consumers have no private right of action against furnishers for reporting inaccurate information to [reporting agencies] regarding consumer accounts. . . . Instead, the only private right of action consumers have against furnishers is for a violation of § 1681s-2(b), which requires furnishers to conduct an investigation following notice of a dispute."); 15 U.S.C. § 1681s-2(c)(1) (providing that there is no liability for violating section 1681s-2(a))).
171. McGee v. Wells Fargo Bank N.A., No. 3:23-cv-437-RGJ, 2024 WL 1119420, at *5 (W.D. Ky. Mar. 14, 2024) (citing Boggio v. USAA Fed. Sav. Bank, 696 F.3d 611, 615 (6th Cir. 2012)).
172. *See id*.
173. *See* Prosser v. Cap. One Bank (USA), N.A., No. 1:20-cv-01117-TWP-TAB, 2021 WL 6050015, at *5 (S.D. Ind. Dec. 21, 2021).
174. *See id*.
175. *See* Martinez v. Granite State Mgmt. & Res., No. 8-2769, 2008 LEXIS 94995, at *5 (D.N.J. Nov. 20, 2008).
176. *See id*.

is impractical under the current framework. The legal doctrine is disconnected from its practical implications. *Saunders* places a heavy burden on furnishers to comply despite limited, if any, statutory, regulatory, and industry guidance.

The Fourth Circuit in *Saunders* created a cause of action that the plain language of the FCRA does not support. *Saunders* further creates a duplicative process where a consumer disputes their account with a CRA, and a furnisher then has a further responsibility to report the account as disputed, despite that the account is clearly disputed when the consumer begins the ACDV process with the CRA. Based on the *Sherman* test it is practically impossible for furnishers to determine whether a dispute is meritorious. Even if furnishers invest critical time and resources into investigating such disputes, this investigation cuts against confidence in their own reporting processes. After *Wood*, furnishers still have no guidance on how to follow *Saunders* and report consumer disputes to CRAs. Finally, *Saunders* assumes automatic liability when a furnisher fails to report a disputed tradeline, alleviating any responsibility of the consumer to prove causation. Because of *Saunders*' many legal and practical flaws, the claim it created should be rejected.