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The Impact of the Fair Credit Reporting Act

George S. King Jr.

of the party with the burden of proof will help deter parties from litigating when their causes are utterly without foundation. Much needless expense and time will thus be saved by both the judicial system and the parties themselves.

FRED H. MOODY, JR.

The Impact of the Fair Credit Reporting Act

A substantial part if not most of the routine commercial transactions that occur in this country everyday are between persons having no more than a minimal acquaintance with each other. To some degree this is a product of urbanization and mobility of the population, and, to that degree, dealing with strangers, or virtual strangers, should parallel the trend of increasing urbanization. At the same time, there is a trend of increasing credit transactions[1] and other transactions that have traditionally required at least one of the parties to have fairly extensive knowledge about the other party. The resultant information gap has been filled by various organizations, usually businesses known as credit bureaus or credit reporting agencies, which undertake to provide the information needed. Recently Congress determined that some regulation of these agencies is desirable and accordingly enacted the Fair Credit Reporting Act[2] (FCRA). The objective of this comment is to examine briefly the role played by credit reporting agencies, some of the problems that result, how the problems have been dealt with traditionally, and how the FCRA copes with them.

THE NATURE OF CREDIT REPORTING AND PROBLEMS IT CAUSES

The transactions in which credit reports are most frequently used—the granting of credit, the underwriting of insurance, and employment—all involve some degree of risk, and the purpose of the report is to assist in assessing it. Thus, the credit grantor is concerned with the risk of whether the person to whom he grants credit will pay when the obligation becomes due. The insurance underwriter is concerned about identifying as precisely as possible the degree of risk against which he

[1]*Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 571 (1970) [hereinafter cited as *House Hearings*].
[2]15 U.S.C. §§ 1681 to 1681t (1970).

is called upon to insure. The prospective employer is concerned with whether the job applicant will be the sort of employee that he needs.

These risks may be dealt with in several ways. For example, the credit grantor may be able to predict with fair accuracy that if he grants credit to everyone who requests it, he will be unable to collect ten percent of the money due him in any given year and will adjust the interest rate charged so that the ninety percent who do pay will pay enough for the lender to recover an amount equal to the total amount lent plus a reasonable return thereon. Such a method effectively minimizes the risk to the credit grantor if the nonpayment prediction is reasonably accurate, but in effect it transfers the burden of the nonpayment to the shoulders of the ninety percent who do pay. The values of our society are such that this result is inequitable if there exists another method of risk control that will more nearly result in each individual paying his own way. The optimum pay-your-own-way situation is for the credit grantor to lend only to those who are certain to pay in full and on time. Since the requisite certainty is impossible, most credit grantors use a combination of the two methods by which borrowers are categorized according to the predicted likelihood of timely repayment. Those categorized as unlikely to repay are not extended credit; those categorized as most likely to repay on time are granted credit at an interest rate that represents the value of the use of the money plus a small amount as a reserve against nonpayment by some members of the category. The less likely the members of the category are to repay, the larger will be the amount charged for nonpayment reserve. With this sort of system a critical determination is the categorization of a given transaction. To some extent this is controlled by the nature of the credit transaction itself—whether there is any collateral involved and what it is. The other major consideration is who the borrower will be—will he pay or not? Any prediction of the likelihood that any given person will pay must rest on some knowledge of that person. At this point the credit report is typically used to verify and supplement information that the credit applicant normally supplies about himself. A credit report to a prospective credit grantor will typically contain information about the subject's monetary worth, his income, his history of making payments, suits filed against him, and other miscellaneous information.[3]

[3] *Hearings on the Credit Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 21 (1968) [hereinafter cited as *Senate Hearings*].

The problem of the insurance underwriter and his approach to it are very similar to those of the credit grantor. The risks involved are somewhat different, but it is widely accepted that they can be reasonably controlled if the underwriter has sufficient information about the person or property to be insured. Thus the credit report on the applicant for life or automobile insurance will contain information that hopefully will illuminate his living and driving habits and the environment in which he spends most of his time or where his car is usually kept.[4]

The problem of the prospective employer is apt to be less well defined and his approach to it more subjective. His basic concern is with the reliability and honesty of the applicant, a concern shared by the credit grantor. Therefore, the nature of the report the employer seeks is very similar to that used by the credit grantor, although perhaps it contains more information about the applicant's living habits.

Until society's values change substantially enough that everyone has a right to credit, insurance, or employment on a basis that causes everyone to share the risks equally, it will be necessary for credit grantors, insurance underwriters, and employers to have information with which to classify and control these inherent risks. While in most cases the user of the credit report could himself gather most, if not all, of the information in the credit report, it is quicker and cheaper to buy a report from a credit reporting agency. Thus the role played by credit reporting agencies in our economy is valuable if not absolutely necessary.[5]

Despite their value to the economy, the use of credit reports is not without the potential for causing substantial harm. The user of a credit report is harmed anytime he foregoes a profitable transaction because of incorrect conclusions drawn from the report, but this type of injury has not generated much interests because its relative magnitude is not likely to be great, and it can be remedied for the most part in the market place. The credit report user can go elsewhere for his information and to some extent can pass on to his customers any losses occasioned by the unsatisfactory reports. On the other hand, the plight of the subject of the credit report has attracted substantial interest because he is more likely to fit the traditional concept of a victim.[6]

Three facets of credit reporting are potentially harmful to the subject of the report—the method used to gather the information, the dis-

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[4]*House Hearings* 478-85.

[5]*Id.* at 571.

[6]*See, e.g., House Hearings* 42-43, 59-61, 433-43, 626-31, 631-38.

semination of the information, and the accuracy of the information.

One source of information frequently used by credit reporting agencies is public records. Typically the agency is interested in records of lawsuits to which the subject is a party, recorded tax liens, bankruptcy or divorce proceedings, and criminal prosecutions. The primary danger to the subject in such cases is that the information may be inaccurate or incomplete. Thus in many jurisdictions the agency may pick up and put in the subject's file the fact that he has been named the defendant in a law suit but fail to disclose that the suit was settled or dropped because the court keeps no up-to-date records of such dispositions.[7] Since public records frequently do not adequately identify the individual, there may also be an increased risk of this sort of information getting into the file of the wrong subject if his name is a fairly common one. There is also some danger that the person who searches the public record and then makes an entry in the subject's file in the process will write down incorrect or misleading information.[8]

A large part of the information in a credit report comes from those who have previously granted credit to the subject. Businesses that regularly use credit reports normally agree to provide information about their dealings with customers to the credit reporting agency. Such information is usually provided upon request from the agency, but in some cases the business will report adverse information without request as a matter of course. A reporting agency that is allied with a collection agency may also have access to information about accounts placed for collection.[9] Usually when the subject applies for credit, employment, or insurance, he is required to give references, including the name of his bank, which the credit report user passes along to the credit reporting agency. Using that information, the agency then contacts the references and seeks to learn from them the nature of the credit granted, the highest amount granted, the promptness of payment, and the length of time the reference has dealt with the subject.[10] The transferring of information in this manner carries with it a certain potential for having erroneous or incomplete information included in the subject's file. To

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[7] *See Hearings on Commercial Credit Bureaus Before a Subcomm. of the House Comm. on Governmental Operations*, 90th Cong., 2d Sess. 10-11, 125 (1968).

[8] *See, e.g., House Hearings* 336-38.

[9] In the 130 largest cities in the United States, 66% of the credit reporting agencies affiliated with the Associated Credit Bureaus of America are owned commonly with collection agencies. *Senate Hearings* 42.

[10] *See, e.g.*, the commonly used forms in *Senate Hearings* 143-245.

begin with, the information can be no more accurate in the agency's file than it was in the referrer's file, and the accuracy of record-keeping systems of various referrers may vary widely. Because the information is frequently transmitted by low-level clerical personnel over the telephone, the opportunity for transmission and identity errors may be enhanced. Finally, there is also some danger that the referrer will deliberately give erroneous information because of some dispute with the subject.

A third form of information-gathering that is widely used in preparing reports for prospective employers, insurance underwriters, and, to a lesser extent, credit grantors is the interviewing of persons who know or know about the subject. Current or previous employers of the subject will be interviewed to determine the subject's work record, a key inquiry frequently being whether the subject would be rehired by the previous employer and in what position.[11] Neighbors and fellow employees are frequently interviewed for the purpose of inquiring into the personal habits and reputation of the subject with emphasis being placed on the subject's drinking habits, his moral character, and the environment in which he lives.[12] Occasionally the subject himself or a member of his household will be interviewed,[13] but for the most part this practice seems to be confined to use by newcomer welcoming services that are allied with a credit agency which uses the welcoming interview to start a file on the subject.[14]

Although the interviewing technique employed seems very similar to that used by various governmental investigative agencies, there is little evidence that credit reporting agencies use the techniques of surveillance and electronic surveillance that have brought criticism to the government agencies. In fact, one of the criticisms most frequently leveled against the interviewing technique of the credit reporting agencies is that it is too superficial, that it is prone to report the juicy bit of gossip which does not accurately reflect the true character of the subject.[15] Despite the fact that the operating procedures of the larger companies that do most of the interviewing require the investigator to con-

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[11] *See id.* at 167-71.

[12] *See, e.g., House Hearings* 474, 478-85.

[13] *See, e.g.,* Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966).

[14] *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 91st Cong., 1st Sess. 168-72 (1969) [hereinafter cited as *Financial Hearings*].

[15] *Id.* at 374.

firm derogatory statements by those interviewed,[16] most investigators are paid partly on a piecework basis or at least have quotas which place a premium on rapid completion of a given job.[17] The result is that such reports are hurried compilations of hearsay from persons who may or may not bear the subject malice. While the information gathered from interviews is less likely than other information to suffer from mistakes of identity, it is more likely to be inaccurate or incomplete and to reflect the bias or malice of its source.

The interviewing method of information-gathering is the method most likely to cause direct harm to the subject. Questions about the subject necessarily imply some statement about the subject, and the interviewer may feel compelled to give a little information to get some information. In the process the subject's reputation may suffer. This danger appears to be of a fairly small magnitude, however. The primary danger of information-gathering appears to be that it may result in the inclusion of inaccurate information in the subject's file.

Much of the information contained in a credit report is essentially private in nature, the sort of information that will be unknown to the subject's friends, acquaintances, and fellow employees or colleagues. It may be the sort of information that the subject does not wish to be generally known, because, for example, it would cause him humiliation or embarrassment. This is particularly true since the subject's file will be devoted primarily to assembling adverse information rather than favorable information.[18] Thus, possibly only a single, insignificant default in an extensive and otherwise unblemished credit life of a subject may appear in his file. It is therefore of some importance to the subject that such information be provided only to those who have a legitimate need for it or his consent to seek it.

While the credit reporting industry generally has recognized the need or desirability of protecting the privacy of the subject,[19] the control of dissemination of credit reports has been spotty in the past. There is reason to believe that virtually anyone using a business name could purchase a credit report on any individual in some localities.[20] Since the

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[16]*House Hearings* 474.

[17]*Financial Hearings* 378-402.

[18]Although one company specializes in derogatory reports, most others do record favorable information such as "pays on time" or "has good reputation"; however, apparently the major effort is directed at adverse information. *Id.*

[19]*E.g., Senate Hearings* 69-72.

[20]A good example of this was seen on CBS Evening News, March 17, 1969. The text of that program segment is reprinted in *House Hearings* 59.

typical credit reporting agency provides reports to its subscribers without question upon request, there is also a great opportunity for the employees of the subscriber to obtain and use credit reports without authorization. To make matters worse, until recently about the only person who could not get a copy of the subject's credit report was the subject himself. This was because the credit reporting agency's contract with the user of the credit report prohibited disclosure of even the existence of the report to the subject.[21] The result of this practice was that the subject might have application after application rejected without reason and be unawareof the source and nature of the information causing the rejections; he would realize something was wrong but be unable to defend himself. Even where the subject might guess or be told the source of the offending report, the credit agency would not normally show him the report or discuss it with him. The most the subject might get from the credit agency was advice to straighten out his dealings with a particular merchant, or something of that nature.[22]

Another aspect of the dissemination problem has received publicity recently—the use of electronic data processing equipment by credit reporting agencies.[23] One of the largest agencies in the country currently is a computerized operation,[24] and it is likely that many, if not most, of the larger agencies will eventually convert to computer operations. As more and more of these agencies utilize computers, the ability to punch a button or pick up a telephone and learn nearly everything about an individual becomes more nearly a reality. This is a development that many find disquieting. To some people the very existence of a computer system capable of laying bare of the life of an individual is as distressful as having a neighbor who stores explosives on the adjacent premises.[25] Regardless of the rationality of such a reaction, most people have had enough contact with computerized business operations to be aware not only that computer systems are capable of error but also that when errors are made, they are devilishly hard to correct. Further, computers possess no more judgment than they are programmed to exercise and will usually provide information to anyone having physical access to the machine who knows the appropriate code. The danger of unauthorized

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[21] *Hearing on Retail Credit Co. Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 2d Sess. 47 (1968).

[22] *See, e.g., House Hearings* 78-81.

[23] *E.g.*, Miller, *The Credit Networks: Detour to 1984*, 210 THE NATION 648.

[24] *Financial Hearings* 373.

[25] *Id.* at 372-76.

disclosure of information may thereby be increased.

The most obvious danger to the subject of the credit report, and potentially the most harmful, is that the report may contain inaccurate information. Inaccurate information includes not only incorrect information but also information that is misleading because of incompleteness or other factors. Most of the horror stories about credit reporting and litigation involving it stem from some inaccuracy in a report. It appears likely that the vast majority of credit reports are substantially accurate,[26] but, as has been seen, the methods used to collect and transmit file data virtually assure that mistakes will be made. Moreover, the impact of a mistake upon the subject of the report can be of enormous magnitude. It takes little imagination to foresee the possible consequences of an erroneous statement that the subject is a habitual drunkard and wife beater. Such a mistake could cause the subject to be all but unemployable, uninsurable, and unable to obtain credit, and literally might put him on the welfare rolls. Furthermore, under the previously common practice of secrecy, he might never discover what had actually happened and be totally unable to remedy his situation. In the past, when the subject of the credit report has suffered harm as the result of the actions of a credit reporting agency, his resort to the legal process has been of little value.

PRE-FCRA LEGAL REMEDIES

Methods generally used by credit reporting agencies to some extent invade the privacy of the subject of the report; that is, they intrude upon the subject's solitude or seclusion. Yet the courts seldom find the intrusion to be substantial enough to warrant judicial action.[27] Even a court more inclined to protect the solitude of the subject may find that the subject consented to the intrusion by applying for credit, insurance, or employment[28] or that the conditional privilege afforded the credit reporting agency in defamation actions also applies to gathering the information.[29] It is generally recognized that a cause of action may exist for the public disclosure of private facts.[30] In the context of the credit report, such an action is of little use because the courts have limited it

[26] *House Hearings* 130.

[27] *E.g.*, Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966).

[28] *See* Harrison v. Humble Oil & Ref. Co., 264 F. Supp. 89, 92 (D.S.C. 1967).

[29] *See* Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966).

[30] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 809 (4th ed. 1971).

to situations in which the disclosure is to the public[31] (a large group), the facts are private,[32] and the publication would be offensive to one of ordinary sensibilities.[33] Very few credit reports are distributed widely enough to make use of such a cause of action; secrecy rather than publicity has been the traditional hallmark of credit reporting agencies.[34]

For the most part the only real hope that an injured credit report subject has had for a judicial remedy has been the defamation action.[35] However, even where the subject of the credit report has been able to establish the defamatory nature of the statement about himself and has been able, if necessary, to show special damages, he has typically run into an insurmountable obstacle—the conditional privilege generally afforded credit reporting agencies.[36] The law of defamation generally treats as conditionally privileged statements made about third persons to one whose interests may be affected by the third person,[37] particularly where the person spoken to has requested the information.[38] The privilege that protects the credit report is merely a facet of this broader privilege, even though it is often stated in terms of a conditional privilege to make credit reports.[39] Underlying the privilege as applied to credit reports are several basic propositions that frequently go unarticulated. First, no one has a *right* to credit or, perhaps more precisely, no one has a duty to risk his property on the conduct of others. Conversely, the property owner has the right to pick and choose his risks, and, since the degree to which he can cover his risks by charging higher rates may

[31]Harrison v. Humble Oil & Ref. Co., 264 F. Supp. 89 (D.S.C. 1966).

[32]Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956).

[33]*See* Shorter v. Retail Credit Co., 251 F. Supp. 329, 331 (D.S.C.1967).

[34]*House Hearings* 475.

[35]*Financial Hearings* 438.

[36]*See* Note, *The Mercantile Agency and Conditional Privilege in Defamation*, 11 S.C.L.Q. 256 (1959). Two American jurisdictions, Georgia and Idaho, do not extend the privilege to credit reporting agencies. The Georgia court felt that the furnishing of a credit report for consideration was not the performance of a public or private duty, either legal or moral, that would invoke the privilege provided by the Georgia Code. Johnson v. Bradstreet Co., 77 Ga. 172 (1886). The Idaho court refused to extend the privilege to credit reporting agencies on the theory that "[t]he company that goes into the business of selling news reports about others should assume the responsibility for its acts and must be sure that it is peddling the truth." Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 704, 139 P. 1007, 1010 (1914).

[37]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115, at 787-89 (4th ed. 1971).

[38]50 AM. JUR. 2D *Libel and Slander* § 202 (1970).

[39]Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160, 161 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952).

be limited by the government,[40] he has a legitimate interest in information that will help him evaluate the risks involved. Secondly, it is socially desirable that these inherently risky transactions occur.[41] Inasmuch as credit reports tend to encourage such transactions, credit reporting agencies perform a service of great social value that tends to outweigh the occasionally harmful effects they may have on the subjects of the reports.[42] Third is the strong feeling that the subject has at least impliedly consented to the use of such reports by applying for credit, insurance, or employment and has thereby agreed to assume the risk of inaccurate reporting that falls short of some gross misconduct by the reporting agency.[43] The practical result is that the credit reporting agency is granted immunity so long as its activities are directed toward the protected purpose and the interests of the subjects are not too blatantly ignored.

As with other conditional privileges, the credit reporting agency may lose its immunity if it abuses the privilege. The privilege may be abused and lost by making the defamatory statements to those who do not reasonably appear to have a legitimate interest in the information,[44] or if the defamatory statement is not the sort of information in which the user has a legitimate interest,[45] or if the statement is made with malice.[46] The policy that favors credit reporting seems to be strong enough that the courts are reluctant to find abuses of the conditional privilege. Thus a credit reporting agency may reasonably rely on nearly any representation of interest of a potential user without losing the privilege[47] and may likewise furnish any information that is arguably

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[40] *E.g.*, N.C. GEN. STAT. §§ 24-1 to -17 (Supp. 1971) (interest rate controls); *id.* § 58-131.2 (1965) (insurance commissioner empowered to change certain insurance rates); *id.* §§ 95-85 to -96 (minimum wage act).

[41] It hardly bears repeating that America has a credit-based economy. At the end of 1968, there were nearly 350 billion dollars of consumer credit outstanding in the United States. *Financial Hearings* 319.

[42] Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160, 161 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952).

[43] *See* Harrison v. Humble Oil & Ref. Co., 264 F. Supp. 89, 92 (D.S.C. 1967).

[44] Watwood v. Stone's Mercantile Agency Inc., 194 F.2d 160, 161 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952).

[45] Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951); Lathrop v. Sundberg, 55 Wash. 144, 148, 104 P. 176, 178 (1909).

[46] Hooper-Holmes Bureau, Inc. v. Bunn, 161 F.2d 102, 104 (5th Cir. 1947).

[47] *See* Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160, 162-62 & n.4 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952).

relevant to the proposed transaction without losing the privilege.[48] The policy of protecting credit reports is strong only when the reporting agency is trying in good faith to provide accurate information to the user; there is no interest in protecting those motivated by malice. Courts have tended to disagree about what conduct constitutes malice sufficient to lose the privilege. Most agree that it is not limited to ill-will or malice in a moral sense, but also includes conduct consciously indifferent to or in reckless disregard of the rights of others.[50] Beyond that point agreement disappears, and various courts have found the privilege vitiated where there were no reasonable grounds for believing a statement to be true,[51] where there was negligence so gross as to amount to malice,[52] and where there was negligence in preparing or communicating the report.[53] However, the vast majority of courts reject negligence as sufficient to destroy the conditional privilege.[54] To the extent that the subject has any chance of penetrating the privilege, it seems that trying to show a reckless indifference to his interests offers the greatest hope of success; actually proving it would be difficult.

For the most part, unless the subject of the credit report is able to show fairly gross misconduct by the credit reporting agency, he is left without a remedy and must console himself with the knowledge that his suffering promotes the smooth flow of commerce for everyone's benefit.

POST-FCRA REMEDIES

Congress determined, after lengthy hearings, that the interests of the subjects of credit reports were not being adequately protected and set out to remedy the situation itself. That effort culminated in the Fair Credit Reporting Act,[55] which was enacted as an amendment to the Consumer Credit Protection Act.[56] The FCRA was designed to give

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[48]*See, e.g.*, Wetherby v. Retail Credit Co., 235 Md. 237, 201 A.2d 344 (1963). There the plaintiff had applied for life insurance and the credit report indicated that neighbors suspected that the plaintiff was a lesbian. Without discussing the relevance of lesbianism to life insurance the court found that no abuse of the conditional privilege had been shown.

[49]15 AM. JUR. 2D *Collection and Credit Agencies* § 23 (1964).

[50]Annot., 40 A.L.R.3d 1049, § 3[a] (1971).

[51]Roemer v. Retail Credit Co., 3 Cal. App. 3d 368, 371, 83 Cal. Rptr. 540, 542 (Ct. App. 1970).

[52]Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 390, 90 S.E.2d 370, 373 (1955).

[53]Douglass v. Daisley, 114 F. 628, 634 (1st Cir. 1902).

[54]Annot., 40 A.L.R.3d 1049, § 3[b] (1971).

[55]15 U.S.C. §§ 1681 to 1681t (1970).

[56]*Id.* §§ 1601 to 1681t.

increased protection to consumers;[57] the Congress apparently felt that businessmen were capable of taking care of themselves in these matters. Its general scheme is to establish certain standards of conduct for both credit reporting agencies and users of credit reports; to provide some practical, non-judicial remedies for consumers; to provide for civil judicial remedies for the consumer; and to provide for administrative and criminal enforcement of some standards.[58]

The FCRA seeks substantially to eliminate the problems caused by the practices of credit reporting agencies,[59] imposing upon them various duties and standards of conduct. The circumstances under which a credit report[60] may be issued are restricted to those enumerated in the statute. Issuance of a report is permissible only (1) in response to a court order; (2) in accordance with the written instructions of the subject; (3) to a person who the agency has reason to believe intends to use the information (a) in connection with a credit transaction involving the extension of credit to, or review or collection of an account of, the subject, (b) for employment purposes, (c) in connection with underwriting insurance involving the subject, or (d) in connection with certain governmental transactions; or (4) to a person the agency has reason to believe "otherwise has a legitimate business need for the information in connection with a business transaction involving" the subject.[61] In addition, credit agencies are permitted to furnish identifying information about the subject to governmental agencies, but not a full report unless the government's need to know falls within one of the other permitted categories.[62]

Recognizing that much of the information typically contained in credit reports tends to lose its descriptive value with the passage of time, the FCRA requires that obsolete information be deleted from reports

[57]The FCRA defines a consumer as an individual. *Id.* § 1681a(c). The definition of "consumer report" speaks of credit or insurance to be used primarily for personal, family, or household purposes, which fairly indicates a desire to exclude business transactions. *Id.* § 1681a(d).

[58]The provisions for administrative and criminal enforcement are in *id.* §§ 1681q-81s; they will not be treated here. For a critical view of the effectiveness of the administrative provisions, see Note, *The Fair Credit Reporting Act*, 23 MAINE L. REV. 253, 261-63 (1971).

[59]The FCRA uses the name "consumer reporting agency," which is broadly defined as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f) (1970).

[60]The FCRA uses the name "consumer report." *Id.* § 1681a(d).

[61]*Id.* § 1681b.

[62]*Id.* § 1681f.

unless the report is used in connection with a credit or insurance transaction of 50,000 dollars or more or in connection with employment of an individual at an annual salary of 20,000 dollars or more.[63] Information is obsolete if it pertains to a bankruptcy more than fourteen years old or if it is adverse information more than seven years old.[64] The exception for large transactions merely recognizes that the risk-taker has a legitimate interest in more detailed information where the amount risked is large.

The poor reliability of adverse character information obtained by interviewing neighbors or others who know or know of the subject is particularly recognized by a provision that requires such information contained in a report to be verified before it is used in a subsequent report if the information is more than three months old.[65] Reporting agencies are also required to maintain procedures to assure that public record information contained in reports for employment purposes is up to date and complete as of the date of the report or to notify the subject that public record information is being reported to the person requesting the report.[66] This is one of the weakest provisions of the FCRA, and why it was limited to reports for employment purposes is not apparent. Possibly Congress felt that consumers could adequately protect themselves by seeing to it that public records were accurate and complete.

The strongest provision in terms of imposing an unequivocal duty upon reporting agencies is section 607.[67] It provides:

> (a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 [15 U.S.C. § 1681c] [obsolete information] and to limit the furnishing of consumer reports to the purposes listed under section 604 [15 U.S.C. § 1681b]. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing

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[63] *Id.* § 1681c.

[64] Where the information pertains to a suit or judgment, it may be included after 7 years if the applicable statute of limitations has not run. Where criminal records are concerned, the 7 years is measured from the date of disposition, release, or parole, as applicable. *Id.* § 1681c(a).

[65] *Id.* § 1781*l*. An exception is made for information of public record.

[66] *Id.* § 1681k.

[67] *Id.* § 1681e.

> such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604.
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> (b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

The wording in subsection (b), "reasonable procedures to assure maximum possible accuracy," is very strong and should be construed to require much more effort by the agency than if the wording had been "to assure reasonable accuracy."

If credit reporting agencies make a bona fide effort to comply with these standards, many of the subject's problems will be alleviated. However, where problems do arise, the FCRA has implicitly recognized that many of them can be straightened out between the parties without resort to the judicial process. Accordingly, the FCRA provides that certain users must notify the subject of the use of credit reports and the credit reporting agency must work with the subject to iron out any problems.

Except where the information is sought "for employment purposes for which the [subject] has not specifically applied," no user may procure or cause to be prepared an investigative consumer report without giving the subject notice that the report is being prepared.[68] Further, anytime a user of a credit report denies the subject credit, insurance, or employment or increases the charge for credit or insurance either wholly or partly because of information contained in the report, the user must apprise the subject of that fact and identify the source of the credit report.[69] With one minor exception, credit reporting agencies are not required to give the subjects of the reports any notice that such reports are being made.[70]

Once the subject discovers, through the notice procedures or otherwise, that the reports are being made or that a file exists, he may demand that the agency disclose to him the nature and substance of the

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[68] *Id.* § 1681d.

[69] *Id.* § 1681m. Both sections that require users to give notice to the subjects of credit reports provide that the user shall not be held liable for failure to give the required notice if he shows by the preponderance of the evidence that he maintained reasonable procedures to assure compliance. *Id.* §§ 1681d(c), 1681m(c).

[70] Agencies are required to notify subjects that public record information is being reported for employment purposes unless the agency checks the record the day it sends the report. *Id.* § 1681k.

information in the file, the sources of the information (except sources acquired and used only for preparing investigative reports), and a listing of all persons to whom a report was furnished for employment purposes in the preceding two years or was furnished for any other purpose in the preceding six months.[71] The agency is required to provide a trained person to explain the report to the subject.[72] It is at this level that many misunderstandings may be worked out informally. To assist in this process the subject has a right to be accompanied by one person of his own choosing.[73]

If the subject is not satisfied that any item in the report is accurate or complete he may so inform the agency, and it must reinvestigate the item within a reasonable period unless it has reasonable grounds to believe the dispute is frivolous or irrelevant. If the item is found to be inaccurate or can no longer be verified, the agency must delete it and must record the current status of any verified item.[74] If this does not resolve the dispute—as for example, where the source of the item insists that the subject's account was once six months in arrears and the subject flatly denies it—the subject may have included in his file and the agency must include in future reports, a brief statement of his side of the dispute.[75] When the subject's file is altered in this manner or by deletions or corrections, the agency must inform the subject that he has the right to have the amended report sent to any user whose identity the agency is required to disclose.[76] If the subject received notice of adverse action based on the credit report, the agency must make the disclosures and send any amended reports without charge. Otherwise the agency may charge the subject a reasonable fee for disclosure of the file information and also charge for the sending of a disputed report, but it may not charge for sending reports, correcting, or deleting information.[77]

The primary advantage of this fairly informal method of resolving problems is that it offers the hope of clearing up the situation before any substantial harm is done. Since the real value of the credit report is in its reliability, it is probable that the agency will be nearly as

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[71] *Id.* § 1681g.

[72] *Id.* § 1681h(c).

[73] *Id.* § 1681h(d).

[74] *Id.* § 1681i(a).

[75] The agency may limit the subject's statement to 100 words if it assists him in writing it and may clearly and accurately codify or summarize it for transmission purposes. *Id.* § 1681i(b), (c).

[76] *Id.* § 1681i(d).

[77] *Id.* § 1681j.

interested as the subject in getting the matter straight. Where errors are discovered and a new report is sent out, the user who once rejected the subject in part because of the report may be under some pressure to approve the transaction when the report is revised, thereby reducing the harm or the subject's feeling of having been harmed.

To deal with those situations in which the informal procedure is inadequate to prevent or remedy harm, the FCRA has two provisions for civil actions by subjects against credit reporting agencies and the users of credit reports.[78] To enhance the usefulness of these actions where the amount of damage is relatively low, though substantial, the actions may be brought in a federal district court without regard to the amount in controversy,[79] and, should the plaintiff succeed, the defendant will be liable for costs and reasonable attorney's fees as determined by the court.[80] The actions differ only in that if the plaintiff can establish a greater degree of misconduct, he can have punitive damages.[81] Under the more basic of the two provisions, "[a]ny consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed" by the FCRA shall be liable for any actual damages sustained by the subject as a result of the failure.[82] The basis of liability is the negligent failure to meet the standards imposed. As previously stated, one such standard is that the credit reporting agency "shall follow reasonable procedures to assure maximum possible accuracy of the information" in the credit report.[83] It would thus seem that where an injured subject was once required to show that the reporting agency's conduct in preparing a report was malicious, or so reckless as to amount to malice, he may now succeed by showing that the agency was negligent in preparing a report that was inaccurate. For most jurisdictions this represents a substantial change. Defamation actions are generally thwarted by the conditional privilege, which is not lost by mere negligence in the preparation of a credit report,[84] and the courts have generally refused to entertain an action based on a negligent misstatement.[85] Liability may also be found where the credit reporting agency

[78] *Id.* §§ 1681n, 1681*o*.
[79] *Id.* § 1681p.
[80] *Id.* §§ 1681n(3), 1681*o*(2).
[81] *Id.* § 1681n(2).
[82] *Id.* § 1681*o*.
[83] *Id.* § 1681e(b).
[84] Annot., 40 A.L.R.3d 1049, § 3[b] (1971).
[85] Note, *Liability for Misstatements by Credit-Rating Agencies*, 43 VA. L. REV. 561, 563-67 (1957).

negligently transmits obsolete information or negligently fails to assure that reports are made to persons with proper purposes. In the latter case it seems reasonably certain that the good faith reporting of an account placed for collection ten years ago would be privileged in a defamation action; under the FCRA, an agency that was negligent in not deleting the information would be liable. The FCRA requirement that reports be sent only to proper persons seems to be the least radical departure from the normal rule; yet it appears to set a stricter than normal standard since it not only places an affirmative duty on the agency reasonably to assure that reports are sent only to proper persons for proper purposes, but also flatly forbids furnishing a report where the agency has reasonable grounds to believe the report will not be used for a proper purpose.[86]

Saying that negligence is a sufficient basis for liability is one thing; proving negligence is another. Although proving negligence should be less difficult than proving malice or its equivalent and should put less strain on courts that want the plaintiff to recover, there will still be difficulties, if only because the requisite information is likely to be in the sole possession of the defendant. Liberal discovery rules will alleviate the problem somewhat, and the fact that the defendant was in exclusive control of the harmful mechanism may permit circumstantial proof of negligence. For example, if the plaintiff is able to show that a report sent out varies substantially from the information in the defendant's files, he should be deemed to have established a prima facie case of negligence.

The liability imposed is for "actual damages sustained by the consumer as a result of the failure" to comply.[87] Unfortunately, the statute does not explain what it means by "actual damages" and there are only two clues as to what is contemplated. First, the other civil action provision duplicates the "actual damages" language and also provides for the awarding of punitive damages;[88] thus it may fairly be assumed that "actual damages" at most means all damages other than punitive damages. Secondly, it is provided that no action "in the nature of defamation, invasion of privacy or negligence" may be brought based on information required to be disclosed under certain provisions of the statute

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[86] 15 U.S.C. § 1681e(a) (1970). This provision may have the effect of preventing the agency from weighing the evidence and making a judgment as to whether to send the report; it seems to say, "If there is a weight on the negative side, you may not send it."

[87] *Id.* § 1681*o*(1).

[88] *Id.* § 1681n(2).

except for those actions provided for in the statute.[89] A possible inference is that the actions provided for are in the nature of defamation, invasion of privacy, or negligence and that the sorts of damages that may be recovered in such actions may be recovered under the statute.

It is probably safe to surmise that some form of publication outside the credit reporting agency is required to fail to comply with the standards considered thus far and that there can thus be no damage without publication.[90] Where publication has resulted in a determination by the user adverse to the subject, the subject will probably be able to recover for the loss of the bargain involved and consequential damages, limited by causation considerations. For example, the subject who is turned down for automobile insurance and has to purchase it under an assigned-risk plan should be able to recover the difference in premiums and perhaps for the loss of the use of the automobile in the interim period, if such insurance is compulsory. Beyond that he might also recover for the embarrassment of being rejected and for the injury to his reputation in the same manner as in a libel action. Where the publication has not resulted in adverse action, it would seem that the subject would be limited to something very close to the recovery in a libel action. To some extent this may raise the libel per se-libel per quod controversy,[91] and there is nothing to indicate where that might come out. If the publication is to one not deemed a legitimate user, the action would be more appropriately treated as though it were an invasion of privacy by public disclosure of private facts with the "public" requirement waived.

The credit reporting agency defendant has clearly been stripped of its conditional privilege and probably may not assert truth as an affirmative defense, although in many cases the plaintiff will probably have to show falsity as an element of his cause of action.[92] The agency may try to raise contributory negligence or consent as defenses, but the tenor

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[89] *Id.* § 1681h(e).

[90] Credit reporting agencies may also incur liability under the statute *inter alia* for failing to comply with the requirements of discussing the subject's file with him or failing to include his dissenting statement in a report. *Id.* §§ 1681g, 1681i, 1681n, & 1681*o*.

[91] Byrd, *Recent Developments in North Carolina Tort Law*, 48 N.C.L. REV. 791, 798-99 & n.34 (1970).

[92] Where it is alleged that the credit reporting agency has failed to comply by publishing obsolete information or furnishing a report for an impermissible purpose, the truth of the information would have no bearing on liability. Where liability is predicated on the inaccuracy of the report, it should be on the plaintiff to show that the statement was inaccurate, as it would be in an action for misrepresentation. *See* Ginsberg v. Zagar, 126 Colo. 536, 251 P.2d 1080 (1952).

of the statute is one of absolving the consumer from responsibilities, which forebodes a cool reception for such defenses.

The other provision for civil actions is substantially the same except that it provides that where the credit reporting agency or credit report user willfully fails to comply with the statute the injured subject may also recover punitive damages.[93] Although "willfully" is not defined, it is obviously a substitute for malice. Because of other language in the FCRA it is fairly certain that "willfully" was not meant to require malicious or evil motive.[94] "Willful" is given a wide variety of meanings by various courts, but the federal courts dealing with it in federal statutes seem to have settled on a requirement of a conscious, voluntary, and intentional decision to do the proscribed act.[95] Thus, what is required by many courts to establish liability should be sufficient under this provision for punitive as well as actual damages.

The FCRA works an interesting change in the law of defamation as it applies to persons who supply information to credit reporting agencies. For example, assume that a department store erroneously reports to the credit agency that the subject's account has been placed for collection. In a normal defamation action, the department store could use the same sort of conditional privilege afforded the credit reporting agency,[96] and the subject would then have to show malice or, in many jurisdictions, reckless or callous disregard of his interests in order to recover.[97] Under the FCRA, if the subject had discovered the erroneous report through any disclosure required by the statute, he would be forbidden to bring any action in the nature of defamation, invasion of privacy, or negligence against the reporting agency, any user of the information, or any person who furnished the information to the reporting agency except as provided in the civil action provisions of the statute.[98] The civil action provisions of the statute are applicable only

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[93]15 U.S.C. § 1681n (1970).

[94]FCRA § 610(e), 15 U.S.C. § 1681h(e) (1970), limits consumers in certain situations to use of either the provision for an action based on negligence or the provision for an action based on willful noncompliance but withdraws the limit if there was "malice or willful intent to injure." Therefore "willfully fails to comply" must be the less culpable standard. *Compare* 15 U.S.C. § 1681h(e) (1970), *with* 15 U.S.C. § 1681n (1970).

[95]*See, e.g.*, Hewitt v. United States, 377 F.2d 921, 924 (5th Cir. 1967); Dowd v. Blackstone Clearners, Inc., 306 F. Supp. 1276, 1281 (N.D. Tex. 1969).

[96]*See* Putnal v. Inman, 76 Fla. 553, 80 So. 316 (1918); *cf.* Froslee v. Lund's State Bank, 131 Minn. 435, 155 N.W. 619 (1915).

[97]Annot., 40 A.L.R.3d 1049, § 3[a] (1971).

[98]15 U.S.C. § 1681h(e) (1970).

to credit reporting agencies and users of the credit reports.[99] But for an exception to the exclusive remedy provision, the source of the information would be immune. The exception is made "as to false information furnished with malice or willful intent to injure" the subject.[100] The net effect of this is that if the action is tainted by the disclosure provisions, the defendant in a defamation action who was a source of information may now claim what amounts to a statutory privilege. To overcome the privilege the plaintiff will have to show that the information was furnished with malice or willful intent to injure the plaintiff. In many states this will be more difficult than showing an abuse of the traditional conditional privilege. To the extent that the duties imposed by the statute do not completely cover acts for which the subject might bring an action in the nature of defamation, invasion of privacy, or negligence, the credit reporting agency might also find a small sanctuary. However, it is not likely that a very meaningful sanctuary will be found if the courts construe the statutory requirements in accordance with the specified purposes of the FCRA.

A subject of a report who discovers its existence by some method other than the FCRA disclosure procedures has a choice of actions. He may either proceed under the statute or bring any other action to which he is entitled under state law. In most cases it will probably be more advantageous to utilize the statute, if for no other reason than that attorney's fees may be recovered.[101] In those cases in which the duties imposed by the statute are not closely enough related to the harm, the subject will probably want to use a state cause of action. When he does so, he obviously will run squarely into the old conditional privilege problem.

It is arguable that the FCRA expresses such a strong national policy with respect to credit reporting agencies that the basis for the conditional privilege ought to be re-examined. The basic rationale of the privilege has been that the public interest and advantages of publication so outweigh the occasional damage caused to individuals that the damage should be allowed to go unremedied.[102] As the privilege has been applied to credit reporting agencies, it has been questioned whether it

[99] *Id.* §§ 1681n, 1681*o*.

[100] *Id.* § 1681h(e).

[101] *Id.* §§ 1681n(3), 1681*o*(2).

[102] Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160, 161 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952).

can be properly applied to a business for profit.[103] It seems quite clear that credit and other risk-taking transactions make up an important part of the economy and that if there were no credit reporting agencies, so that the risk-takers had to make their own investigations, the denial of the conditional privilege to the sources of information would substantially decrease the amount of information available. The result would be a diminution in the number and magnitude of valued transactions. In that situation the conditional privilege is probably necessary because there would be no effective mechanism for spreading the risk of a large judgment. This does not, however, present a convincing argument for granting the privilege to credit reporting agencies unless one feels compelled to view such an agency as a simultaneous extension of both the information source and the user. The agency is really a separate entity capable of independently harming the subject of the credit report; it is thus proper that the availability of the privilege to the agency be viewed separately. In this context it is at once apparent that the credit reporting agency is a mechanism capable of spreading the risk of a large judgment by raising its fees in order to insure itself. If the statements of industry spokesmen are accurate, the risk is really not very great, and where a given agency performs so poorly that it is driven out of business with lawsuits, society probably experiences a benefit rather than a detriment. By implication the FCRA stands as a finding by Congress that a less limited exposure of credit reporting agencies to liability is in the best interest of society. Accordingly, it seems that the courts ought to assume the posture of treating the credit agencies much like disseminators and hold them liable for inaccurate transmission of information and liable for the inaccuracies of the information where they reasonably should have discovered the inaccuracy or where their dissemination is unreasonably improper. This would not affect the liability of the sources of information and thus would not affect the availability of the information.

The FCRA will not please those primarily concerned with the privacy aspects of credit reporting, particularly those who believe that credit information is a property belonging to the individual that he has a right to control. The statute makes it fairly clear that the user of credit reports has the right to demand credit information as a condition to

[103]Smith, *Conditional Privileges for Mercantile Agencies, Macintosh v. Dun* (pts. 1-2), 14 COLUM. L. REV. 187, 296 (1914).

[104]*See* Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1042-49 (1971).