CLOSING THE "NO FURTHER RESPONSIBILITY" LOOPHOLE IN RESOLVING CREDIT BILLING ERRORS

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I. INTRODUCTION

Imagine sitting at home checking your credit card account online.[1] You notice a $500 unauthorized charge on your account that posted the day before and call your credit card company. After reporting the incident, the credit card company indicates that they will send out a new card and issue a provisional credit for the disputed amount while they investigate the charge. After two months, you notice another charge from the same merchant for $500 is again billed to your credit card account. You call your credit company and they say, "We are sorry for the inconvenience, but since this new charge relates to the charge from two months ago, we *no longer have any further responsibility*."[2]

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1. The hypothetical fact pattern in this paragraph is loosely based on some of the facts in Krieger v. Bank of Am., N.A., 890 F.3d 429, 432 (3d Cir. 2018) and Humphrey v. U.S. Bank, N.A., No. 11-CV-272-GKF-PJC, 2012 WL 3686272, at *1 (N.D. Okla. Aug. 24, 2012).

2. *See* 15 U.S.C. § 1666(a)(B) (2018) ("After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with

Understandably, you are upset. In this case, your fraudulent charge is not refunded, the credit card company has probably not completed a reasonable investigation, and you are left with either accepting the status quo or bringing an action against the merchant or credit card company.

The aforementioned scenario is precisely what could continue to happen if the billing error loophole in the Fair Credit Billing Act (FCBA)[3] is not closed. Despite the FCBA's intent to provide protection for consumers against fraudulent transactions as well as undelivered goods and services, creditors are able to bypass the statutory procedural steps[4] by simply providing temporary relief. In order to close this loophole, rebilled billing errors must be treated as a distinct billing error—notwithstanding whether the merchant or creditor rebills the initial billing error.

Although there is limited case law regarding this exact issue of the FCBA,[5] the legislative intent of the Act is clearly on the side of the consumer.[6] In addition, by exploring the underlying principles of both the duty to monitor in corporate law[7] and the doctrine of claim preclusion in civil procedure,[8] it will become clear why rebilled charges should be treated as distinct billing errors under the FCBA.

Part II of this Note will discuss a brief history of the Fair Credit Billing Act, Regulation Z, and relevant case law. Part III will provide a summary of the duty to monitor principle and will compare that principle to the resolution process for credit billing errors. Part III will also compare the resolution of credit billing errors to the principle of claim preclusion and will illustrate how closing the loophole will help mitigate financial litigation risk for creditors. Finally, Part IV will summarize the need to close the credit billing error loophole.

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respect to such error."). *See also* 12 C.F.R. § 1026.13(h) (2020) ("A creditor that has fully complied with the requirements of this section has no further responsibilities . . . if a consumer reasserts substantially the same billing error.").

3. *See supra* note 1 and accompanying text; *see also* 15 U.S.C. § 1666.

4. 15 U.S.C. § 1666(a)(B).

5. There is likely limited case law authority because of the opportunity cost of litigation, for both the consumer and the creditor, to resolve a specific billing error. In addition, filing a complaint with private organizations, such as the Better Business Bureau, or government regulatory agencies, such as the Consumer Financial Protection Bureau or a state attorney general's office, provides the consumer a no-cost or low-cost avenue to resolve his billing error.

6. *See infra* Part II.

7. *See infra* Parts III.A–B.

8. *See infra* Part III.C.

II. BACKGROUND

The Fair Credit Billing Act (FCBA) was enacted in 1974 "to protect the consumer against inaccurate and unfair credit billing and credit card practices."[9] Among its effects, the FCBA sets out procedures and processes for credit billing errors.[10]

The FCBA defines six specific billing errors, reserving discretion for the appropriate regulatory committee to create more.[11] For the purpose of this Note, two of the specified billing errors will be underlined: fraud, either by an incorrect amount being charged or an unauthorized person using the credit; and goods and services undelivered to the consumer in accordance to the original transaction.[12] While the FCBA governs billing errors across numerous credit outlets, this Note will focus on an extension of credit through credit cards.[13]

The FCBA structure was first introduced by Senator Proxmire in February 1971.[14] In one of the first Senate subcommittee meetings for his bill, Senator Proxmire articulated that massive technological advances in the credit industry, fueled by the rise in credit card issuance and use, caused some creditors to lose their "human element."[15] He explained that consumers with a credit card billing error had to be persistent, and for consumers to actually advance in their inquiries, they had to either be lucky or request help from their legislators to actually advance in their inquiry.[16] Consequently, the Senator proclaimed "[t]he consumer needs a

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9. 15 U.S.C. § 1601(a) (2018). This provision has its roots in H. R. 11221, 93d Cong. (1974), which was signed into law on October 28, 1974 as Pub. L. 93-495.

10. *See generally* 15 U.S.C. § 1666.

11. 15 U.S.C. § 1666(b).

12. *See* 15 U.S.C. § 1666(b)(1), (3); *see also* 15 U.S.C. § 1643; 15 U.S.C. § 1666i; 12 C.F.R § 1026.12(b) (2020) (setting out cardholder liability limitations for unauthorized use of a credit card); 12 C.F.R. § 1026.12(c) (establishing the "holder in due course" cause of action against a creditor for goods or services undelivered); *cf. Official Interpretation for 1026.12(c)–1. Relationship to § 1026.13*, CFPB, https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/12/#12-e-2-Interp-1 [https://web.archive.org/web/20200623223009/https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/12/] (clarifying that a claim for a billing error is independent from a claim under the "holder in due course" basis).

13. *See* 15 U.S.C. § 1602(g).

14. S. 652, 92d Cong. § 161 (1st Sess. 1971).

15. *Fair Credit Billing: Hearings on S. 652 Before the Subcomm. on Fin. Insts. & Consumer Prot. of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong. 1 (1971) [hereinafter *Fair Credit Billing*] (statement of Sen. Proxmire).

16. *Id.*

bill of rights to protect him from unfair or deceptive billing practices."[17] That bill of rights is the FCBA.

But in that same subcommittee meeting, a ranking member of the subcommittee, Senator Bennett, urged restraint in the process.[18] Senator Bennett indicated that the current version of Senator Proxmire's bill may have been too ambitious and warned "[t]here is such a thing as overkill, and we must be careful not to insist on that."[19] Senator Proxmire agreed and even indicated that "[he] never expected that the bill would be passed in the form in which we introduced it."[20] In fact, unsurprisingly, the bill was not passed in its original form and one of the changes to the original bill is the focus of this Note.[21]

The February 1971 version of the bill provided that once the consumer gave proper notice of the billing error, the creditor had thirty days to either correct the consumer's account or to explain why they believed the alleged billing error was correct.[22] In the latter instance, the creditor had to conduct an investigation and provide the consumer with "documentary evidence of the obligor's indebtedness" along with the creditor's written explanation.[23]

Nonetheless, in the final, current version of the FCBA bill, which ultimately became law, the creditor has two complete billing cycles to either correct the error or to explain why the apparent billing error is, in fact, accurate.[24] In addition, if the creditor determines the entire billing error amount is accurate in full or in part, then the creditor only has to send documentary evidence of the creditor's indebtedness at the consumer's behest.[25] If the alleged billing error is that goods were not delivered pursuant to an original agreement with a merchant, then the creditor is to determine whether the goods were actually delivered or sent and then provide the consumer with a statement to that effect.[26] Moreover, the final and current version of the FCBA includes a specific provision for creditors: "After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make

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17. *Id.*
18. *Id*. at 3.
19. *Id.*
20. *Id.*
21. *See* S. 652, 92d Cong. (1971) and 15 U.S.C. § 1601(a) (2018) to contrast the differences between the first bill and the final public law.
22. S. 652, 92d Cong. §161(a)(B) (1971).
23. *Id.*
24. 15 U.S.C. § 1666(a)(B).
25. *Id.*
26. *Id.*

substantially the same allegation with respect to such error."[27] Looking at the legislative history, the "no further responsibility" provision was not introduced into the statutory text until June 1973.[28]

Other changes to the FCBA that are outlined above (the increased time for creditors and change in the documentary evidence standard) appeared as early as May 1972.[29] So why did the "no further responsibility" provision appear late in the legislative cycle? According to the June 1973 Senate Banking, Housing, and Urban Affairs Committee report, it appears that this provision was introduced to clarify that the creditor could begin "[its] normal collection activity," including the ability for the creditor to report a delinquent amount to a credit agency after meeting the prescribed requirements.[30] The Committee emphasized that all of the provisions in the bill made it "fair to the consumer and workable to the credit industry" in an attempt to "establish a fair and equitable system for the resolution of billing disputes."[31] By adding the "no further responsibility" provision, it likely aided the Committee in their efforts.[32]

While the then-bill may have added a provision that favored the creditor and not the consumer, it was clear that the Committee believed that the creditor's responsibility to do an investigation for an alleged billing error was essential to protecting the consumer. The Committee Report mentioned the need for an investigation not only in the "Need for the Legislation" section, but also in the "Section-by-section Summary," despite the rationale not being in the bill's section at the time or in the finalized version.[33] Specifically, the Committee Report stated that "[t]he requirement to investigate each billing inquiry is intended to preclude pro

27. 15 U.S.C. § 1666(a).

28. S. 2101, 93d Cong. §161(a) (1973).

29. S. 652, 92d Cong. § 161(a)(B) (1972).

30. SEN. WILLIAM PROXMIRE, TRUTH IN LENDING ACT AMENDMENTS, S. REP. NO. 93-278, at 6 (1973).

31. *Id.*

32. *See id.* (indicating that the Committee tried to reach a balance between meeting the interests of both consumers and creditors).

33. *See id*. at 5, 22. The "Need for the Legislation" section of the Report states that "[t]he requirement for an investigation is intended to preclude a creditor from making an automatic form letter response without actually looking into each billing inquiry." *Id.* at 5. The "Section-by-section Summary" portion of the Report states that "[t]he requirement to investigate each billing inquiry is intended to preclude pro forma replies which simply assert the amount billed is correct." *Id.* at 22; *see also* H.R. 11221, 93d Cong. §166 (1974); S. 2101, 93d Cong. §161 (1973) (showing no legislative rationale in the specific section).

forma replies which simply assert the amount billed is correct."[34] Consequently, although the finalized bill was changed from the original version, Senator Proxmire's intent to bring back the "human element" to creditors by enacting the FCBA remained intact.[35]

A. Regulation Z

More than four decades after the FCBA was enacted, the finalized provisions mentioned above are materially unchanged.[36] The Consumer Financial Protection Bureau (CFPB) administers the FCBA through Regulation Z.[37] Both of the billing errors focused on in this Note—fraud, either by an incorrect amount charged or an authorized user, and undelivered goods and services according to the original transaction—are covered by Regulation Z.[38] In addition, the same standards of how creditors must respond to an alleged billing error are materially the same as those in the FCBA, with two exceptions.[39] In Regulation Z, the investigation conducted by the creditor must be a "reasonable" investigation.[40] When the underlying billing error is fraud, the CFPB provides eight items that the creditor may use to complete their reasonable investigation.[41] Second, in the case of undelivered goods or

34. S. REP. NO. 93-278, at 22. "The requirement for an investigation is intended to preclude a creditor from making an automatic form letter response without actually looking into each billing inquiry." *Id.* at 5.

35. See *Fair Credit Billing: Hearing on S. 652*, *supra* note 15, at 1 (statement by Sen. Proxmire) ("In their haste to computerize, some creditors have neglected the human element. Consumers have complained about the inordinate amount of trouble they have had in resolving a relatively simple billing error."). The FCBA, as enacted, encompasses mandatory deadlines for creditors to comply with consumer submitted billing errors. Pursuant to 12 C.F.R. § 1026.13(c) (2020), the creditor must acknowledge receipt of the consumer's billing error within thirty days and must resolve the dispute within two complete billing cycles or, at most, ninety days.

36. *See* 15 U.S.C. § 1666 (2018); H. R. 11221, 93d Cong. §166 (1974).

37. Krieger v. Bank of Am., N.A., 890 F.3d 429, 436 (3d Cir. 2018).

38. 12 C.F.R. § 1026.13(a) (2020).

39. 12 C.F.R. § 1026.13(c), (e)–(f).

40. 12 C.F.R. § 1026.13(f).

41. *Official Interpretation for 1026.13—Billing Error Resolution*, CFPB, https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/Interp-13/#13-f-Interp-3 [http://web.archive.org/web/20200421172727/https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/Interp-13/]. These eight items include: reviewing the consumer's past purchasing patterns (amount, delivery location, merchant location), comparing the signature from a disputed transaction to the cardholder's signature, asking for a copy of a police report, requesting additional documentation, soliciting a "signed statement from the consumer," and requesting additional information from the consumer about authorized users. *Id.*

services, the CFPB states that a creditor must "determine[] . . . the property or services were actually delivered, mailed, or sent as agreed[]" before rejecting the consumer's billing error.[42] While the FCBA includes this standard, it is only for goods—not for services per se.[43]

There is one other difference between the FCBA and Regulation Z that is relevant to this Note. Regulation Z states that once a creditor fully complies with the billing error section, the creditor has "no further responsibilities under this section . . . if a consumer reasserts substantially the same billing error."[44] In contrast, in the FCBA, the creditor has no further responsibility when the consumer "continues to make substantially the same allegation with respect to such error."[45] Consequently, the language in the FCBA may be regarded as narrower than the language in Regulation Z since the FCBA focuses on the "allegation," while Regulation Z focuses on the "billing error." Regrettably, there is no CFPB official interpretation of the "no further responsibilities" section of Regulation Z.[46]

B. Case Law

In *Humphrey v. U.S. Bank, N.A.*, the United States District Court for the Northern District of Oklahoma cited Regulation Z's "no further responsibilities" section to prevent a consumer from initiating another complaint against his creditor.[47] In that case, the Humphreys began a refinance process with U.S. Bank and agreed to have an appraisal done on their home.[48] The Humphreys were to receive a copy of the appraisal, and U.S. Bank charged the Humphreys' Capital One credit card for the appraisal in the amount of $415.[49] The Humphreys alleged that U.S. Bank never performed the appraisal.[50]

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42. *Id.*
43. 15 U.S.C. § 1666 (a)(B)(ii) (2018).
44. 12 C.F.R. § 1026.13(h). The creditor has one further responsibility in paragraph (g)(4) of the regulation, relating to the reporting requirements of a delinquent amount to credit bureaus. This responsibility is outside the scope of this Note. 12 C.F.R. § 1026.13(g)(4).
45. 15 U.S.C. § 1666 (a)(B).
46. *Official Interpretation for 1026.13—Billing Error Resolution*, *supra* note 41, (listing no official interpretation for the given subsection).
47. Humphrey v. U.S. Bank, N.A., No. 11-CV-272-GKF-PJC, 2012 WL 3686272, at *5 (N.D. Okla. Aug. 24, 2012).
48. *Id.* at *1.
49. *Id.*
50. *Id.*

The Humphreys notified Capital One of the home appraisal charge on their credit card.[51] After a reasonable investigation, Capital One credited the Humphrey's account for the charge and considered the matter closed as long as the merchant did not resubmit the charge within forty-five days.[52] After forty-five days, U.S. Bank resubmitted the charge, and the Humphreys had only seven days to provide Capital One with additional documentation to rebut the rebilled charge.[53] The Humphreys alleged that demanding additional documentation within a short period of time from the consumer was a common practice by Capital One, notwithstanding allowing merchants "[forty-five] days to provide documentation and to resubmit the charge."[54]

The court held that Capital One's investigation of the original charge was reasonable.[55] In addition, the court held that the rebilled charge by U.S. Bank was "not subject to the requirements of the FCBA or Regulation Z."[56] The court stated that the Humphreys' claim that the rebilled charge was different than the original billing dispute was conclusory.[57] Citing Regulation Z's "no further responsibilities" provision, the court held that Capital One had no responsibility for the rebilled charge since it "was by the same vendor, for the same amount, for the same service—a real estate appraisal in connection with [the Humphreys'] refinancing application."[58]

While the consumer lost in *Humphrey,* the consumer prevailed in *Krieger v. Bank of America*.[59] In *Krieger*, William Krieger's credit card information was stolen via an elaborate phone scam, and his credit card was charged $657 for a Western Union money transfer.[60] He immediately notified his card issuer, Bank of America, of the fraudulent charge.[61] Krieger initially got the runaround, but Bank of America finally credited Krieger's account the $657 and began an investigation into the alleged fraudulent transaction.[62]

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51. *Id*. at *1–2.
52. *Id*. at *2, *5. Pleading in the alternative, the Humphreys alleged that a reasonable investigation was not completed by Capital One. Nonetheless, the court found that a reasonable investigation was completed by Capital One on the original charge by U.S. Bank.
53. *Id*. at *2.
54. *Id*.
55. *Id*. at *5.
56. *Id*.
57. *Id*.
58. *Id*.
59. Krieger v. Bank of Am., N.A., 890 F.3d 429, 437 (3d Cir. 2018).
60. *Id*. at 434–35.
61. *Id*. at 435.
62. *Id*.

Approximately a month after the credit to Krieger's account, Bank of America rebilled the charge after receiving a sales slip from Western Union for the transaction.[63] The sales slip included Krieger's email, home address, and phone number.[64] Despite Krieger's request that Bank of America remove the rebilled charge, Bank of America considered the charge valid since the Western Union sales slip matched Krieger's account information.[65]

Like the Humphreys, Krieger brought a suit against his credit card issuer under the FCBA.[66] In *Krieger*, the main FCBA issue was whether Krieger was entitled to a new reporting timeline based on the rebilled charge as opposed to the original charge.[67] Although Bank of America prevailed in the District Court, the Third Circuit ruled in favor of Krieger.[68] The Third Circuit held that Krieger was entitled to a new sixty-day reporting period from the statement with the reversed credit.[69] In addition, the court stated that requiring a consumer to state a claim for a billing error that he thought had been corrected would undermine the purpose of the FCBA.[70] Furthermore, the court detailed that when the creditor conveys information to the consumer in an ambiguous manner, as opposed to a clear and conspicuous manner, the '"ambiguities . . . [are] resolved in the favor of the consumer.'"[71]

In a footnote, the Third Circuit in *Krieger* addressed *Humphrey.*[72] The court stated that the decision in *Humphrey* was inapplicable to a case, such as *Krieger*, where "a consumer claims the creditor never performed a reasonable investigation at any point in the process."[73] The *Krieger* court further indicated, in another footnote, that they would not address whether Krieger's pleading concedes that Bank of America conducted a reasonable investigation because it was not addressed by the District Court.[74]

63. *Id*.
64. *Id*.
65. *Id*. at 435–36.
66. *Id*. at 432; *see also* Humphrey v. U.S. Bank, N.A., No. 11-CV-272-GKF-PJC, 2012 WL 3686272, at *5 (N.D. Okla. Aug. 24, 2012) (stating that the Humphreys asserted several claims, including "claims [based on] violation of the Fair Credit Billing Act . . . against Capital One").
67. *Krieger*, 890 F.3d at 436.
68. *Id*. at 445.
69. *Id*. at 439.
70. *Id*. at 441.
71. *Id*. (quoting Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384, 394 (3d Cir. 2002)).
72. *Id.*
73. *Id*.
74. *Id*.

From both *Krieger* and *Humphrey*, it is clear that the reasonable investigation and the "no further responsibility" provisions in the FCBA and Regulation Z are interrelated.[75] Consequently, it becomes imperative to determine where the line should be drawn between the two provisions, especially when the billing error is rebilled.

III. ANALYSIS

In order to determine where the line should be drawn between the provision detailing "no further responsibility" for the creditor and an initial reasonable investigation for a billing error, it is necessary to first inquire as to why a reasonable investigation is needed in the first place. In corporate America, there are few situations, absent a contractual or fiduciary obligation, that require companies to conduct investigations as does the Fair Credit Billing Act (FCBA).[76] Nevertheless, in corporate law, the duty of loyalty—specifically, the duty to monitor—requires an affirmative obligation for a corporation's board of directors to at least set up an effective compliance system.[77]

After briefly discussing the duty of loyalty in corporate law, this Note will use a similar framework to argue that a creditor should treat a rebilled billing error, regardless if made by the same merchant or the creditor, as a separate billing error. In other words, the *Krieger* approach to rebilled billing errors—where the rebilled amount was a distinct billing error[78]—should be adopted. Consequently, any reasonable investigation conducted into the original billing error cannot shield the creditor from its obligation to perform another reasonable investigation. Moreover, the "no further responsibility" section in the FCBA and its promulgated regulation, Regulation Z, would not apply to the rebilled billing error because the original billing error and the rebilled billing error would be two separate claims.[79]

75. *See id.* at 429; Humphrey v. U.S. Bank, N.A., No. 11-CV-272-GKF-PJC, 2012 WL 3686272 (N.D. Okla. Aug. 24, 2012).

76. *See generally* Cecil J. Hunt, II, *The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 WAKE FOREST L. REV. 719 (1994) (discussing the history of fiduciary duties in the banking industry and arguing that a general fiduciary relationship should exist when a bank is servicing the borrower or depositor).

77. *See infra* Part III.A.

78. *See Krieger*, 890 F.3d at 439 ("[W]here a creditor removes a charge from a consumer's statement only later to reinstate it, the consumer has [sixty] days after receiving the first statement on which the reinstated charge appears to provide written notice of the billing error.").

79. *See infra* Part III.B.

A. Duty to Monitor in Corporate Law

Despite no clear definition of the duty of loyalty in corporate law,[80] generally the "[d]uty of loyalty is a director's responsibility to act at all times in the best interests of [his or her] company."[81] There are several causes of action under the duty of loyalty,[82] but the duty to monitor is of particular interest to this Note's analysis.[83] In *Caremark*, the Delaware Court of Chancery specified the high standard of liability for the failure to monitor: "[O]nly a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a *reasonable* information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability."[84] Further caselaw detailed two precise scenarios for when a corporate director would face liability: "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, [directors] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[85] In both scenarios, the directors had to make a conscious decision to not appropriately monitor.[86] While *Caremark* and its progeny transformed the standard for

80. E. Norman Veasey, *Duty of Loyalty: The Criticality of the Counselor's Role*, 45 BUS. LAW. 2065, 2067 (1990).

81. Will Kenton, *Duty of Loyalty*, INVESTOPEDIA (Mar. 29, 2018), https://www.investopedia.com/terms/d/duty-loyalty.asp [https://web.archive.org/web/20200321000427/https:/www.investopedia.com/terms/d/duty-loyalty.asp]; *see also Duty of Loyalty*, BOUVIER L. DICTIONARY (Desk ed. 2012) ("[Duty of Loyalty] can generally be described as the 'undivided and unselfish' duty to act in the best interests of the principal."). The duty of loyalty concept can also be applied to agents, such as trustees and corporate officers, but, for simplicity, this Note focuses solely on a corporate director's duty of loyalty.

82. A director who usurps a corporate opportunity or makes a self-interested transaction can also breach the duty of loyalty. *Duty of Loyalty,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/duty_of_loyalty [https://web.archive.org/web/20200321000603/https:/www.law.cornell.edu/wex/duty_of_loyalty].

83. The duty to monitor was initially a duty of care cause of action. Nonetheless, in 2006, the Delaware Supreme Court clarified that the duty to monitor was a duty of loyalty claim. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

84. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996) (emphasis added).

85. *Stone*, 911 A.2d at 370.

86. *See id.* ("In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.").

corporate compliance monitoring, its effects are still deliberated to this day—over two decades later.[87]

The prominent Business Judgment Rule (BJR), which is a presumption that the board acted and relied on good faith reliance,[88] defeats a duty to monitor claim when the claim is based on a business risk.[89] For example, if shareholders claim that a bank's board of directors violated their duty to monitor because the company engaged in a risky subprime mortgage scheme, those claims would be dismissed based on the BJR.[90] Accordingly, a prima facie duty to monitor claim "generally only [arises] where the failure to investigate involves red flags that concern fraudulent or criminal conduct rather than business risk."[91]

In *Stone v. Ritter*, shareholders of AmSouth Bancorporation ("AmSouth") filed a derivative suit against AmSouth's board of directors.[92] The shareholders alleged that the directors breached their duty to monitor employees who failed to comply with federal bank and

87. *See* Donald C. Langevoort, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 741 (2018) (noting that *Caremark* "remains part of the canon of authorities regularly cited as the impetus to taking compliance seriously . . . . But it is also cited and embraced by critics . . . who see unchecked costs to the obsession with compliance and wish to return to more business judgment deference to boards and managers . . . ."). *See generally* Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. ILL. L. REV. 859 (2013) (looking at corporate compliance after the 2008 recession); Darian M. Ibrahim, *Intrapreneurship*, 73 WASH. & LEE L. REV. 1741, 1778–82 (2016) (arguing that "Delaware judges should inspire directors to monitor for all important risks to their businesses, but only hold them liable for failing for law compliance. In these ways, then, the duty to monitor can speak—albeit softly—to the asymmetric information problem"); Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine*, 38 FLA. ST. U. L. REV. 209 (2011) (arguing that the duty to monitor scope must be expanded).

88. *See Business Judgment Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/business_judgment_rule [https://web.archive.org/web/20200321000744/https:/www.law.cornell.edu/wex/business_judgment_rule] ("[A] court will uphold the decisions of a director as long as they are made (1) in good faith, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that the director is acting in the best interests of the corporation.").

89. *In re* Citigroup Inc. Shareholder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009).

90. *See id.* at 131 ("To impose oversight liability on directors for failure to monitor 'excessive' risk would involve courts in conducting hindsight evaluations of decisions at the heart of the business judgment of directors.").

91. Louis J. Bevilacqua, *Monitoring the Duty to Monitor*, N.Y. L. J. (Nov. 28, 2011), https://www.cadwalader.com/uploads/books/00775db921691af892a2600dd02c83f5.pdf [https://web.archive.org/web/20200321000856/https:/www.cadwalader.com/uploads/books/00775db921691af892a2600dd02c83f5.pdf].

92. Stone v. Ritter, 911 A.2d 362, 364 (Del. 2006).

anti-money laundering rules.[93] As a result, AmSouth paid fifty million dollars in fines and civil penalties, while the directors remained unscathed.[94]

The Delaware Supreme Court determined that the AmSouth shareholders did not have a duty to monitor cause of action against the directors.[95] The court noted that an outside accounting firm found that the board of directors not only implemented a compliance system but also "exercised oversight by relying on periodic reports" from the employees responsible for compliance.[96] Even though individual AmSouth employees may not have informed the board when necessary, the Delaware Supreme Court refused to hold the directors liable since they met the *Caremark* standard.[97]

Finding liability in a duty to monitor case "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[98] Consequently, it is not suggested that the billing error resolution process should go through scrutiny similar to a duty to monitor claim against a corporate director or that the process should go through similar litigation steps in asserting a duty of loyalty claim.[99] However, discussing the duty to monitor standard illustrates the importance of having an investigative process. Similarly, the investigative *process* regarding alleged billing errors and rebilled billing errors matters.[100]

93. *Id*. at 364–65.

94. *Id*. at 365.

95. *See id.* at 373 ("[W]e hold that the Court of Chancery properly . . . dismissed the plaintiffs' derivative complaint for failure to excuse demand by alleging particularized facts that created reason to doubt whether the directors had acted in good faith in exercising their oversight responsibilities.").

96. *Id.* at 372–73.

97. *Id*. at 373.

98. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

99. In Delaware, shareholders must make demand on a company's board of directors or show that demand would be futile in a derivative duty of loyalty suit. *See* DEL. CH. CT. R. 23.1 ("The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort."). In Model Business Corporation Act jurisdictions, shareholders generally must make demand on the board to assert a duty of loyalty claim. *See* MODEL BUS. CORP. ACT § 7.42 (AM. B. FOUND. 2003) ("No shareholder may commence a derivative proceeding until . . . a written demand has been made upon the corporation to take suitable action . . . .").

100. *See infra* Part III.B.

B. Duty to Monitor Approach for Rebilled Billing Errors

The mechanics of the duty to monitor protections and the billing error protections, which are found in the FCBA, are astoundingly similar. The duty to monitor aims to protect the corporation,[101] while the FCBA aims to protect consumers.[102] Both protections are triggered from some reporting process—compliance reporting in the duty to monitor context[103] and proper reporting of an alleged billing error by the consumer in the FCBA context.[104] Once the trigger is initiated, a resolution is sought.[105] In duty to monitor instances, the resolution is hopefully resolved through an internal compliance system.[106] On the other hand, when a consumer properly informs the creditor of a billing error, the creditor has two resolution options: the creditor can either immediately rectify the billing error or the creditor can conduct a reasonable investigation into the matter.[107] If the creditor decides to take the latter option, after the reasonable investigation, the creditor can either cure the billing error, in whole or in part, or identify the alleged billing error as a legitimate transaction.[108] After the creditor completes one of the resolution options, the creditor has no further responsibility regarding the billing error.[109]

While the duty to monitor has overtones, the FCBA protection against billing errors has its own nuances.[110] In particular, although the billing error resolution procedure seems straightforward, complications arise when the creditor provides temporary relief or preliminary decisions as to the legitimacy of the billing error.[111] As seen in *Humphrey*,[112] a disagreement can arise about whether the creditor has any further responsibility after the billing error is initially rectified but is

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101. Eric J. Pan, *A Board's Duty to Monitor*, 54 N.Y.L. SCH. L. REV. 717, 720 (2010).

102. 15 U.S.C. § 1601(a) (2018).

103. *See, e.g.*, Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006) ("[The company's] Board at various times enacted written policies and procedures designed to ensure compliance. . . . [a]mong other things, . . . [a] [p]olicy direct[ed] all . . . employees to immediately report suspicious transactions or activity . . . .").

104. 15 U.S.C. § 1666(a).

105. *Id.*; Pan, *supra* note 101, at 720.

106. *See, e.g.*, *Stone*, 911 A.2d at 373 ("[T]he Board received and approved relevant policies and procedures, delegated to certain employees and departments the responsibility for . . . monitoring compliance, and exercised oversight by relying on periodic reports from them.").

107. 15 U.S.C. § 1666(a)(B).

108. *Id*.

109. *Id*.

110. *See supra* Part II.B (describing case law regarding this controversy).

111. *Id.*

112. *Id*.

later rebilled by either the creditor or the merchant. To assist in resolving this dispute, it is helpful to juxtapose the duty to monitor standard against the FCBA resolution standard for billing errors.

In the duty to monitor context, directors must take reasonable steps to monitor corporate activities.[113] In order to illuminate how the duty to monitor liability merely relies on the corporation's board to make reasonable and good faith efforts to implement a monitoring system,[114] a simple author-created hypothetical may be used. Suppose an employee, Michael, of a public Fortune 500 company, Woof Paper Company, is embezzling funds from Woof Paper.[115] Specifically, Michael is marking up his corporate travel expenses reimbursements ten to twenty percent of the actual value. Luckily, Woof Paper has a compliance email address that is supposedly monitored by the human resource manager, Toby. One of Michael's co-workers, Angela, gets wind of Michael's conduct and sends an email to the compliance email address detailing Michael's illegal activity. At this point, in terms of the duty to monitor, it would seem that Woof Paper's directors would not have anything to worry about. However, later it is revealed that the directors set up the compliance email address but never assigned Toby or anyone else in the company the task of checking the compliance inbox or of completing compliance investigations. Consequently, under the duty of monitor principles outlined in *Caremark* and *Stone*, it is likely that the directors would be liable for a breach of their duty to monitor.[116] Phantom monitoring simply would not be enough for Woof Paper's directors to escape liability.[117]

Similarly, a phantom resolution of a billing error should not suffice. Analogous to the duty to monitor for a corporate director,[118] the FCBA

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113. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (citing Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003)) ("[I]mposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.").

114. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) ("[A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists . . . .").

115. The characters in this hypothetical fact pattern are borrowed from the television show *The Office* (U.S. version).

116. *C.f. Stone,* 911 A.2d at 373 (showing that the implementation of a compliance system and relying on periodic reports were reasonable steps to ensure monitoring).

117. Due to the complex nature of corporate processes, "*Caremark* was wise to demand almost nothing beyond asking that some compliance system exists . . ." Langevoort, *supra* note 87, at 729–30.

118. *See Stone*, 911 A.2d at 370 ("Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith." (internal citations omitted)).

requires that a creditor investigate billing errors and invokes an affirmative obligation to inquire into the consumer's billing error.[119] In fact, a Senate Committee Report regarding the FCBA indicates that "[t]he requirement for an investigation is intended to preclude a creditor from making an automatic form letter response without actually looking into each billing inquiry."[120] Congress clearly intended that the consumer could rely upon the creditor to resolve consumer billing errors.[121] But, as seen in *Krieger* and *Humphrey*, the creditor is able to hide behind a loophole in the FCBA by telling the consumer, "Sorry, we *no longer have any further responsibility*"[122] when a rebilled billing error is assessed to the consumer's account. Nonetheless, just like the duty to monitor calls for a reasonable effort to supervise corporate tribulations,[123] the FCBA charges the creditor to safeguard its consumers from billing errors in a reasonable manner.[124]

If the rebilled transaction was treated as a separate billing error rather than one with initial billing error, then the consumer would still be allowed the statutory protections available under the FCBA.[125] If the rebilled transaction was treated as an independent, separate transaction,

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119. *See* Krieger v. Bank of Am., N.A., 890 F.3d 429, 439 (3d Cir. 2018) ("'Allowing lenders to violate' their statutory obligations 'but avoid liability if they successfully concealed the violation from the debtor . . . would undermine the core remedial purpose of TILA . . . .'" (quoting Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998))). The Fair Credit Billing Act (FCBA) is a subsection of the Truth and Lending Act (TILA). Truth in Lending Act, Pub. L. 90-321 § 1 82 Stat. 146, 146 (1968) (current version at 15 U.S.C. § 1601 (2018)).

120. S. REP. NO. 93-278, at 5 (1973).

121. *Id.* at 1–2 ("The legislation seeks to establish a system for insuring that billing disputes or inquiries are resolved. . . . This objective is achieved through the following[:] . . . Creditors are required . . . to resolve [billing] inquires. . . . An inquiry is resolved by either correcting the customer's bill or explaining why the original bill is correct.").

122. *See* 15 U.S.C. § 1666(a)(B) ("After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error."); *see also* 12 C.F.R. § 1026.13(h) (2020) ("A creditor that has fully complied with the requirements of this section has no further responsibilities . . . if a consumer reasserts substantially the same billing error.").

123. *See supra* Part III.A.

124. *See* S. REP. NO. 93-278 (indicating that Congress intended that billing errors would be resolved by creditors); *see also* 12 C.F.R. § 1026.13(f) (requiring a reasonable investigation "if [a] different billing error or no billing error occurred").

125. Protections include restricting the creditor from demanding payment of the disputed amount and associated finance charges from the consumer before the billing error is resolved and not closing the consumer's account prior to resolution of the billing error resolution. 15 U.S.C. § 1666(c)–(d).

as it was in *Krieger*,[126] the credit card company could not rely on the "no further responsibility" provision and would have to either provide permanent relief or conduct a reasonable investigation into the rebilled transaction.[127] Just as the duty to monitor aims to protect the corporation, the FCBA is designed to protect the consumer. By allowing creditors to claim that rebilled transactions are a part of the same billing error originally initiated, creditors are allowed to circumvent their duty[128] to resolve consumers' billing errors.

C. Civil Procedure Approach to Rebilled Billing Errors

Support for embodying the *Krieger* approach to rebilled billing errors can also be found by exploring the principle of claim preclusion.[129] The doctrine of claim preclusion bars a second claim when a first claim has been disposed on a final judgement on the merits.[130] "On the merits" refers to a ruling "after hearing all of the relevant facts and evidence presented in court."[131] To qualify for claim preclusion, the second claim must be between the same two initial parties, and the second claim must arise out of the same transaction or occurrence as the first claim.[132]

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126. *See* Krieger v. Bank of Am., N.A., 890 F.3d 429, 439 (3d Cir. 2018) ("[W]here a creditor removes a charge from a consumer's statement only later to reinstate it, the consumer has [sixty] days after receiving the first statement on which the reinstated charge appears to provide written notice of the billing error.").

127. This Note does not analyze whether the reasonable investigation guidelines set out in *Official Interpretation for 1026.13—Billing Error Resolution*, *supra* note 41, are sufficient for rebilled billing errors opposed to initial billing errors.

128. *See* 15 U.S.C. § 1666(a) ("the creditor shall . . . (i) make appropriate corrections in the account of the [consumer] . . . or (ii) send a written explanation or clarification to the [consumer], after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account . . . was correctly shown . . . .").

129. The Latin term for claim preclusion is res judicata, which means "judged matter." This sub-section will compare judicial claim preclusion and the "no further responsibility" section of the Fair Credit Billing Act as well as corresponding section in Regulation Z. For an excellent primer on claim preclusion, including its history and modern application, *see* Kevin M. Clermont, *Res Judicata As Requisite for Justice*, 68 RUTGERS U.L. REV. 1067 (2016). *C.f.* Stephen C. DeSalvo, Note, *Invalidating Issue Preclusion: Rethinking Preclusion in the Patent Context*, 165 U. PA. L. REV. 707, 729–32 (2017) (arguing that claim preclusion should apply "when a patent is held not invalid in an earlier proceeding").

130. *Res Judicata*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/res_judicata [https://web.archive.org/web/20200321001123/https:/www.law.cornell.edu/wex/res_judicata].

131. *Id*.

132. 63 OHIO JUR. 3D *Judgments* § 372 (2018).

Claim preclusion promotes efficiency for both the litigants and the court system.[133] Further, analogous to stare decisis, claim preclusion seeks "to maintain stability in human relations by giving repose to litigation, and . . . to prevent the constant reconsideration of settled questions . . . ."[134] Similarly, the FCBA's "no further responsibility" section promotes efficiency for the creditor and the consumer.[135] As in claim preclusion, once the creditor rectifies the billing error or determines the billing error is actually correct, in part or in whole, then the matter is disposed as far as the FCBA is concerned.[136] But when temporary relief is given to the consumer and the final resolution differs, the matter may not have been resolved using all "relevant facts and evidence presented."

When an aggrieved party has not had a full and fair opportunity to be heard, claim preclusion does not apply.[137] Likewise, when the creditor provides temporary relief and that relief is deemed sufficient for the FCBA, the consumer is not being allowed a full and fair opportunity to be heard. The critic will argue that even if there is a reversal of the preliminary relief, the creditor will base the reversal on a reasonable investigation. But will the creditor actually conduct a *reasonable* investigation?

If the creditor could claim that they had no further responsibility, even without completing any investigation,[138] then there is clearly no statutory requirement that they complete a *reasonable* investigation. The Consumer Financial Protection Bureau (CFPB) not only identifies eight steps that the creditor can take in completing a reasonable investigation for an unauthorized charge but mandates that "[the] creditor must conduct a reasonable investigation before it determines that no billing error occurred or that a different billing error occurred from that

133. Allen v. McCurry, 449 U.S. 90, 94 (1980) (citing Montana v. United States, 440 U.S. 147, 153–54 (1979)); *see also* Clermont, *supra* note 129, at 1090 ("The most influential values of justice [in claim preclusion] . . . are procedural efficiency and fairness." (internal citations omitted)).

134. Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929) (internal citations omitted).

135. *See supra* Part II (discussing legislative intent).

136. *See* 15 U.S.C. § 1666(a)(B) (2018) ("After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error."); *see also* 12 C.F.R. § 1026.13(h) (2020) ("A creditor that has fully complied with the requirements of this section has no further responsibilities.").

137. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 480 (1982) (internal citations omitted).

138. *See supra* Part III.B.

asserted."[139] The CFPB even mentions that the creditor can seek the consumer's assistance while it is conducting the reasonable investigation.[140] However, all of that guidance could be lost when the creditor has its own discretion in conducting its own investigation—reasonable or not.[141] As former Representative John Dingell eloquently stated, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."[142]

While the consumer protection in the FCBA is nowhere close to the intricacies of the United States court system,[143] the doctrine of claim preclusion illuminates the need to have rebilled billing errors treated as a separate billing error, as seen in *Krieger*.

D. Challenges to the Krieger *Approach for Billing Errors*

If the *Krieger* approach was adopted, creditors would likely argue that the process would create an undue burden and would harm—not

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139. *Official Interpretation for 1026.13—Billing Error Resolution*, *supra* note 41. Some of the eight steps include:

> Reviewing the types or amounts of purchases made in relation to the consumer's previous purchasing pattern . . . where the purchases were delivered in relation to the consumer's residence . . . where the purchases were made in relation to where the consumer resides or has normally shopped . . . [and] [c]omparing any signature on credit slips . . . to the [consumer's] signature . . .

Id.

140. *Id.*

141. *C.f.* Berman v. Nationsbank of Del., N.A., No. CIV. A. 97-6645, 1998 WL 88342, at *2 (E.D. Pa. Mar. 2, 1998) (stating that "[u]nder the statutory scheme, it is ultimately for the creditor to determine whether a charge is valid . . . . A creditor who complies with the procedural requirements of the Act regarding an alleged billing error has no further legal responsibility.").

142. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm, on Admin. Law & Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) https://babel.hathitrust.org/cgi/pt?id=pur1.32754075285134&view=1up&seq=3 [https://web.archive.org/web/20200624063728/https://babel.hathitrust.org/cgi/pt?id=pur1.32754075285134&view=1up&seq=3].

143. One outspoken commenter succinctly pinpoints these intricacies and the resulting consequences:

> The civil justice system today—whether dealing with simple or complex matters—takes so long and costs so much that it no longer serves as an effective tool in regulating society's legal matters. In the end, the system has become so dysfunctional that it's virtually impossible for the average person to rely on it as a means of resolving disputes.

Anthony V. Curto, Opinion, *No Justice for All—How Our Civil Justice System Is Failing Americans*, FOX NEWS (May 7, 2015), https://www.foxnews.com/opinion/no-justice-for-all-how-our-civil-justice-system-is-failing-americans [https://web.archive.org/web/20200321001236/https:/www.foxnews.com/opinion/no-justice-for-all-how-our-civil-justice-system-is-failing-americans].

protect—the consumer and would therefore be unnecessary. In terms of harming the consumer, the creditor may argue that adopting the *Krieger* approach would hinder consumers' provision of temporary relief for alleged billing errors and would increase overhead costs that would be passed on to the consumer. Each one of these qualms will be addressed.

Creditors would likely claim that they would be burdened if they treated rebilled billing errors distinctly.[144] Similar protests were common practice prior to the passage of the FCBA.[145] Nonetheless, just as Congress reasoned in 1974, the goal "to protect the consumer against inaccurate and unfair credit billing and credit card practices"[146] should prevail over these grumblings. In fact, the creditors themselves brought on the FCBA with some of their inhuman practices in handling billing errors.[147] Over forty years later, the creditors are now trying to exploit a loophole in the FCBA.[148] But, just as consumers prevailed in 1974, consumers should prevail in 2020—closing this loophole once and for all.

Another conceivable claim by adversaries is that closing the loophole is trivial. A similar argument was made in a 1970's FCBA hearing.[149] In

144. *See* Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ [http://web.archive.org/web/20200313213856/https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/] ("In 1972, against the backdrop of growing compliance costs, slowing economic growth and rising wages, a community of leading CEOs formed the Business Roundtable, an organization devoted explicitly to cultivating political influence. . . . This sense of an existential threat motivated the leading corporations to engage in serious political activity.").

145. *Fair Credit Billing*, *supra* note 15, at 246 (prefacing a question on the topic, Sen. Proxmire observed that "[s]ome bankers argue that if they became subject to cardholder claims against merchants with respect to credit card purchases, the bank would have to become a policing bureau or consumer protection agency and that they are not equipped to perform this function"); *see also id.* at 285 (statement of Prof. John A. Spanogle) ("It undoubtedy [sic] will be urged that any such step will not be feasible—that banks cannot handle such a program, and that any reform will cut off credit to needy consumers. There is no objective data to justify such scare tactics.").

146. H.R. 11221, 93d Cong. § 302 (1974).

147. *Fair Credit Billing*, *supra* note 15, at 1 (indicating that Sen. Proxmire said some creditors lost their "human element" in the expansive credit and technology era).

148. *See* Krieger v. Bank of Am., N.A., 890 F.3d 429, 439 (3d Cir. 2018) (quoting Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998) and stating that allowing lenders to avoid their statutory obligations, while concealing the violation from consumers, would undermine the purpose of the Truth in Lending Act). The Fair Credit Billing Act is a subsection of the Truth and Lending Act. Truth in Lending Act, Pub. L. 90-321 § 1 82 Stat. 146, 146 (1968) (current version at 15 U.S.C. § 1601 (2018)).

149. *Fair Credit Billing*, *supra* note 15, at 399 (responding to a constituent's statement, Sen. Proxmire remarked, "I got from a number of you gentlemen, some of you

defending the FCBA against that position, Senator Proxmire stated, "[W]e are not just talking about something that is trivial, that a few people might feel might be a nice thing to have. This is something we find literally millions of people are plagued by, and they want some land of redress."[150] Since there is no available aggregated public data regarding the number of consumers that are afflicted by rebilled billing errors, it is difficult to measure the exploitation of the loophole. Nonetheless, it is hard to imagine that creditors will not take advantage of a loophole that benefits them.[151]

Two other possible criticisms of adopting the *Krieger* approach are that it will deter creditors from granting temporary credits for disputed amounts and that it will pass the overhead costs onto consumers. However, the abovementioned criticisms are eerily similar to the Business Judgment Rule (BJR) in the duty to monitor context. The BJR is a presumption that the board of directors acted reasonably and in good faith.[152] In a fiduciary duty context, including a duty to monitor claim, "[the BJR] helps to guard a corporation's board of directors from frivolous allegations about the way it conducts business."[153] Likewise, the manner in which the corporation interacts with consumers once the billing error loophole is closed is entirely a business decision.[154]

If the creditor determines that it will not issue temporary credits, then the consumer may look to other creditors that handle billing errors differently.[155] Similarly, if the creditor decides to pass these costs off to

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gentlemen, at least, the notion that this was just well-intentioned legislation that serves a well-motivated purpose perhaps, but it does not serve much of an important purpose.").

150. *Id.*

151. *See, e.g.*, Marcus Baram, *Big Banks Are Exploiting a Risky Dodd-Frank Loophole That Could Cause a Repeat of 2008* (June 29, 2018), https://www.fastcompany.com/90178556/big-banks-are-exploiting-a-risky-dodd-frank-loophole-that-could-cause-a-repeat-of-2008 [http://web.archive.org/web/20200314182929/https://www.fastcompany.com/90178556/big-banks-are-exploiting-a-risky-dodd-frank-loophole-that-could-cause-a-repeat-of-2008] (noting the Dodd-Frank credit default swap loophole).

152. *See Business Judgment Rule*, *supra* note 88.

153. Will Kenton, *Business Judgment Rule*, INVESTOPEDIA (Nov. 23, 2019), https://www.investopedia.com/terms/b/businessjudgmentrule.asp [http://web.archive.org/web/20200421181922/https://www.investopedia.com/terms/b/businessjudgmentrule.asp].

154. *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2282 (2018) (noting that American Express chooses to charge higher merchant fees than its competitors to offset the cost of its customer rewards program in order "[t]o maintain the loyalty of its cardholders . . . .").

155. *See* Jessica Dickler, *Millennial Customers Will Flee If Their Bank Accounts Are Hacked*, CNBC (June 14, 2016), https://www.cnbc.com/2016/06/13/millennial-customers-will-flee-if-their-bank-accounts-are-hacked.html

consumers by cutting benefits or increasing fees, the consumer may look to another creditor lacking those passed on costs to the consumer.[156] "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."[157]

E. Creditors Benefit from Closing the Loophole by Mitigating Future Litigation Risks

Undoubtably, this Note focuses on closing the loophole from the perspective of the consumer as well as general consumer protection principles. Nonetheless, it would be careless to fail to mention that the creditors themselves can also benefit by closing the loophole. By closing the loophole, creditors benefit by mitigating the potential litigation risk of unresolved rebilled billing errors, or even worse for creditors, the risk of a class action lawsuit regarding their practices.[158] In fact, creditors

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[http://web.archive.org/web/20200314184122/https://www.cnbc.com/2016/06/13/millennial-customers-will-flee-if-their-bank-accounts-are-hacked.html] ("A study showed that [twenty-nine] percent of millennials will close all accounts with that bank after [a single fraud] incident, compared with about [twenty-two] percent of all U.S. consumers.").

156. *See* Herb Weisbaum, *Major Credit Card Companies Are Cutting Their Perks. Here's What You Need to Know*, NBC NEWS (June 18, 2018), https://www.nbcnews.com/better/business/major-credit-card-companies-are-cutting-their-perks-here-s-ncna884406 [http://web.archive.org/web/20200421182256/https://www.nbcnews.com/better/business/major-credit-card-companies-are-cutting-their-perks-here-s-ncna884406] (noting that Chase and Discover eliminated their price protection benefits and that Citi reduced their price protection coverage, but American Express improved their price protection benefit); *see also* Matt Egan, *Wells Fargo Customers Are Fed up. They Could Yank Billions of Dollars in Deposits*, CNN BUS. (Oct. 10, 2018), https://www.cnn.com/2018/10/10/business/wells-fargo-bank-customers-scandal/index.html [http://web.archive.org/web/20200421182526/https://www.cnn.com/2018/10/10/business/wells-fargo-bank-customers-scandal/] ("Bank of America [deposit] customers complained about needless fees and poor customer service. About one in four Bank of America customers are at risk of leaving the bank . . .").

157. ADAM SMITH, *Of the Principle Which Gives Occasion to the Division of Labour*, *in* AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 5 (1776) (ebook), https://en.wikisource.org/wiki/The_Wealth_of_Nations/Book_I/Chapter_2 [http://web.archive.org/web/20200314185216/https://en.wikisource.org/wiki/The_Wealth_of_Nations/Book_I/Chapter_2].

158. See Michael Hiltzik, *Column: Banks and Credit Card Companies Really Hate Class-action Lawsuits. Will Trump Help to Outlaw Them?*, L.A. TIMES (Apr. 14, 2017), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-class-action-dodd-frank-20170414-story.html [http://web.archive.org/web/20200314185945/https://www.latimes.com/business/hiltzik/la-fi-hiltzik-class-action-dodd-frank-20170414-story.html] (stating class action "settlements were a bigger hit to the banking defendants and often includes [sic]

have historically tried to reduce litigation costs by introducing mandatory arbitration clauses in their credit agreements with consumers.[159]

If closing the loophole would mitigate, or even prevent, future litigation, then why would creditors continue to exploit the loophole in the first place? First, some creditors may mitigate their potential litigation costs in another way, such as by implementing mandatory arbitration clauses,[160] as mentioned above, which would usually cover any billing error dispute.[161] Second, some creditors may choose to evade

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agreements to change their behavior so the abuses that were the targets of the lawsuits wouldn't happen again.").

159. Corrado Rizzi, *Should I Reject JP Morgan Chase's Binding Arbitration Agreement for Credit Card Disputes?*, CLASSACTION.ORG (June 14, 2019), https://www.classaction.org/blog/should-i-reject-jp-morgan-chases-binding-arbitration-agreement-for-credit-card-disputes [http://web.archive.org/web/20200314190625/https://www.classaction.org/blog/should-i-reject-jp-morgan-chases-binding-arbitration-agreement-for-credit-card-disputes]. For a brief overview of the effect of these agreements, *see* Kif Leswing, *How to Opt out of Arbitration for the New Apple Card (and Why You'd Want to)*, CNBC (Aug. 21, 2019 6:38 PM), https://www.cnbc.com/2019/08/21/apple-card-arbitration-agreement-how-to-opt-out.html [https://web.archive.org/web/20200624072820/https://www.cnbc.com/2019/08/21/apple-card-arbitration-agreement-how-to-opt-out.html]. Further, the Leswing article references the CFPB's 2015 Arbitration Study, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://web.archive.org/web/20200624072911/https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf], which is an in-depth, informative report and survey of the effects of arbitration agreements in consumer banking and lending.

160. Generally, a consumer is allowed a small-time window to opt out of a mandatory arbitration agreement, but the consumer must notify the creditor of their decision to opt-out. *See* Leswing, *supra* note 159, (stating that customers of the Goldman Sachs–sponsored Apple Credit Card had ninety days to opt-out of the mandatory arbitration agreement and could do so via a text-like message, phone, or mail). *See also* Jacob Passy, *Chase Is Bringing Forced Arbitration Clauses Back to Its Most Popular Credit Card*s, MARKETWATCH (June 15, 2019), https://www.marketwatch.com/story/chase-is-bringing-forced-arbitration-clauses-back-to-its-most-popular-credit-cards-2019-06-04 [https://web.archive.org/web/20190607141338/https://www.marketwatch.com/story/chase-is-bringing-forced-arbitration-clauses-back-to-its-most-popular-credit-cards-2019-06-04] (indicating that the majority of Chase credit card customers had approximately two months to opt-out of Chase's mandatory arbitration clause, and opt-out letters had to be sent via mail). Furthermore, some consumers, such as members of the military, may be shielded from mandatory arbitration clauses by other laws. *Id.* (citing *Servicemembers, Veterans, and Forced Arbitration,* NAT'L CONSUMER L. CTR., https://www.nclc.org/issues/service-members-forced-arbitration.html?mod=article_inline [https://web.archive.org/web/20200624072323/https://www.nclc.org/issues/service-members-forced-arbitration.html?mod=article_inline]).

161. *See* Rizzi, *supra* note 159*,* (quoting Chase's 2019 Arbitration Clause: "This arbitration agreement provides that all disputes between you and Chase must be resolved

the loophole because the short-term savings of forgoing an investigation are realized in the present, and the potential long-term costs are likely attenuated or not even thought of by the creditor.[162] This mentality led to fraudulent consumer accounts being opened at Wells Fargo.[163] While engaging in the practice of opening unauthorized accounts, Wells Fargo's front-line employees met performance expectations, its C-Suite rained in their bonuses, and its shareholders were beside themselves.[164] But, the bank is still calculating its financial losses from the illegal practice, and the toxic corporate culture at Wells Fargo remains.[165]

Nonetheless, the fraudulent activity displayed at Wells Fargo is by far more egregious than a creditor exploiting the billing error loophole.

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by BINDING ARBITRATION whenever you or we choose to submit or refer a dispute to arbitration"). *See also* Leswing, *supra* note 159 (quoting *Apple Card Customer Agreement*, GOLDMANSACHS.COM, at 15, https://www.goldmansachs.com/terms-and-conditions/Apple-Card-Customer-Agreement.pdf [https://web.archive.org/web/20200622204359/https://www.goldmansachs.com/terms-and-conditions/Apple-Card-Customer-Agreement.pdf]) ("You hereby knowingly and voluntarily WAIVE THE RIGHT TO BE HEARD IN COURT OR HAVE A JURY TRIAL on all Claims subject to this Agreement.").

162. *See* Eilene Zimmerman, *The Risks and Rewards of Short-Termism*, N.Y. TIMES (Nov. 4, 2015), https://www.nytimes.com/2015/11/05/business/dealbook/the-risks-and-rewards-of-short-termism.html[http://web.archive.org/web/20200314191006/https://www.nytimes.com/2015/11/05/business/dealbook/the-risks-and-rewards-of-short-termism.html] (discussing the effects of short-term oriented businesses decisions).

163. *See* Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, STAN. U. GRADUATE SCH. OF BUS. RES. PAPER NO. 17-1 2 (2019), https://ssrn.com/abstract=2879102 [http://web.archive.org/web/20200314191444/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879102] ("Branch employees were provided financial incentive to meet cross-sell and customer-service [daily] targets . . . . In September 2016, Wells Fargo announced that it would pay $185 million to settle a lawsuit . . . admitting that employees had opened as many as 2 million accounts without customer authorization over a five-year period." (internal citation omitted)). For a detailed account of the aftermath of the cross-selling scandal at Wells Fargo, see Tayan's complete research paper. *Id.*

164. *See id.* at 2–3 (describing the bonuses for both personal bankers and tellers and noting Elizabeth Warren's rebuke of former Wells Fargo CEO John Stumpf for increasing the value of his Wells Fargo shares and keeping his bonuses).

165. *See* Imani Moise, *Wells Fargo Workers Seek Washington's Help with Internal Gripes*, REUTERS (Feb. 26, 2020), https://www.reuters.com/article/us-wells-fargo-workers/wells-fargo-workers-seek-washingtons-help-with-internal-gripes-idUSKCN20K0JJ [http://web.archive.org/web/20200314192138/https://www.reuters.com/article/us-wells-fargo-workers/wells-fargo-workers-seek-washingtons-help-with-internal-gripes-idUSKCN20K0JJ] ("[In February 2020], the bank reached a $3 billion deal with U.S. authorities over the matter - the latest in a string of costly settlements and regulatory penalties. Since [2016] Wells Fargo has overhauled performance goals, compensation formulas and risk management. . . . However, [an] advocacy group says problems still exist . . . .").

First, exploiting the loophole may not be technically illegal, as was the case in *Humphrey*.[166] And second, the fraudulent activity displayed at Wells Fargo was wrongful conduct by the company and its employees.[167] In comparison, a creditor exploiting the billing error loophole is exacerbating the wrongful conduct of either: (1) a merchant who does not properly deliver goods or services; (2) a merchant who charges an incorrect amount; or (3) a criminal who is fraudulently using a consumer's credit card.[168] To the extent these differences minimize the "risk" of a creditor exploiting the billing error loophole, creditors may be more willing to "roll the dice" and hope the affected consumer simply abandons their pursuit to rectify the rebilled billing error.[169]

Finally, it should be noted that not all creditors will exploit the loophole, and some creditors may not even know about the loophole. However, since creditors are unlikely to advertise whether they will use the loophole or not,[170] it becomes essential for all creditors to be subject to the intended consumer protection for both initial and rebilled billing errors. For "[i]f men were angels, no government would be necessary."[171]

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166. *See* Humphrey v. U.S. Bank, N.A., No. 11-CV-272-GKF-PJC, 2012 WL 3686272, at *5 (N.D. Okla. Aug. 24, 2012) (holding the creditor had no further legal responsibility for the consumer's rebilled billing error).

167. *See* Tayan, *supra* note 163, at 3–5 (describing Well Fargo's unrealistic, unattainable goal framework and its detrimental decentralized corporate structure as identified in a 2017 independent investigation report).

168. *See* 15 U.S.C. § 1666(b)(1), (b)(3) (2018) (listing both fraudulent activity and undelivered goods and services as billing errors).

169. *See* Dan Holly & Sabine Vollmer, *Top Global Business Risks and How to Tackle Them*, FIN. MAG. (Dec. 14, 2018), https://www.fm-magazine.com/news/2018/dec/2019-business-risks-201820271.html [http://web.archive.org/web/20200314193225/https://www.fm-magazine.com/news/2018/dec/2019-business-risks-201820271.html] (noting "[r]egulatory change and heightened regulatory scrutiny" is the third largest global business risk, despite the "decline[] in importance in North America compared with previous years . . .").

170. *See* Will Kenton, *Loophole*, INVESTOPEDIA (Oct. 13, 2019), https://www.investopedia.com/terms/l/loophole.asp [http://web.archive.org/web/20200314194028/https://www.investopedia.com/terms/l/loophole.asp] ("Most loopholes will close in time, as those who have the power to do so rewrite the rules to cut off the opportunity for loophole advantage."). For a company taking advantage of a loophole, the company will want to minimize discussion of the loophole in fear that it might close.

171. THE FEDERALIST NO. 51 (James Madison). In Federalist 51, Madison argued that the government needs to have checks and balances along with separation of powers. Similarly, the Fair Credit Billing Act and Regulation Z both (1) provide the necessary checks and balances for creditors to handle billing errors and (2) allocate power and responsibilities to consumers and creditors to resolve billing errors.

IV. CONCLUSION

With the rise of identity theft incidents and security breaches in America,[172] it is essential to have proper consumer protection against unauthorized credit charges. Moreover, it is paramount that creditors protect consumers from merchants that do not deliver goods and services as originally agreed. These protections are one of the numerous reasons why consumers choose to use credit cards in lieu of traditional payment methods, such as checks and cash.[173] And by closing the billing error loophole currently exposed in the Fair Credit Billing Act, the aforementioned protections will be preserved as Congress originally intended in 1974.[174] Moreover, creditors benefit by closing the loophole since the costs of billing error litigation may be mitigated.[175] Nonetheless, if the loophole is left unchanged, it may become an increasingly common avenue for creditors to displace billing error liability among their very own consumers.[176]

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172. *See Identity Fraud Hits All Time High With 16.7 Million U.S. Victims in 2017, According to New Javelin Strategy & Research Study*, JAVELIN (Feb. 6, 2018), https://www.javelinstrategy.com/press-release/identity-fraud-hits-all-time-high-167-million-us-victims-2017-according-new-javelin [http://web.archive.org/web/20200314194518/https://www.javelinstrategy.com/press-release/identity-fraud-hits-all-time-high-167-million-us-victims-2017-according-new-javelin] (noting a rise in identity fraud victims from 2012 to 2017; with 16.7 million victims in the United States in 2017).

173. Brian O'Connor, *6 Reasons to Stop Using Cash and Start Using Credit Cards*, CREDITCARDS.COM (Oct. 26, 2017), https://www.creditcards.com/credit-card-news/6-reasons-use-credit-cards-instead-of-cash.php [http://web.archive.org/web/20200314194919/https://www.creditcards.com/credit-card-news/6-reasons-use-credit-cards-instead-of-cash.php] (citing security and consumer protection as two reasons for consumers to choose credit cards over cash. In particular, credit cards "also offer more protection than cash substitutes such as debit and prepaid cards and checks, because the money isn't taken immediately from your account"); *see generally* Gail Hillebrand, *Before the Grand Rethinking: Five Things to Do Today with Payments Law and Ten Principles to Guide New Payments Products and New Payments Law*, 83 CHI.-KENT L. REV. 769 (2008) (recommending statutory and regulatory changes to non-cash payment systems to strengthen consumer protection); Clayton P. Gillette & Steven D. Walt, *Uniformity and Diversity in Payment Systems*, 83 CHI.-KENT L. REV. 499 (2008) (analyzing the rules for various payment systems including credit cards, debit cards, and checks).

174. *See supra* Part II.

175. *See supra* Part III.E.

176. *See* Humphrey v. U.S. Bank, N.A., No. 11-CV-272-GKF-PJC, 2012 WL 3686272, at *5 (N.D. Okla. Aug. 24, 2012) (dismissing the consumer's Fair Credit Billing Act claim because the creditor had no further responsibility).