

*Symposium on Federal Jurisdiction and Procedure*

## The Consumer's Guide to Litigatory Remedies Under the Fair Credit Reporting Act

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# THE CONSUMER'S GUIDE TO LITIGATORY REMEDIES UNDER THE FAIR CREDIT REPORTING ACT

## INTRODUCTION

Any consumer who has ever made an application for credit, insurance or employment may have unwittingly caused himself to become the subject of an investigation, culminating in the issuance of a consumer report.<sup>1</sup> Such investigations are the business of consumer reporting agencies<sup>2</sup> whose reports are sold to merchants for a fee. While consumer reporting agencies perform a valuable service for the mercantile community and consumers as well, faulty reporting practices can have a serious detrimental impact on consumers. Reported information which is inaccurate, incomplete or obsolete can create a distorted picture of a consumer, making it virtually impossible for him to secure credit, insurance or employment.<sup>3</sup>

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1. The Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1970) [hereinafter cited as FCRA], defines "consumer report" as

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

FCRA § 1681a(d).

2. The FCRA defines "consumer reporting agency" 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.

FCRA § 1681a(f). The term "person" in this definition includes, among other entities, individuals, corporations and governmental units. FCRA § 1681a(b).

3. *Hearings on S. 823 before the Subcomm. on Financial Institutions of the Senate Banking and Currency Comm.*, 91st Cong., 1st Sess. 359, 399 & 431-32 (1969) [hereinafter

Some reports, in particular those made to determine eligibility for insurance or employment, contain highly personal information which can damage a consumer's reputation or invade his privacy.<sup>4</sup> Often such personal information is gleaned from the unreliable hearsay opinions of the consumer's neighbors and associates.<sup>5</sup> Another source of consumer injuries is the indiscriminate dissemination of reports to persons having no legitimate business interest in receiving the reports.<sup>6</sup>

In the past, the predicament of the consumer injured by faulty reporting practices was particularly hopeless for two reasons. First, the consumer reporting industry carried on its activities behind a nearly impenetrable cloak of secrecy. Consumers were not allowed to see the contents of their files.<sup>7</sup> Reports were furnished on the condition that the user agree not to reveal to the consumer any information in the report or the identity of the reporting agency.<sup>8</sup> Industry secrecy was so tight that consumers often did not know that they were being investigated or even that an adverse report was the reason they had been denied credit or employment.<sup>9</sup> Secondly, even if a consumer knew he had been injured by faulty reporting practices and could prove it, he was seldom able to recover in a suit for damages. Recoveries were few because state courts developed legal theories designed to shield the reporting industry from liability.<sup>10</sup>

The Fair Credit Reporting Act (FCRA),<sup>11</sup> which took effect April 25, 1971, is Congress' attempt to deal with some of these

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cited as *Senate Hearings*]; *Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 130 (1970)* [hereinafter cited as *House Hearings*].

4. Reports prepared for prospective insurers or employers typically contain information about the subject's hobbies, the tidiness of his home and yard, any domestic troubles he might be having, his character and morals and his drinking habits, including speculation as to the reason he drinks. *Senate Hearings, supra* note 3, at 278-87. See also *id.* at 373-76 & 441.

5. *Id.* at 359 & 399; *House Hearings, supra* note 3, at 186.

6. Reports have been sold to politicians who seek derogatory information on their political opponents. *House Hearings, supra* note 3, at 209. See also *id.* at 59-61; *Senate Hearings, supra* note 3, at 359 & 440.

7. *Senate Hearings, supra* note 3, at 78.

8. *Id.* at 79 & 189.

9. *House Hearings, supra* note 3, at 78-81.

10. See notes 54-61 *infra* and accompanying text.

11. 15 U.S.C. §§ 1681-1681t (1970).

problems. Under the FCRA consumers for the first time have a statutory right to find out what information is being circulated about them. Whenever a person is turned down for credit, insurance or employment because of an adverse report, he now must be told the name and address of the reporting agency.<sup>12</sup> Upon request the agency must disclose to the consumer the "nature and substance" of the information in its files on him.<sup>13</sup> Furthermore, agencies are now obligated to correct demonstrated inaccuracies,<sup>14</sup> to eliminate obsolete information<sup>15</sup> and to establish safeguards to assure the confidentiality<sup>16</sup> and accuracy<sup>17</sup> of consumer information.

In addition to creating new consumer rights, the FCRA has greatly altered the liability of reporting agencies. From the point of view of the damaged consumer the remedial scheme of the FCRA is a mixed blessing, sometimes working to his benefit and at other times erecting obstacles to his recovery. In the injured consumer's favor is the newly created federal cause of action which allows suits against agencies for negligence.<sup>18</sup> Unfortunately, some consumer injuries result from agency actions for which the new federal cause of action imposes no liability.<sup>19</sup> In those cases the consumer must look to the traditional state common law theories of defamation and invasion of privacy.<sup>20</sup> But the consumer who must turn to state law for relief may be surprised to learn that the FCRA hinders, and may even bar, his cause of action.<sup>21</sup>

This note will examine the scope and effect of the remedies now available to the consumer who has been injured by faulty reporting practices. Particular attention will be devoted to problematic language in the provisions of the FCRA dealing with consumer suits against reporting agencies, and to the discovery of interpretations of that language which comport with the intent of the drafters. The new federal cause of action and the current status of the traditional state remedies will be examined in turn.

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12. FCRA § 1681m.

13. FCRA § 1681g.

14. FCRA § 1681i.

15. FCRA § 1681c.

16. FCRA § 1681e(a).

17. FCRA § 1681e(b).

18. FCRA § 1681o.

19. See notes 48-53 *infra* and accompanying text.

20. See notes 78-81 *infra* and accompanying text.

21. FCRA § 1681h(e). See p. 392 *et seq.*, *infra*.

THE FEDERAL CAUSE OF ACTION

*Section 1681o: Liability Based on Negligence*

For the injured consumer, the key feature of the FCRA is section 1681o, which exposes reporting agencies and the users of agency reports to liability for certain acts of negligence.<sup>22</sup> This new negligence liability sharply contrasts with the reporting industry's liability under state law. When a consumer sues a reporting agency for defamation, nearly all state courts allow the agency to raise the defense of conditional privilege.<sup>23</sup> Once the defense is raised, the consumer has the very difficult task of proving that the agency acted with actual malice.<sup>24</sup> The wide variance between the negligence and "actual malice" standards of liability should make it clear to a state court that the defense of conditional privilege is not available to a reporting agency in a suit brought under section 1681o.<sup>25</sup>

If a consumer can establish the negligence liability<sup>26</sup> of an agency or user under section 1681o, he may recover his "actual damages"<sup>27</sup> plus costs of the action and attorney's fees. In addition, section 1681n allows recovery of punitive damages if the agency acted willfully.<sup>28</sup>

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22. Section 1681o states:

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

23. See note 57 *infra* and accompanying text.

24. See note 58 *infra* and accompanying text.

25. One primary purpose of the draftsmen of the FCRA was "the abrogation of the common law 'qualified privilege' in protecting against liability for simple acts of negligence." *House Hearings*, *supra* note 3, at 475.

26. A number of commentators have urged that in a suit against an agency or user a presumption of negligence or the doctrine of *res ipsa loquitur* should operate in the consumer's favor. Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 *Geo. L.J.* 509, 518-19 (1969); Note, *The Fair Credit Reporting Act*, 56 *MINN. L. REV.* 819, 836 (1972); Note, *Consumer Protection: Regulation and Liability of the Credit Reporting Industry*, 87 *NOTRE DAME LAW.* 1291, 1299 (1972); Note, *Protecting the Subjects of Credit Reports*, 80 *YALE L.J.* 1035, 1052 n.88 (1971). See also *House Hearings*, *supra* note 3, at 235.

27. See note 52 *infra* and accompanying text.

28. Section 1681n states:

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any

Section 1681o imposes liability for certain acts of negligence, but it does not create a general duty on the part of reporting agencies to act with reasonable care. An agency can be liable under section 1681o only if it was "negligent in failing to comply with any requirement imposed under [the FCRA]." Thus, when a consumer has been damaged by an agency, the consumer's attorney must at the outset determine which FCRA requirement, if any,<sup>29</sup> the agency has violated.

### *Procedural v. Non-procedural Requirements*

The FCRA imposes two types of requirements: those which obligate an agency or user to maintain certain procedures (hereafter referred to as *procedural* requirements), and those which either prescribe or proscribe particular acts on the part of agencies and users (hereafter referred to as *non-procedural* requirements). Non-procedural requirements are by far the most numerous. For example, whenever an investigative consumer report<sup>30</sup> is made on a consumer, he must be notified.<sup>31</sup> Notification must also be given whenever a user denies a consumer a benefit, such as credit, insurance or employment, because of an unfavorable report, at which time the consumer must be supplied with the name and address of the re-

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consumer is liable to that consumer in an amount equal to the sum of—

- (1) any actual damages sustained by the consumer as a result of the failure;
- (2) such amount of punitive damages as the court may allow; and
- (3) in the case of any successful action to enforce any liability under this

section, the costs of the action together with reasonable attorney's fees as determined by the court.

29. Some types of agency misconduct are not subject to FCRA requirements. For example, the FCRA places no restrictions on the subject matter of reported information. See note 50 *infra*. Nor does the FCRA require agencies to report only information which is accurate. See note 49 *infra* and accompanying text.

30. An "investigative consumer report" is a special type of consumer report under the terminology of the FCRA. Section 1681a(e) states:

The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

31. FCRA § 1681d(a). Notice is not required, however, if the investigative report is used by the consumer's employer to determine eligibility for promotion. FCRA § 1681d(a)(2).

porting agency.<sup>32</sup> The agency must then upon request disclose to the consumer the "nature and substance of all information (except medical information) in its file on [him]."<sup>33</sup> In the event the consumer disputes the accuracy of the information, the agency must reinvestigate the information.<sup>34</sup> If it is found to be inaccurate or unverifiable, the agency must delete the information<sup>35</sup> and send corrected reports to past recipients of inaccurate reports.<sup>36</sup> If reinvestigation fails to resolve the dispute, the agency must include in subsequent reports a brief statement setting forth the consumer's version of the disputed facts.<sup>37</sup> Moreover, an agency may not furnish a report to a user except for specified permissible purposes,<sup>38</sup> nor may the agency report particular items of obsolete information.<sup>39</sup>

The FCRA imposes procedural requirements governing four areas of agency activity. The most important procedural requirement is the one found in section 1681e(b), which states that agencies "shall follow reasonable procedures to assure maximum possible accuracy" of reported information. Secondly, if a reporting agency exercises its option not to notify the consumer every time it issues a report on him containing public record information, that agency must maintain "strict" procedures to insure that such information is complete and up-to-date.<sup>40</sup> Thirdly, reporting agencies must maintain reasonable procedures designed to prevent violations of the non-procedural requirement which prohibits the reporting of obsolete information.<sup>41</sup> Finally, reasonable procedures must be maintained to assure compliance with the non-procedural requirement prohibiting the issuance of reports for impermissible purposes.<sup>42</sup>

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32. FCRA § 1681m(a).

33. FCRA § 1681g(a)(1).

34. FCRA § 1681i(a).

35. *Id.*

36. FCRA § 1681i(d).

37. FCRA § 1681i(b).

38. FCRA § 1681b. This section is summarized in the text accompanying note 88 *infra*.

39. FCRA § 1681c.

40. FCRA § 1681k.

41. The reporting of certain items of obsolete information is prohibited by section 1681c. Section 1681e(a) states that "[e]very reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c."

42. Section 1681b limits the circumstances under which reports may be issued. See text accompanying notes 87 & 88 *infra*. Section 1681e(a) states:

Every consumer reporting agency shall maintain reasonable procedures designed

*Formulating the Test of Liability*

In a section 1681o negligence suit for failure to comply with a procedural requirement, the consumer's attorney should devote particular attention to formulating the test of agency or user liability. When the suit involves the violation of a non-procedural requirement, the test is analytically rather simple. For example, in a section 1681o negligence suit against an agency which has violated section 1681i(a) by failing to delete disputed information which the agency could not verify, the test of liability is whether the agency exercised reasonable care when it failed to delete the unverified information. Suits involving procedural requirements entail a more complicated test of liability.

For example, section 1681e(a) requires agencies to maintain reasonable procedures designed to avoid violations of section 1681c, which prohibits the reporting of obsolete information. Thus, in a suit for a negligent failure to comply with section 1681e(a), the test of liability is whether the agency exercised *reasonable* care in maintaining *reasonable* procedures designed to avoid violations of section 1681c. The test of liability takes a somewhat different form where a failure to comply with section 1681k(2) is alleged. Here the test is whether the agency exercised *reasonable* care in maintaining *strict* procedures designed to insure that public record information is complete and up-to-date. A third variation will be found in a negligence suit involving the section 1681e(b) accuracy requirement. The agency in such a suit is liable if it failed to exercise *reasonable* care in following *reasonable* procedures to assure *maximum possible* accuracy.<sup>43</sup>

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. . . to limit the furnishing of consumer reports to the purposes listed under section 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 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 1681b . . . .

43. For a more detailed description of what is procedurally required of agencies regarding accuracy, see *Miller v. Credit Bureau, Inc.*, [1971-1973 Transfer Binder] CCH CONSUMERISM, NEW DEVELOPMENTS 573 (D.C. Super. Ct., Civ. Div., Small Claims Conciliation Branch, June 22, 1972); Compliance with the Fair Credit Reporting Act, 4 CCH CONSUMER CREDIT GUIDE ¶ 11,306, at 59,790-91 (1971).



The language of sections 1681k(2) and 1681e(b) should compel courts to scrutinize closely the procedures of reporting agencies regarding the currency of reported public record information and the accuracy of reports generally. In section 1681k(2) the draftsmen employed the word "strict" to describe the required procedures, in contrast to the less stringent word "reasonable" used in section 1681e(a). Likewise, in section 1681e(b) the phrase "to assure maximum possible accuracy" was chosen by the draftsmen in lieu of other very natural phraseologies which might have been employed, such as "to assure reasonable accuracy" or simply, "to assure accuracy." The FCRA's imposition of particularly rigorous procedural duties concerning accuracy and public record information can be explained by the fact that there are no non-procedural requirements governing these two areas of agency activity. In comparison, the less demanding "reasonable" procedures required by section 1681e(a) cover areas of agency activity which are subject to non-procedural requirements in addition to the procedural requirements.<sup>44</sup>

*The Defense of Reasonable Procedures: When an Agency May Raise It*

Once an injured consumer has established in court that an agency or user has failed to exercise reasonable care in complying with a particular requirement of the FCRA, he may yet face an obstacle in his pursuit of compensation. Consider the case of the consumer who is injured as a result of a negligent violation of the FCRA committed by an employee of an agency or user. Assume that the violation occurred despite carefully maintained company procedures designed to prevent such violations. During the consumer's suit for damages it is likely that the following issue will arise: Should the company be absolved of liability for the misconduct of its employee if it proves that it exercised reasonable care in maintaining procedures to detect and rectify such employee misconduct? Or more simply, can "reasonable procedures" be raised as a defense which avoids liability?

The FCRA expressly declares that the company can raise the defense of reasonable procedures in two specific situations. Section 1681d requires a user who has requested an investigative report on a particular consumer to notify the consumer that the report is

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44. See notes 41 & 42 *supra* and accompanying text.

being made; section 1681m provides that a user who has denied a consumer a benefit because of an adverse report must notify the consumer of the existence of the report and supply him with the name and address of the reporting agency. Each of these sections concludes with the following language:

No person shall be held liable for any violation of [this section] if he shows by a preponderance of the evidence that at the time of the . . . violation he maintained reasonable procedures to assure compliance with [the provisions of this section].<sup>45</sup>

Thus, even though an employee of a company which uses consumer reports has negligently violated the notice requirements of section 1681d or 1681m, the company can avoid liability by proving that it maintained reasonable procedures to prevent the violation.

Unfortunately, the FCRA does not expressly state whether the defense of reasonable procedures may be raised in suits involving sections other than 1681d and 1681m. Clearly, whenever a violation of one of the four FCRA procedural requirements has been alleged, the agency must be permitted to defend itself by proving that its procedures did in fact meet the FCRA standards. But even in a suit involving misconduct covered by a procedural requirement, doubts may arise as to whether an agency should be permitted to offer evidence of its procedures on the issue of liability. Consider the case of the consumer who has been damaged by a report containing obsolete information. As noted earlier, the reporting of obsolete information is subject to both the section 1681e(a) procedural requirement and the section 1681c non-procedural requirement. Suppose, then, that the consumer sues the reporting agency on the ground that one of its employees negligently entered obsolete information into a report on the consumer. Should the agency be permitted to exonerate itself by proving that its procedures to insure the deletion of obsolete information, though concededly not foolproof, were nevertheless "reasonable" and were therefore in compliance with the section 1681e(a) procedural requirements?

The answer to this question requires an examination of the rationale behind the FCRA's breakdown of requirements into the

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45. FCRA §§ 1681d(c) & 1681m(c).

two types, procedural and non-procedural. According to deliberations at one point during the congressional hearings held on the FCRA, the two types of requirements were meant to impose liability on the agency for two distinct categories of misconduct: *non-procedural* requirements subject the agency to liability for the negligent acts of its *individual employees*; *procedural* requirements create liability where the *agency* itself is negligent in the design of its procedures and in the supervision of employees.<sup>46</sup> Under this analysis, sections 1681c and 1681e(a) are distinct and independent sources of agency liability regarding the reporting of obsolete information. Thus, if an agency employee negligently violates the non-procedural requirement of section 1681c, the agency is liable—the fact that it maintained reasonable procedures in compliance with section 1681e(a) is immaterial.

Moreover, the foregoing analysis is equally applicable to a suit which charges the violation of a non-procedural requirement other than the one in section 1681c. In general, if the employee of an agency or user has negligently violated *any* non-procedural requirement (the notice requirements of sections 1681d and 1681m excepted), the agency or user should not be permitted to raise the defense of reasonable procedures. The correctness of this result is

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46. The original House version of the FCRA contained a section which was summarized and analyzed as follows:

*Section 24. Civil Liability for Negligence.* When a reporting agency or user negligently fails to comply with any requirement under this act, any individual injured thereby can sue for actual damages. In addition if there was negligence in the design of procedures or supervision of employees to assure compliance, the individual can recover his attorney's fees.

*Analysis.* The above distinction was made to differentiate between acts of negligence over which the agency or user can exercise some control and those negligent acts which occur in the normal course of doing business regardless of the type of supervision exercised.

*House Hearings, supra* note 3, at 12. During the hearings on the original House version of the FCRA, Congresswoman Sullivan, who introduced the House bill and chaired the subcommittee conducting the hearings, noted "the distinction made in section 24 between the acts of negligence by employees, on the one hand, and on the other hand those of the company in design of its procedures and in its supervision of the employees." *Id.* at 76.

Thus it appears that the FCRA's imposition of both procedural and non-procedural requirements finds its legislative roots in section 24 of the original House bill. Although procedural requirements under the FCRA are separate sources of agency liability, whereas under the original bill they only served to permit recovery of attorney's fees, the basic distinction between procedural and non-procedural requirements undoubtedly remains intact: the former apply to misconduct of the agency as an organization while the latter cover the misconduct of individual employees.

bolstered by the fact that the FCRA expressly permits the defense of reasonable procedures in suits involving the section 1681d and 1681m notice requirements.<sup>47</sup> Congress must have believed that the defense would not be available in a suit for violation of a non-procedural requirement; otherwise it would not have taken the trouble to provide expressly for the defense in these two sections.

### *Inadequacy of the Federal Remedy*

By predicating liability on mere negligence, the FCRA has greatly improved the recovery chances of the consumer who has been injured by faulty reporting practices. In a number of instances, however, the new cause of action fails to provide relief. Although reporting agencies and users of information are subject to liability under the federal cause of action, those who supply information to the reporting agency are not.<sup>48</sup> The FCRA provides no remedy for the consumer who has been damaged by an inaccurate report if the agency can prove that it maintained the required procedures to insure accuracy, even though the inaccuracy was the result of the

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47. One writer has criticized the remedial scheme of the FCRA in so far as the maintenance of reasonable procedures will discharge agency and user obligations regarding accuracy and notification:

Thus, if a reasonably accurate credit bureau sends an erroneous report to a user which has reasonable notification procedures, but which fails to notify, neither is liable under the FCRA. . . . As regards the report user, this is a lower standard of care than negligence, for if it has reasonable procedures there is no liability for occasions of negligent failure to follow them.

Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1067-68 (1971) (footnote omitted). These words prompted another writer to retort that the non-liability of an agency or user which maintains reasonable procedures "is inevitable under a negligence theory, for to do otherwise would be to impose strict liability." Note, *The Fair Credit Reporting Act: Are Business Reports Regulated?*, 1971 DUKE L.J. 1229, 1241 n.67 (1971). This disagreement would seem to evaporate if one bears in mind that the FCRA does not impose a general duty to exercise reasonable care. Rather, reasonable care must be exercised in complying with statutory requirements, some of which cover the actions of individual employees and others of which specifically apply to the conduct of the employer organization in the design and maintenance of procedures. Thus, in those cases where the agency or user can absolve itself of liability by proving that it exercised reasonable care in maintaining proper procedures, technically the standard of care remains unchanged—"reasonable care" is still the watchword. The more precise explanation of the lessened liability in such cases is that the agency or user only has a duty to maintain procedures—there are no duties applicable to individual employees. Under this analysis it should also be clear that depriving the agency or user of the defense of reasonable procedures does not result in strict liability. The agency or user is liable only if an employee *negligently* fails to comply with an FCRA non-procedural requirement.

48. FCRA §§ 1681n & 1681o.

negligent or even willful act of an agency employee.<sup>49</sup> Since there are no FCRA provisions which limit the content of a consumer report to items of information relevant to the purpose of the report,<sup>50</sup> the consumer has no federal remedy against an agency which disseminates a report containing highly personal information utterly unrelated to the user's need for the report.<sup>51</sup> If a consumer is unable to prove "actual damages,"<sup>52</sup> he has no federal remedy.<sup>53</sup> In cases like these, the injured consumer must look to *state law* for relief.

### THE STATE CAUSE OF ACTION

#### *The Common Law Remedies*

Prior to the FCRA's liability based on negligence, the best way

49. Section 1681e(b) only requires agencies to maintain certain procedures regarding accuracy; it does not per se prohibit the reporting of inaccurate information. The dissemination of inaccurate information can be actionable, however, under a libel theory. See notes 54-61 *infra* and accompanying text.

50. The Senate bill and the House bill each contained a section prohibiting agencies from reporting information which is not relevant to the purposes for which it is sought or which represents an invasion of the consumer's right of privacy. S. 823, 91st Cong., 1st Sess. § 164(c) (1969); H.R. 16340, 91st Cong., 2d Sess. § 54 (1970). Restrictions concerning the relevancy of consumer information were criticized on the ground that they would "unquestionably hamper the efficient operation of mercantile reporting companies, and be almost impossible of workable interpretation and enforcement." *Senate Hearings, supra* note 3, at 174. Both sections were ultimately deleted, a result which prompted Congresswoman Sullivan to remark as follows, when she presented the FCRA to the House for its final approval:

[T]his bill will not adequately, in my opinion, protect the right to privacy of our citizens. [The original House bill] would have offered . . . provisions to protect privacy. I hope the new law can be amended in the next Congress to protect this invaluable right more effectively.

116 CONG. REC. 36572 (1970).

51. An agency which disseminates highly personal information may be liable in a state law suit for invasion of privacy. See notes 62-75 *infra* and accompanying text.

52. In *Miller v. Credit Bureau, Inc.*, [1971-1973 Transfer Binder] CCH CONSUMERISM, NEW DEVELOPMENTS 573 (D.C. Super. Ct., Civ. Div., Small Claims Conciliation Branch, June 22, 1972), the court held that the defendant had negligently failed to comply with the FCRA, but denied recovery because the plaintiff had not proven actual damages. The rejection of an application for a credit card did not constitute "actual damage" when the consumer had a number of other credit cards which he could have used. *Id.* at 576.

In any event, once actual damages are proven the plaintiff must further prove that they were proximately caused by the failure to comply with the FCRA. *Beresh v. Retail Credit Co.*, 358 F. Supp. 260, 262 (C.D. Cal. 1973).

One writer has suggested that in a section 1681n suit for *willful* failure to comply, the plaintiff may be able to recover punitive damages even though no actual damages are proven. Ullman, *Liability of Credit Bureaus after the Fair Credit Reporting Act: The Need for Further Reform*, 17 VILL. L. REV. 44, 61 n.94 (1971).

53. In those few states which do not recognize the doctrine of conditional privilege, the plaintiff in a suit for libel may recover substantial sums without proving or even alleging damage. See note 56 *infra* and accompanying text.

for an injured consumer to recover against a reporting agency was to sue for libel.<sup>54</sup> In an ordinary suit for unprivileged libel, two conclusive presumptions operate in favor of the plaintiff. The law presumes, first, that the defendant published the defamatory material with malice,<sup>55</sup> and secondly, that the plaintiff has been damaged as a result.<sup>56</sup> Unfortunately, the theory of a libel action is quite different where the defendant is a consumer reporting agency. Most states permit reporting agencies to raise the defense of conditional privilege.<sup>57</sup> Once the defense is raised, the two presumptions vanish, leaving the consumer with the difficult task of proving that the reporting agency acted with actual malice<sup>58</sup> towards him and that

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54. Libel is the written form of defamation, slander being the oral form. W. PROSSER, *THE LAW OF TORTS* 737, (4th ed. 1971) [hereinafter cited as PROSSER]. In either form, defamation is an invasion of the plaintiff's interest in reputation and good name by a communication to a third party which affects the community's opinion of him. *Id.* Truth is a complete defense in a defamation action. *Id.* at 796-99. Generally, a defamatory communication is one which tends to elicit hatred, contempt or ridicule toward the plaintiff, or to cause him to be shunned or avoided. *Id.* at 739. Many of the statements typically found in consumer reports are defamatory if false. Sheppard v. Dun & Bradstreet, 71 F. Supp. 942 (S.D.N.Y. 1947) (stated plaintiff refuses to pay debts); Bates v. Campbell, 213 Cal. 438, 2 P.2d 383 (1931) (alleged plaintiff was dishonest); Petition of Retailers Commercial Agency, Inc., 342 Mass. 515, 174 N.E.2d 376 (1961) (stating plaintiff had gone bankrupt); Lyman v. New England Newspaper Pub. Co., 286 Mass. 258, 190 N.E. 542 (1934) (claimed plaintiff was having marital trouble); Rudawsky v. Northwestern Jobbers' Credit Bureau, 183 Minn. 21, 235 N.W. 523 (1931) (stated plaintiff had been indicted); McKee v. Robert, 197 App. Div. 842, 189 N.Y.S. 502 (1921) (claimed plaintiff was a drunk); More v. Bennet, 48 N.Y. 472 (1872) (stating plaintiff engaged in immoral activity); Gartman v. Hedgpeth, 138 Tex. 73, 157 S.W.2d 139 (1941) (stating plaintiff had been fired).

55. PROSSER, *supra* note 54, at 771-72.

56. Where a defamatory imputation is made in a libelous rather than slanderous form, damage is presumed, with the result that the plaintiff can recover substantial compensatory sums for harm to his reputation, without any proof that the harm in fact occurred. PROSSER, *supra* note 54, at 762-64. In the words of one court:

The reason for the rule may be that evil report [*sic*] is insidious, that it travels and does damage in the dark, meandering in ways whereof it is difficult for man to find out, or because . . . cases may arise where, from the nature of the business in which the party is engaged, it would be almost impossible to prove the loss of trade by witnesses who had dealt with the party bringing the suit.

Douglass v. Daisley, 114 F. 628, 638 (1st Cir. 1902).

57. *E.g.*, Stationers Corp. v. Dun & Bradstreet, Inc., 62 Cal. 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965); Ormsby v. Douglass, 37 N.Y. 477 (1868).

Only two jurisdictions have refused to grant the privilege. Johnson v. Bradstreet Co., 77 Ga. 172 (1886); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914). *Cf.* Vinson v. Ford Motor Credit Co., 259 So. 2d 768 (Fla. Dist. Ct. App. 1972), discussed in note 109 *infra*.

58. Malice is frequently described as a conscious indifference to, or reckless disregard of, the rights of others. *See, e.g.*, A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F.2d

he has suffered "special damage."<sup>59</sup> As a result recoveries have been few in those jurisdictions recognizing the conditional privilege.<sup>60</sup> The judiciary has justified the privileged status of reporting agencies on the ground that the interest of the mercantile community in the free flow of consumer information outweighs the interest of an occasional consumer who is injured by faulty reporting practices.<sup>61</sup>

Another, though less effective, means for holding a reporting agency liable is an action in tort for invasion of privacy.<sup>62</sup> Although

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775 (2d Cir. 1957). See also Annot., 40 A.L.R.3d 1049, § 3[a] (1971). Although some courts have held that the conditional privilege may be defeated by conduct resembling simple negligence (see, e.g., the "reasonable care" language in *Roemer v. Retail Credit Co.*, 3 Cal. App. 3d 368, 83 Cal. Rptr. 540 (Ct. App. 1970) and *Bartels v. Retail Credit Co.*, 185 Neb. 304, 175 N.W.2d 292 (1970)), the vast majority of courts reject negligence as the standard. See Annot., 40 A.L.R.3d 1049, § 3[b] (1971). However, cogent arguments have been made for a negligence standard. E.g., Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1091, 1114 (1969). This position is also taken in 3 RESTATEMENT OF TORTS §§ 594 & 605 (1938). It has been held that the mental state of a reporting agency employee who is "out to get" a particular consumer satisfies the malice requirement. *Hooper-Holmes Bureau, Inc. v. Bunn*, 161 F.2d 102 (5th Cir. 1947). Most often, however, the malice takes the form of impersonal recklessness. See, e.g., *Morgan v. Dun & Bradstreet, Inc.*, 421 F.2d 1241 (5th Cir. 1970) (agency republished information after being notified that it was false); *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 345 S.W.2d 34 (1961) (reporting agency failed to await further clarification of report that plaintiff was going out of business). A reporting agency may lose its conditional privilege by acting recklessly with regard to the accuracy of information reported, as in the last two cases cited, or by recklessly furnishing information to one who has no legitimate interest. *Fulton v. Atlantic Coast Line R.R.*, 220 S.C. 287, 67 S.E.2d 425 (1951); *Lathrop v. Sundberg*, 55 Wash. 144, 104 P. 176 (1909).

59. The requirement of special damage means that the plaintiff must prove that the libel caused him pecuniary loss. PROSSER, *supra* note 54, at 760-62. Special damage is necessary to the cause of action, but once the action is established, non-pecuniary compensatory damages as well as punitive damages may be recovered. *Id.*

60. It has been noted that the malice requirement gives reporting agencies an all but absolute immunity. Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 516 (1969).

61. *Watwood v. Stone's Mercantile Agency*, 90 U.S. App. D.C. 156, 194 F.2d 160, cert. denied, 344 U.S. 821 (1952). In *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 286 F. Supp. 899 (W.D. Pa. 1968), the court stated:

The reason for the [conditional] privilege is that in furnishing information the agencies are supplying a legitimate business need, and that without the privilege few would undertake to furnish such information, and the cost thereof would be high, if not prohibitive.

*Id.* at 910. The only comprehensive statement of the rationale for conditional privilege is found in Smith, *Conditional Privilege for Mercantile Agencies*, 14 COLUM. L. REV. 187 (1914). For a recent critical discussion of the law of conditional privilege see Ullman, *Liability of Credit Bureaus After the FCRA: The Need for Further Reform*, 17 VILL. L. REV. 44, 44-54 (1971).

62. The right of privacy is a relatively new addition to the law of torts. The first state

the right of privacy has been broadly described as "the right to be let alone,"<sup>63</sup> courts have been unwilling to provide relief for infringements of the right except in certain narrowly defined situations.<sup>64</sup> There are two ways a reporting agency can invade one's privacy. First, the agency may release information on a consumer to a person who has no legitimate business interest in receiving it.<sup>65</sup> To recover, the consumer must prove that the reporting agency publicized private facts about him in such a way as would be offensive to a person of ordinary sensibilities.<sup>66</sup> In the typical case, however, where the reporting agency has not released the information to a large group of people, the consumer will find it difficult to establish the element of publicity.<sup>67</sup> Recovery will be further thwarted if the court, as in libel suits, allows the defense of conditional privilege, thereby saddling the consumer with the burden of proving actual malice.<sup>68</sup>

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to recognize it was Georgia, in 1905. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). Unlike defamation, invasion of privacy concerns the dissemination of information which is true. See, e.g., *McKinzie v. Huckaby*, 112 F. Supp. 642, 645 (W.D. Okla. 1953) ("truth is no defense" to an invasion of privacy).

63. *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951).

64. RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 13, 1967) [hereinafter cited as RESTATEMENT] states:

The right of privacy is invaded when there is

- (a) unreasonable intrusion upon the seclusion of another . . . or
- (b) appropriation of the other's name or likeness . . . or
- (c) unreasonable publicity given to the other's private life . . . or
- (d) publicity which unreasonably places the other in a false light before the public

65. See note 6 *supra*.

66. RESTATEMENT, *supra* note 64, § 652D. Comment b to this section states:

"Publicity" . . . differs from "publication" as that term is used . . . in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by a defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

Comment c to this section delineates the kind of facts which are deemed "private":

Every individual has some phases of his life and his activities, and some facts about himself, which he does not expose to the public eye, but keeps entirely to himself, or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history which he would rather forget.

67. See, e.g., *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962).

68. See, e.g., *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (Ct. App. 1927). See also RESTATEMENT, *supra* note 64,



Secondly, a reporting agency may invade a consumer's privacy by collecting and storing highly personal facts about him.<sup>69</sup> Here the courts so far have been unwilling to provide any remedy. Although recovery has been permitted where an invasion of privacy takes the form of an intrusion upon the plaintiff's solitude or seclusion,<sup>70</sup> the courts have not extended the rationale of the intrusion cases to the information gathering practices of reporting agencies.<sup>71</sup> Nor has a reporting agency been liable for merely storing intimate facts about a person, or for issuing a report containing such facts to a user who otherwise has a legitimate interest in receiving the report.<sup>72</sup> Future cases, however, may witness a change in this judicial unconcern for the privacy of report subjects. Commentators have urged a turnabout,<sup>73</sup> a fact which may have special significance in the light of past judicial responsiveness to legal treatises on the right of privacy.<sup>74</sup> Recent developments in constitutional law indicate that the expansion of the right of privacy is already under way.<sup>75</sup>

A very small number of courts have intimated that a consumer may have a state law action against a reporting agency based on a negligence theory. A few courts have held that the consumer has satisfactorily shown "actual malice" on the part of the agency if he proves that the agency performed acts which constitute little more than simple negligence.<sup>76</sup> One court, by dictum, has indicated that

§ 652H; PROSSER, *supra* note 54, at 818. *But see* Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963).

69. *See, e.g.,* Wetherby v. Retail Credit Co., 235 Md. 237, 201 A.2d 344 (1963) (report stated that neighbors of consumer suspected she was a Lesbian); note 4 *supra*.

70. *E.g.,* Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968), *affd.*, 449 F.2d 245 (9th Cir. 1963) (invading plaintiff's home); Souder v. Pendleton Detective, Inc., 88 So. 2d 716 (La. App. 1956) (peering through windows); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964) (electronic eavesdropping); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959) (illegally searching shopping bag).

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

72. Thus far the only cases upholding liability for invasion of privacy are ones which fall within one of the four categories listed in note 60. *See* PROSSER, *supra* note 54, at 816.

73. *E.g.,* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1091, 1156-62; Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 524-27 (1969).

74. "The recognition and development of the so-called 'right of privacy,' is perhaps the outstanding illustration of the influence of legal periodicals upon the courts." PROSSER, *supra* note 54, at 802 (footnote omitted).

75. *Id.* at 816. *See* notes 129-32 *infra* and accompanying text.

76. Roemer v. Retail Credit Co., 3 Cal. App. 2d 368, 83 Cal. Rptr. 540 (Ct. App. 1970); Locke v. Bradstreet Co., 22 F. 771 (C.C.D. Minn. 1885); Bartels v. Retail Credit Co., 185 Neb. 304, 175 N.W.2d 292 (1970).

the consumer injured by an erroneous report may also have an action against the reporting agency for negligent misstatement.<sup>77</sup> But in the main, with respect to reporting agency liability, no significant judicial cognizance has been given to suits framed in terms of negligence.

### *State Remedies as a Supplement to FCRA Remedies*

As this survey of common law remedies illustrates, traditional state law has not been an abundant source of relief for victims of faulty consumer reporting. But due to gaps in the remedial scheme of the FCRA, the consumer will of necessity in two instances continue to look to state remedies. As discussed earlier, a reporting agency can be liable under the FCRA for an inaccurate report, but only if it negligently failed to design and maintain the required procedures regarding accuracy.<sup>78</sup> Thus, as long as the required procedures exist, the agency is not liable under the FCRA for inaccuracies which result from the inadvertent, negligent or even malicious acts of an individual employee. On the other hand, in a suit for libel the consumer can recover in all jurisdictions when an employee has acted maliciously, and, in a few jurisdictions, even when the inaccuracy is the result of only negligence<sup>79</sup> or inadvertence.<sup>80</sup> Another major gap is the FCRA's failure to impose liability upon agencies for gathering and storing highly personal facts about consumers. Although section 1681b offers some protection to the consumer by prohibiting the issuance of reports to improper recipients, the FCRA places no restrictions on the subject matter or relevancy of information contained in agency files.<sup>81</sup> Here, again, state law may fill the gap if it permits an action for invasion of privacy. The ultimate efficacy of this action and the action for libel is controlled by such factors as the consumer's ability to adduce evidence on the issue of malice, his ability to prove damage and, most importantly, the jurisdiction's attitude toward the defense of conditional privilege and what is required to defeat it.

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77. *H.F. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387, 397 n.13 (4th Cir. 1957).

78. See note 49 *supra* and accompanying text.

79. See notes 76 & 77 *supra* and accompanying text.

80. In the jurisdictions which do not recognize the conditional privilege, the reporting agency is strictly liable once the consumer establishes that a libelous report was sent out. PROSSER, *supra* note 54, at 772-73. Further, the consumer suing in these jurisdictions can recover without proving actual damages. See note 56 *supra*.

81. See note 50 *supra* and accompanying text.

*The FCRA's Limitation of State Remedies*

Once a consumer determines that he has no remedy under the FCRA and that a state remedy provides his only chance of recovery, he must next determine whether the FCRA bars the state cause of action. Section 1681h(e) states that he may not bring a suit for defamation, invasion of privacy or negligence based on information disclosed pursuant to section 1681g,<sup>82</sup> 1681h<sup>83</sup> or 1681m,<sup>84</sup> except as to false information furnished with malice or willful intent to injure him. Under this section reporting agencies, users of reports, and information sources are accorded a degree of immunity to suits based on state law. One important aspect of this immunity is that it extends only to state law suits based on information disclosed to the consumer pursuant to three specified sections of the FCRA. Secondly, in a suit where immunity obtains, the consumer can still recover if he proves that false information was furnished with malice. Both of these features of the section 1681h(e) limitation of state remedy will be examined in greater detail below.

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82. Section 1681g contains the primary disclosure requirements. It provides:

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information, except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided*, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished (A) for employment purposes within the two-year period preceding the request, and (B) for any other purpose within the six-month period preceding the request.

83. Section 1681h specifies the conditions under which a section 1681g disclosure shall take place. For example, section 1681h(b) provides that disclosures may be made to the consumer in person or by telephone if he has made a prior written request for a telephone disclosure. Section 1681h(d) permits the consumer to have one other person accompany him during disclosure.

84. Under section 1681m(a) the user who refuses to grant a consumer credit, insurance or employment because of an adverse report, must so advise the consumer and supply him with the name and address of the reporting agency. Section 1681m(b) applies to the situation where the user has received adverse information on the consumer from a person other than a reporting agency. Section 1681m(b), unlike section 1681m(a), requires the user to disclose the "nature of the information" to the consumer.

*Avoiding the FCRA Limitation of Remedy: Independent Means of Disclosure*

## Disclosure Via Section 1681b

In a state law suit for libel or invasion of privacy, the consumer must be able to produce evidence that the reporting agency has disseminated defamatory or highly personal information about him. This evidence, which the consumer must have in order to make his case, is usually in the exclusive possession of an agency or user, in the form of a file or a report on the consumer. The most convenient means by which a consumer can obtain the information in a file or report on him, is to compel the agency or user to make disclosures pursuant to section 1681g, 1681h or 1681m. But section 1681h(e), by requiring proof of malice, severely restricts any state law suit which is based on information obtained in this manner. In order to avoid the section 1681h(e) restriction, the consumer must somehow secure the information without invoking any of the three disclosure sections. At least one writer believes it is impossible for him to do so, especially in the light of section 1681q, which makes it a crime to obtain information from an agency under false pretenses.<sup>85</sup>

It is possible, however, that a consumer may gain access to information in his file by utilizing section 1681b.<sup>86</sup> This section is designed to protect the confidentiality of consumer information by prohibiting reporting agencies from furnishing consumer reports<sup>87</sup> except under three specified circumstances. The agency is permitted to furnish a report (1) in response to a court order, (2) in accordance with the written instructions of the consumer and (3) to a person who is engaged with the consumer in a transaction involving

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85. Note, *The Future of Common-Law Libel Actions Under the Fair Credit Reporting Act*, 21 CATH. U.L. REV. 200, 209 (1971).

86. Conceivably the information could also be obtained by means entirely independent of the FCRA. For example, one of the reporting agency's information sources, such as the consumer's next-door neighbor or the retail merchant with whom the consumer has a credit account, may furnish the agency with defamatory or highly personal information about the consumer. If the source subsequently confesses to the consumer, the consumer could then sue the agency on the basis of the information disclosed to him by the source. The suit of course would not be subject to the limitations of section 1681h(e). In all likelihood, however, a source would not confess, for by doing so he exposes himself to liability.

87. Information furnished pursuant to section 1681b will be in the form of a consumer report. This contrasts with information disclosed pursuant to section 1681g, which consists of all information (except medical information) in the reporting agency's files on the consumer, the identity of sources of information, and the identity of prior recipients of reports.

employment, the extension of credit, the underwriting of insurance, the issuance of a license by a governmental agency or an otherwise legitimate business purpose.<sup>88</sup> If a report furnished under one of these circumstances should somehow fall into the hands of the consumer to whom it relates, the consumer would be free to bring a state law suit based on information contained in the report. A report could come into the consumer's possession if, for example, the reporting agency sends it directly to him in accordance with his written instructions.<sup>89</sup> Or the report might be passed to him by a third party who originally received it from a reporting agency under any one of the three specified circumstances.<sup>90</sup>

The potential of section 1681b to skirt the limiting effects of section 1681h(e) is greatly diminished, however, by the fact that section 1681b permits, but does not require, the reporting agency to furnish the report.<sup>91</sup> Reporting agencies traditionally have not been

88. FCRA § 1681b.

89. FCRA § 1681b(2).

90. Some reporting agencies, wary of their new liability under the FCRA for furnishing reports for impermissible purposes, may hesitate to issue a report to a third party in accordance with the written instructions of the consumer, unless the third party shows that the report will be used in one of the five types of business transactions listed in section 1681b(3). Such hesitation is unwarranted; compliance with the written instructions of the consumer (or with a court order) is in itself one of the permissible purposes for furnishing a report. Thus, if either section 1681b(1) or 1681(2) is satisfied, the reporting agency may issue the report even though it will not be used for one of the purposes listed in section 1681b(3). See *FTC v. Manager Retail Credit Co.*, 157 F. Supp. 347 (1973); *FTC Advisory Opinion*, [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,213 & ¶ 99,444 at 89,400; S. Rep. No. 517, 91st Cong., 1st Sess. 5 (1969). In the case just cited the FTC, in the exercise of its authority under section 1681s(a) to enforce the FCRA, attempted to subpoena the consumer files of the Retail Credit reporting agency. The court held that the FTC did not qualify to receive a report under either section 1681b(1) or 1681b(3), but that it could obtain a report pursuant to section 1681b(2) if the subject of the report gave his written permission.

91. Section 1681b provides that "[a] consumer reporting agency *may* furnish a consumer report under the following circumstances . . ." (emphasis added). The permissive character of this section contrasts with the mandatory disclosure requirements of sections 1681g, 1681h and 1681m (see notes 82-84 *supra*). See *FTC Advisory Opinion*, [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,213 & ¶ 99,444 at 89,400. The distinction between permissive and mandatory disclosures explains why section 1681h(e) grants immunity where information is obtained pursuant to sections 1681g, 1681h and 1681m but not where it is obtained pursuant to section 1681b. On several occasions during the congressional hearings on the FCRA the argument was advanced that if reporting agencies are going to be required by law to bare their files to consumers, the agencies must be accorded some degree of immunity to suits based on the disclosed information. *Senate Hearings, supra* note 3, at 76; *House Hearings, supra* note 3, at 476, 490, 494 & 620. It was urged that the primary goal should be the detection and correction of errors and that the realization of this goal would be jeopardized if—by complying with the disclosure requirements of the FCRA—reporting

very willing to allow a consumer to see a copy of his credit report.<sup>92</sup> Thus, whether in actual practice section 1681b will be helpful to the consumer depends entirely upon the reporting agency's willingness to furnish a report under circumstances where it is likely that the report will fall into the hands of the consumer.<sup>93</sup>

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agencies exposed themselves to unbridled liability. Professor Westin of Columbia University made the point early in the Senate hearings:

I think responsible legislators may really be faced with a hard choice here. If you pile an access law on top of the court damage-suit remedy, then it seems to me that reporting companies are caught in what may be an improper crossfire. If they seek to correct errors and provide due process, they can open themselves to very extensive damage suits.

*Senate Hearings, supra* note 3, at 76. Westin's argument was echoed by other witnesses at the hearings, notably by Mr. Burge, chairman of Retail Credit Co.:

[I]f we are to be forced to disclose file information to every individual on request, we think fundamental fairness requires that we also be protected against lawsuits resulting from such disclosures. A lack of protection in this respect could seriously affect the desired cooperation that the bill seeks to achieve [sic] between the reporting agency and the individual legitimately interested in correcting errors.

*House Hearings, supra* note 3, at 490.

92. Professor Westin gave the following testimony at the Senate hearings:

[T]he credit bureaus and personnel companies will warn the people who get these reports that if they disclose it, they will be subject not only to cancellation of a service but to liability for any damages collected by the subject of the report. I know of one case in particular where it was made very directly—that when a form on an individual was furnished to him by a friend who worked for a firm, the company that had drawn the report said to the firm, "If we are sued for damages and if any money is collected against us, we will hold you liable for having given the individual the report."

*Senate Hearings, supra* note 3, at 79. See also *Hearing on Retail Credit Co. Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 2d Sess. 47 (1968); *Hearings on Commercial Credit Bureaus Before a Subcomm. on Invasion of Privacy of the House Comm. on Government Operations*, 90th Cong., 2d Sess. 64 (1968).

93. In some situations it is conceivable that a reporting agency would readily furnish a report, even though the agency is aware that the recipient will probably show the report to the consumer. Such might be the case, for example, where the recipient is a consumer debt counseling agency. A credit report on the counseling agency's client would be helpful in reviewing the client's financial situation and assisting him in managing his indebtedness. Section 1681b permits the reporting agency to furnish a report to the counseling agency as long as the consumer in writing instructs the reporting agency to do so. (Written instructions are necessary here because debt counseling, especially if not done for profit, probably does not involve a business transaction within the purview of section 1681b(3). See FTC Advisory Opinion, [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,213.) The reporting agency has the option of refusing the debt counseling agency's section 1681b request for the report, but if it does, the consumer may compel disclosure pursuant to sections 1681g and 1681h, accompanied by a representative of the counseling agency. In either case the reporting agency would be able to impose a charge for furnishing the information. See FCRA § 1681j. In the latter case, however, the reporting agency would have to exert an extra effort to accommodate the consumer. The extra effort would include disclosing the nature and substance

## Two Problems in Interpreting Section 1681h(e)

Assuming that the consumer has successfully used section 1681b to obtain information from the agency's file on him, two problems in interpreting section 1681h(e) must be resolved before his state law suit is freed of FCRA restrictions. First, section 1681h(e) states that a reporting agency is immune from suits based on information disclosed pursuant to section 1681g, 1681h or 1681m, but it does not state whether immunity still applies when the same information has also been obtained via other means. Consider the typical case of the consumer who, after being turned down on an application for credit, goes to the reporting agency to find out what the problem is with his credit rating. The agency, pursuant to the requirements of section 1681g, discloses to the consumer the information it has been circulating about him, some of which is defamatory. Assuming that the consumer later obtains the same information, but this time pursuant to section 1681b, should a libel suit based on the subsequently obtained information be barred by reason of the earlier section 1681g disclosure? Although it does not speak with complete clarity on this question, the legislative history of the FCRA favors the view that the suit should not be barred.<sup>94</sup> A Federal

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of all the information (except medical information) it has on file about the consumer, providing trained personnel to explain the information, and following required procedures in the event the consumer disputes the accuracy of the information. FCRA §§ 1681g, 1681h & 1681i. Under these circumstances the reporting agency may well prefer to furnish the report as originally requested.

94. The original Senate-passed version of the FCRA contained a section (S. 823, 91st Cong., 1st Sess. § 610 (1969)) which, for the purposes of this discussion, is identical to section 1681h(e). The Senate committee report on the bill commented on the section as follows:

Reporting agencies, their sources and the users of information are given immunity from libel or other suits as a result of information in their credit file disclosed to consumers pursuant to [sections equivalent to FCRA §§ 1681g, 1681h & 1681m] unless the information was furnished with malice or willful intent to injure the consumer. *The immunity provisions under this section do not extend to information acquired by a consumer through other means.*

S. REP. No. 517, 91st Cong., 1st Sess. 6 (1969) (emphasis added). Congresswomen Sullivan explained section 1681h(e) to the House of Representatives as follows:

The bill bars defamation and the invasion of privacy suits against an agency, but only if the individual bases his suit on the information disclosed under the act. *If the individual uses information obtained through independent sources, whether he has also obtained disclosures under the act or not, he may of course bring any action allowed by common law or statute.* It is not intended that the bill grant any immunity to an agency from such suits by individuals whenever the agency has furnished information under this act. In my opinion, this is made clear by the discussion in the Senate committee report.

Trade Commission advisory opinion further supports this view.<sup>95</sup> In sum, it appears that if the consumer can obtain the information upon which his state law claim is based by a means independent of sections 1681g, 1681h and 1681m, the suit will proceed unimpeded by the FCRA, even though the information was also obtained pursuant to one of those sections.

The second problem of interpretation involves the meaning of "information" in the phrase "based on information disclosed pursuant to section 1681g, 1681h, or 1681m."<sup>96</sup> Clearly the term refers to the kind of information which would appear in a consumer report, information pertaining to such matters as the consumer's credit record, employment history and income.<sup>97</sup> Another kind of information an agency retains is information pertaining to its own activity in sending out reports on the consumer. The question is whether the term in section 1681h(e) also applies to information of the latter sort, that is, information which specifies when and to whom consumer reports have been furnished. In many cases this question will be crucial in determining whether the defendant is immune to a suit based on state law. As noted previously, in a suit for either libel or invasion of privacy, the consumer must prove as an element of his cause of action that the defamatory or highly personal information was communicated to someone.<sup>98</sup> Thus, it is incumbent upon the consumer to produce evidence that a report on him was actually furnished to a user. But as a practical matter such evidence normally will be obtainable only if it is furnished to the consumer pursuant to the disclosure requirements of sections 1681g and 1681m.<sup>99</sup> In the usual case, then, where disclosures made pursuant to sections 1681g and 1681m supply the consumer with his only

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116 CONG. REC. 36573 (1970) (emphasis added).

95. Compliance with the Fair Credit Reporting Act, 4 CCH CONSUMER CREDIT GUIDE ¶ 11,313 at 59,810 (1971).

96. FCRA § 1681h(e).

97. The purpose of section 1681h(e) is to restrict suits based on information obtained pursuant to FCRA disclosure requirements. Therefore "information" must refer to that kind of information which might give rise to a suit. The only kind of information which could give rise to a consumer suit for libel or invasion of privacy is, of course, information *about* the consumer, as would be found in a report on him.

98. See notes 54 & 66 *supra*.

99. Under section 1681g(a)(3) an agency must disclose to a consumer the past recipients of reports on him. See note 82 *supra*. Section 1681m(a) requires the user who denies a consumer a benefit because of an unfavorable report so to inform the consumer and disclose to him the identity of the reporting agency.



evidence that a report was in fact sent, the reporting agency can invoke immunity under section 1681h(e) if such evidence is deemed to be “*information disclosed pursuant to section 1681g . . . or 1681m.*”<sup>100</sup>

An examination of the context in which the word “information” appears indicates that it refers only to information about the consumer and does not refer to information concerning the furnishing of reports. The word appears four times in section 1681h(e) other than in the phrase under discussion.<sup>101</sup> In each of these instances the word can sensibly mean only that information which describes the consumer, as would be found in a report about him. Consistency dictates that the word have the same meaning in the fifth instance.<sup>102</sup> If the draftsmen had intended “information” to have a more comprehensive meaning in the phrase under discussion, they could have prefaced it with the word “any,” as was done in the drafting of section 1681h(c). The narrower interpretation of “information” contended for here is further supported by the language of sections 1681g and 1681m. Each of these sections deals with the disclosure of two types of information: information about the consumer<sup>103</sup> and information which reveals that a report has in fact been sent out on the consumer.<sup>104</sup> In both sections the word “information” is used to describe only information of the first type.

Summarizing, the phrase “based on information disclosed pursuant to section 1681g, 1681h, or 1681m . . .” should be interpreted as applying only to information disclosed *about* the consumer. Thus, a consumer suit for libel or invasion of privacy should not be barred by section 1681h(e), even though the only evidence offered to prove that a report was actually furnished to a third party is

100. FCRA § 1681h(e) (emphasis added).

101. Section 1681h(e) states:

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of *information* against any consumer reporting agency, any user of *information*, or any person who furnishes *information* to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, except as to false *information* furnished with malice or willful intent to injure such consumer. (Emphasis added.)

102. When identical words are used in different parts of a statute it is presumed that they have the same meaning. See 82 C.J.S. *Statutes* § 316 at 553 (1953).

103. FCRA §§ 1681g(a)(1), 1681m(b). See notes 82 & 84 *supra*.

104. FCRA §§ 1681g(a)(3), 1681m(a). See notes 82 & 84 *supra*.

evidence obtained pursuant to section 1681g or 1681m. Of course, the remainder of the plaintiff's evidence—that which goes to proving that the published information was defamatory or contained highly personal facts—must be secured by a means independent of sections 1681g, 1681h and 1681m.

### The FCRA as a Reason to Abolish the Conditional Privilege

Assuming that the consumer has obtained a report disclosed pursuant to section 1681b and has thereby placed himself beyond the scope of the section 1681h(e) limitation of state remedies, the fact that Congress has seen fit to enact the FCRA may provide the consumer with new ammunition in a state law suit against a reporting agency. Recall that in a suit for libel or invasion of privacy the courts in most states have permitted the defendant to raise the defense of conditional privilege.<sup>105</sup> The judiciary has justified the privilege by making the policy determination that the interest of the mercantile community in the free flow of credit information outweighs the interest of the occasional consumer who is injured by faulty reporting practices.<sup>106</sup> The propriety of this policy determination has now been called into question by the FCRA, which may be viewed as a congressional declaration that the mercantile interest is no longer of paramount importance.<sup>107</sup> Arguably,

105. See notes 57 & 68 *supra* and accompanying text.

106. See note 61 *supra* and accompanying text.

107. The FCRA is prefaced with the following words:

(a) The Congress makes the following findings:

...  
 (4) *There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.*

(b) *It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.*

FCRA § 1681 (emphasis added). When Senator Proxmire presented the FCRA to the Senate for its final approval, he stated:

*In view of the growing importance of credit information in our economy, we must give consumers a higher degree of protection against the consequences of an inaccurate or misleading credit report.*

*Millions of American consumers are affected by the credit reporting industry. While credit reporting agencies have generally discharged their functions adequately,*

the conditional privilege of reporting agencies should therefore be abolished.<sup>108</sup> So far, one lower state court has relied on this line of reasoning in refusing to permit a reporting agency to raise the defense of conditional privilege.<sup>109</sup> Once a consumer has liberated his state law action from the shackles of section 1681h(e) by finding an independent means of disclosure, it thus appears that he may be able to turn the FCRA to his advantage.

*"Except as to False Information Furnished with Malice"*

The above discussion concerns the one situation where the consumer suing on a state law theory will be able to avoid the defendant's immunity under section 1681h(e), namely, where the information upon which the suit is based was obtained other than pursuant to sections 1681g, 1681h and 1681m. Assuming now that the consumer has failed to obtain the information by an independent means and that section 1681h(e) has therefore been brought into play, it is necessary to examine precisely how the defendant's immunity affects the consumer's suit. Section 1681h(e) states that a consumer may not sue for defamation, invasion of privacy or negligence based on information disclosed pursuant to section 1681g, 1681h or 1681m, "except as to false information furnished with malice or willful intent to injure such consumer."<sup>110</sup> Hence, if the con-

in some cases individuals have been irreparably damaged by inaccurate credit reports.

116 CONG. REC. 35941 (1970).

108. See Ullman, *Liability of Credit Bureaus After the Fair Credit Reporting Act: The Need for Further Reform*, 17 VILL. L. REV. 44, 51 n.48 (1971); Note, *The Impact of the Fair Credit Reporting Act*, 50 N.C.L. REV. 852, 871-73 (1972).

109. In *Vinson v. Ford Motor Credit Co.*, 259 So. 2d 768 (Fla. Dist. Ct. App. 1972), a Florida district court of appeals declined to follow *Putnal v. Inman*, 76 Fla. 553, 80 So. 316 (1918), wherein the Supreme Court of Florida had held that the communication between a credit bureau and one of its members was conditionally privileged. The appellate court justified the abolition of the conditional privilege as follows:

Times change and principles of law change with them. "A man's credit in this day and age is one of his most valuable assets and without it, a substantial portion of the American people would be without their homes, washing machines, refrigerators, automobiles, television sets, and other mechanical paraphernalia that are now regarded as necessities of life." The impersonal and unconcerned attitude displayed by business machines as to the impact of their actions upon an individual consumer . . . was the catalyst for our National Congress to pass the Fair Credit Reporting Act, which provides protection for consumers from irresponsible credit reporting agencies.

259 So. 2d at 771 (footnotes omitted).

110. FCRA § 1681h(e).

sumer can prove that false information was furnished with malice or willful intent to injure, his state remedy remains intact.

With respect to suits for defamation or negligence, the section works little change in existing state remedies. Since all but a few states have granted to reporting agencies the defense of conditional privilege, it has been the consumer's usual fare to be required to plead and prove malice in a suit for defamation.<sup>111</sup> Although the requirement of proving malice or willful intent virtually eliminates any theory couched in terms of negligence, suits against reporting agencies for negligence never have received significant judicial recognition.<sup>112</sup>

#### The FCRA Prohibition Against Suits for Invasion of Privacy: An Unintended Result?

Section 1681h(e) imposes its most severe limitation upon suits for invasion of privacy, for here the cause of action is completely barred. Under section 1681h(e) the defendant loses immunity if "false information [is] furnished with malice or willful intent to injure."<sup>113</sup> Hence there is no liability for maliciously furnishing *true* information. But information is actionable under an invasion of privacy theory not because the information is false, but because the information, though concededly true, is of a highly personal nature.<sup>114</sup> A literal reading of section 1681h(e) therefore means that the reporting agency which prevents a consumer from gaining access to his file unless he invokes the disclosure requirements of sections 1681g, 1681h or 1681m, may without fear of legal sanction, maliciously and with a willful intent to injure, send out highly personal information about the consumer.

It is doubtful that Congress intended such a result. The participants at the hearings were under the impression that section 1681h(e), requiring a consumer to prove malice in a suit based on disclosed information, merely codified the common law doctrine of conditional privilege.<sup>115</sup> Witnesses on behalf of the reporting industry had urged that if the consumer was to be given a statutory right

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111. See note 58 *supra* and accompanying text.

112. See notes 76 & 77 *supra* and accompanying text.

113. FCRA § 1681h(e) (emphasis added).

114. See note 62 *supra*.

115. *House Hearings, supra* note 3, at 94, 142, 173-74 & 465.

of access to his credit file, fairness required that the agency's common law right to raise the defense of conditional privilege also be enacted into law at the federal level.<sup>116</sup> Since the vast majority of the states already recognized the conditional privilege of reporting agencies, section 1681h(e) was viewed as having little effect on existing state law.<sup>117</sup> The hearings indicate that when the legislators considered the merits of the section 1681h(e) limitation of state remedies, they were thinking only in terms of the effect on actions for libel.<sup>118</sup> Significantly, the record is barren of any discussion concerning the rather severe impact of the section on state remedies for invasion of privacy. In all likelihood Congress had no idea that the inclusion of the word "false" in the section meant that the consumer about whom an agency makes disclosures is barred from suing the agency for malicious invasion of privacy.<sup>119</sup>

If "false" in the exception clause of section 1681h(e) was not intended to operate as a bar to privacy suits, what can explain the draftsmen's use of the term? A combination of two factors supplies the probable explanation. First, Congress wanted to insure that the FCRA was drafted in such a way as not to deter agencies from reporting true information of the type properly contained in a consumer report, even though the information might be very damaging to a person's ability to obtain a benefit.<sup>120</sup> For example, an agency

116. *Senate Hearings*, *supra* note 3, at 233-34; *House Hearings*, *supra* note 3, at 154 & 178. See also note 90 *supra*.

117. *House Hearings*, *supra* note 3, at 94, 142 & 173-74.

118. See the passages cited in notes 115-17 *supra*.

119. The significance of the word "false" in the exception clause of section 1681h(e) is easily overlooked, even by the trained eye. The word was left out in a committee report summary of the section:

Reporting agencies, their sources and the users of information are given immunity from libel or other suits as a result of information in their credit file disclosed to consumers pursuant to [sections equivalent to FCRA §§ 1681g, 1681h and 1681m] unless the information was furnished with malice or willful intent to injure the consumer.

S. REP. No. 517, 91st Cong., 1st Sess. 6 (1969) (emphasis added). A recent federal district court decision also seems to have missed the significance of the word "false." The court in *Peller v. Retail Credit Co.*, 359 F. Supp. 1235 (N.D. Ga. 1973) stated:

Since the plaintiff has not alleged malice or willful intent by these two defendants, there can be no action for libel, slander, or invasion of right of privacy under [the FCRA].

*Id.* at 1237. This clearly implies that in the court's view the plaintiff would have had an action for invasion of privacy had he alleged malice.

120. *Senate Hearings*, *supra* note 3, at 117 & 135.

must not in any way be inhibited from reporting to a prospective creditor that a consumer has just gone bankrupt or has lost his job. Secondly, at one point during the hearings the legislators were informed that in some states truth is not always a defense to a suit for libel.<sup>121</sup> A failure to include the word "false" in the exception clause of section 1681h(e) would therefore mean that an agency in one of these states might be held liable for reporting information which is *true* and which the user must have in order to make an intelligent decision regarding the extension of a benefit to a consumer. Thus the word "false" is necessary to insure that agencies in all states will not be inhibited from reporting accurate information on a consumer, even though it may impair his ability to obtain a benefit. Regrettably, inclusion of the word "false" does too much. By endeavoring to protect agencies from legal reprisal when they report true information *properly* contained in a consumer report, Congress inadvertently immunized agencies disseminating true information *not* properly contained in a report—namely, information which is highly personal and which might otherwise give rise to an action for invasion of privacy.

### Salvaging the Invasion of Privacy Remedy

An injured consumer who seeks to sue for malicious invasion of privacy, section 1681h(e) notwithstanding, has a more difficult task than simply persuading the court that Congress did not intend section 1681h(e) to bar his suit.<sup>122</sup> He must first convince the court that extrinsic evidence of legislative intent may properly be used to construe section 1681h(e) in a manner contrary to its clear and plain meaning.<sup>123</sup> The following argument may achieve this purpose.

A court may construe a provision contrary to its plain meaning if the provision conflicts with other portions of the statute.<sup>124</sup> Section 1681 states that "[t]here is a need to insure that consumer report-

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121. *Id.* at 135.

122. Although there are cases *contra*, it has generally been held that in a proper case congressional committee reports and statements made by legislators and witnesses at congressional hearings are admissible to prove legislative intent. See 82 C.J.S. *Statutes* § 356 (1953).

123. A court may not construe a statute contrary to its plain and obvious meaning simply because the legislature did not use proper words to express its intent. See 82 C.J.S. *Statutes* § 322 (1953).

124. See *id.* at § 347.

ing agencies exercise their grave responsibilities with . . . a respect for the consumer's right to privacy."<sup>125</sup> Section 1681 further declares that the purpose of the FCRA is to require reporting agencies to act fairly and equitably toward the consumer, "with regard to the *confidentiality, accuracy, relevancy, and proper utilization* [of information about the consumer]."<sup>126</sup> Arguably, the provisions of this section conflict with section 1681h(e), since section 1681h(e) purports to grant immunity to the reporting agency which maliciously, and with a willful intent to injure, invades a consumer's privacy. Thus, extrinsic evidence of congressional intent should be consulted to resolve the conflict.<sup>127</sup> This argument suffers from a flaw, however, because the rules of statutory construction weigh heavily against the use of legislative findings and statements of purpose to create a conflict with a provision in the body of the statute.<sup>128</sup>

If the court deems this flaw to be a fatal one, recent developments in constitutional law may provide the consumer with an alternative means of resurrecting an action for invasion of privacy from the confines of section 1681h(e). The United States Supreme Court in *Griswold v. Connecticut*,<sup>129</sup> declared that the right of privacy, in particular the right of marital privacy, is protected by the Constitution. Since *Griswold*, lower federal courts have held that liability in tort may be found for a violation of the constitutional right of privacy.<sup>130</sup> But the first indication that the constitutional right of privacy may be violated by the kind of activities in which reporting agencies engage, appears in the 1972 case of *Galella v. Onassis*.<sup>131</sup> The federal district court in *Galella* stated as dictum that the Constitution protects against "such disparate abuses of privacy as the unreasonable seeking, gathering, storing, sharing and disseminating of information by humans and machines."<sup>132</sup>

125. FCRA § 1681(a)(4).

126. FCRA § 1681(b) (emphasis added).

127. Where provisions of a statute conflict, extrinsic evidence of legislative intent is admissible to resolve the ambiguity. See 82 C.J.S. *Statutes* 718 & 736 (1953).

128. See 82 C.J.S. *Statutes* § 349 (1953).

129. 281 U.S. 479 (1965).

130. See, e.g., *York v. Story*, 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964); *Dietemann v. Time, Inc.*, 284 F. Supp. 925 (C.D. Cal. 1968), affd., 449 F.2d 245 (9th Cir. 1971). See also *Nader v. General Motors Corp.*, 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), affd., 31 App. Div. 2d 392, 298 N.Y.S.2d 137 (1969), affd., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

131. 353 F. Supp. 196 (S.D.N.Y. 1972).

132. *Id.* at 232.

Thus it appears that a consumer may now sue a reporting agency for infringement of his *constitutional* right of privacy. A court sympathetic to the plight of the consumer left without a remedy could construe the words "invasion of privacy" in section 1681h(e) as applying only to the state cause of action, thereby preserving the federal claim.<sup>133</sup> The court could justify its construction by taking notice of the fact that in 1970 when the FCRA was enacted, there was no federal cause of action against reporting agencies for invasion of privacy; Congress therefore could not have intended "invasion of privacy" in section 1681h(e) to refer to a federal remedy whose existence was first intimated by dictum in 1972.<sup>134</sup>

### CONCLUSION

On balance, the consumer's situation is greatly improved under

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133. Since the consumer's suit for violation of his constitutional right of privacy will be based on the due process clause of the fourteenth amendment, the requirements of "state action" must be satisfied. Where the defendant in a suit for invasion of privacy is a non-governmental entity, these requirements usually can be met on the theory that the act of a state court, in particular the entry of a judgment denying relief, is state action within the meaning of the fourteenth amendment. The plaintiff first argues for relief under state law. He next argues that even though the court concludes there is no right of privacy under the common law of the state, it is compelled to recognize such a right, for the act of the court in denying relief—relief essential to the vindication of one's constitutional right of privacy—would be state action violative of the due process clause of the fourteenth amendment. See *Galella v. Onassis*, 353 F. Supp. 196, 232 (S.D.N.Y. 1972), and the cases cited therein. However, where the suit is brought by a consumer against a reporting agency and is based solely on information obtained pursuant to the FCRA disclosure requirements, the foregoing theory of state action would not be applicable. In this suit, it is a federal statute, not the state court, which bars the consumer's state cause of action for invasion of privacy. FCRA § 1681h(e). Consequently, the consumer must proceed under the theory that the activities of the reporting agency constitute state action within the meaning of the fourteenth amendment. Although the precise issue of whether a reporting agency is bound by the constraints of the fourteenth amendment has never been decided, one writer has argued that an agency may be so bound. Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 521-23 (1969). See also *Garner v. Louisiana*, 368 U.S. 157, 184-85 (1961) (concurring opinion); Miller, *Toward the "Techno-Corporate" State?—An Essay in American Constitutionalism*, 14 VILL. L. REV. 1, 65-66 (1968).

134. The federal action for invasion of privacy would not fall within section 1681h(e) and technically, therefore, the plaintiff would not need to prove malice, even though he bases his suit exclusively on information obtained pursuant to section 1681g, 1681h or 1681m. It would be proper, however, for the court to require proof of malice anyway in view of the federal policy expressed in section 1681h(e), *viz.*, that a reporting agency which is forced to bare its files should be immune to suit unless it acted with malice.

Moreover, since the suit is not based on a liability created under the FCRA, the plaintiff will have to invoke federal jurisdiction independently of the lenient grant of jurisdiction in section 1681p.



the FCRA. Particularly beneficial among his new statutory rights are the right to know what information is contained in his file at the agency, the right to be notified whenever a report has resulted in the denial of a benefit to him, and the right to have only properly interested parties receive his reports. The seemingly clandestine circulation of dossier information has thus in large measure been abrogated. Although in this respect the FCRA offers a substantial improvement, in the area of remedying consumer injuries the FCRA is deficient. The section 1681h(e) limitation of liability is illustrative of the low priority Congress gave to the compensation of injuries. Even the new federal cause of action for negligence has proven to be an inadequate source of relief, judging from the sparsity of consumer recoveries during the several years the FCRA has been in effect.<sup>135</sup>

In 1973, Senator Proxmire, author of the FCRA, introduced a bill designed *inter alia* to strengthen the remedies available under the FCRA.<sup>136</sup> The proposal would repeal section 1681h(e) and would thereby permit consumers to sue for libel or invasion of privacy, regardless of the means by which the consumer obtained the information upon which his suit is based.<sup>137</sup> In addition, the bill would impose a minimum liability of \$100 for negligent violations of the FCRA and \$1000 for willful violations.<sup>138</sup> As of this writing the prospects are dim that the bill will be enacted.<sup>139</sup>

If section 1681h(e) were repealed, clearing the way for libel and invasion of privacy suits, the injured consumer might have more workable theories of recovery in cases involving the reporting of inaccurate or highly personal information. The efficacy of these theories would depend primarily on the state's attitude toward the defense of conditional privilege and the right of privacy. For this reason, a better way of assuring the adequacy of consumer remedies would be to amend the FCRA so that it can do directly and uniformly what state law can do only haphazardly. Instead of repealing section 1681h(e), Congress would be better advised to add to the FCRA a non-procedural requirement governing accuracy and re-

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135. See 119 CONG. REC. 15605 (daily ed. Aug. 3, 1973) (remarks of Senator Proxmire).

136. S. 2360, 93d Cong., 1st Sess. (1973).

137. *Id.* at § 5(c).

138. *Id.* at §§ 8 & 9.

139. A senate subcommittee voted to put the bill aside. CCH CONSUMERISM 521 (1973).

quirements prohibiting agencies from gathering, storing or disseminating highly personal information. However difficult may be the task of delineating standards concerning the relevancy of information, it is a task which can no longer be postponed.<sup>140</sup> The threat to personal privacy entailed in the burgeoning of the information industry has become a national problem requiring solutions at the national level.<sup>141</sup>

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140. See Radio Address by President Nixon, Feb. 23, 1974; State of the Union Address by President Nixon, delivered before Congress, Jan. 30, 1974.

141. *Id.*

