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## Tort Law—The Continuing Threat to Privacy by Consumer Reporting Agencies

*Tureen v. Equifax, Inc.*<sup>1</sup> presented the United States Court of Appeals for the Eighth Circuit with a request to utilize common law tort principles to provide meaningful protection against encroachments on individual privacy by consumer reporting firms.<sup>2</sup> These firms collect and retain personal information for subsequent dissemination in consumer and investigative consumer reports,<sup>3</sup> thereby creating serious threats to individual privacy. Presently, individuals have virtually no remedy for invasions of privacy by consumer reporting firms;<sup>4</sup> the activities of these firms do not fit comfortably within the recognized classes of the privacy tort, and the Fair Credit Reporting Act makes insufficient provision for the protection of individual privacy.<sup>5</sup> Unfortunately, the court of appeals failed to take the opportunity presented in *Tureen* to provide a remedy against abusive reporting practices.

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1. 571 F.2d 411 (8th Cir. 1978).

2. Fair Credit Reporting Act, 15 U.S.C. § 1681a(f) (1976), provides:

The term "consumer reporting agency" means 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 . . . .

3. The Fair Credit Reporting Act 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" that is to be used as a factor in determining the consumer's eligibility for credit, insurance, employment or other purposes authorized by the Act. *Id.* § 1681a(d).

An investigative consumer report is "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." *Id.* § 1681a(e).

Consumer reports are often distinguished from investigative consumer reports; the former are typically used by small credit bureaus that furnish information on the credit worthiness of individuals to credit-grantors, while the latter are typically used by investigatory agencies (such as Equifax) that furnish comprehensive dossiers on the personal lives of individuals for insurance companies, prospective employers, prospective landlords and the like. Because of the breadth of personal information included in investigative reports, these reports are more likely than consumer reports to intrude upon individual privacy. Note, *The Fair Credit Reporting Act*, 56 MINN. L. REV. 819, 819-21 (1972).

4. See generally Note, *Credit Investigations and the Right to Privacy: Quest For a Remedy*, 57 GEO. L.J. 509 (1969).

5. The Fair Credit Reporting Act was designed to ensure that consumer reporting agencies operate on the basis of fairness, impartiality and respect for the consumer's right of privacy. 15 U.S.C. § 1681a(4) (1976). The Act restricts access to reports to prospective creditors, insurers, employers and others with a legitimate business need. *Id.* § 1681b(3). Consumers must ordinarily be notified when an investigative report is requested. *Id.* § 1681d(a). Reporting agencies must disclose the contents of their file on an individual upon the individual's request, *id.* § 1681g, and certain obsolete material may not be released except in connection with certain high value transactions, *id.* § 1681c. The Act, however, makes reporting agencies liable only for wilful or negligent

The *Tureen* problem began when Equifax<sup>6</sup> submitted an investigative report to All-American Insurance Company<sup>7</sup> containing irrelevant<sup>8</sup> and allegedly false information<sup>9</sup> pertaining to plaintiff's past applications for life and health insurance. Plaintiff brought an invasion of privacy action against Equifax in the United States District Court for the Eastern District of Missouri. The action, framed simply as an invasion of privacy,<sup>10</sup> was based on the inclusion of the irrelevant insurance underwriting history<sup>11</sup> in Equifax's report. Without elaborating on plaintiff's conclusory allegation of an invasion of privacy, the District Court instructed the jury that in order to find an invasion of plaintiff's privacy, they must find that the underwriting history was irrelevant and that the inclusion of this information on the health report would be

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failure to comply with the Act, *id.* §§ 1681n, 1681o, and forbids an action for defamation, invasion of privacy or negligence with respect to the reporting of information against the agency, any user of the information, or any person who furnishes information to the agency, unless false information was furnished with malice or wilful intent to injure the consumer, *id.* § 1681h(e).

Despite rights conferred upon individuals by the Act, there is strong evidence that abusive practices by reporting firms, such as failure to verify adverse information, application of pressure on investigators to produce an unrealistic number of daily reports and quotas of adverse information, continue. Comment, *Commercial Credit Bureaus: The Right to Privacy and State Action*, 24 AM. U.L. REV. 421, 426-38 (1975); Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, 2 HASTINGS CONST. L.Q. 773, 776-82 (1975). See generally Note, *Fair Credit Reporting Act: The Case for Revision*, 10 LOY. L.A.L. REV. 409 (1977).

6. Equifax, formerly known as Retail Credit Company, is the largest individual consumer investigative firm in the country and has been the subject of governmental investigations on invasions of privacy. See Comment, *supra* note 5, at 421-26; Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, *supra* note 5, at 774 n.4.

7. 571 F.2d at 412-14. Plaintiff maintained a health insurance policy with All-American. After suffering two heart attacks, he filed a disability claim for benefits pursuant to this policy. All-American hired Equifax to determine if plaintiff actually was disabled. *Id.* at 412-13.

8. The irrelevance of information on plaintiff's past applications for life and health insurance included in the investigative report "is acknowledged in the report, where, after three insurance carriers are listed it is stated that '[w]e are not quoting the remainder of the 23 insurance companies due to their age.'" *Id.* at 422 n.12 (Heaney, J., dissenting).

9. Plaintiff originally brought this action as two claims, one alleging invasion of privacy, and the other alleging that the report's statements concerning plaintiff's past insurance history were libelous. Because the statute of limitations on the libel claim had run, that claim was dismissed, and the case proceeded to trial solely on the issue of invasion of privacy. *Id.* at 413-14.

10. Plaintiff simply alleged that his privacy had been invaded; he did not classify the invasion according to one of the four torts recognized by Prosser as comprised in the general name "invasion of privacy." See note 34 *infra*.

11. Mr. Tureen objected to the following portion of the report:

FILE DIGEST: A thorough check of our files reveals no previous claim history on Bernard H. Tureen. The last underwriting report was a special life report done on 6-13-68. This report was for Connecticut Mutual Life Insurance Co. . . . Amount applied for was \$100,000 and at the time he was carrying \$4,000,000. Beneficiary was the American Duplex Corp. of which he was President. Insurance history indicates we had reported on 23 occasions to various account numbers for life insurance going back to 1949. Total amount applied for for [sic] life was in excess of \$10,000,000 . . . .

571 F.2d at 413.

offensive to a person of ordinary sensibilities.<sup>12</sup> A jury verdict for plaintiff was reversed by the court of appeals.<sup>13</sup> The court recast plaintiff's general invasion of privacy action as one for the specific torts of intrusion and public disclosure of private facts,<sup>14</sup> and found the requisite elements of each tort lacking.

Intrusion and public disclosure of private facts are discrete torts. The tort of intrusion is composed of two elements: (1) intentional intrusion, physical *or otherwise*, upon the solitude or seclusion of another or of his private affairs or concerns, and (2) the intrusion must be highly offensive to a person of ordinary sensibilities.<sup>15</sup> Actionable intrusions have been based on nonphysical invasions such as wiretapping,<sup>16</sup> peering through windows,<sup>17</sup> persistent phone calls,<sup>18</sup> and unauthorized prying into bank accounts.<sup>19</sup>

The tort of public disclosure of private facts consists of publicizing matters concerning an individual's private life when the matter publicized is of a kind that would be highly offensive to a reasonable person and is not a matter of legitimate public concern.<sup>20</sup> No precise definition of publicity has been formulated, yet the parameters of the term are well established. It is clear that publication in any newspaper<sup>21</sup> or magazine,<sup>22</sup> or by radio<sup>23</sup> or television broadcast,<sup>24</sup> meets the requirement of publicity, while publication in the sense of a communication to another person sufficient to satisfy the publication requirement in defamation actions does not.<sup>25</sup> Confusion exists about what constitutes

12. *Id.* at 414.

13. The court of appeals held that the district court erred in denying defendant's motion for directed verdict at the close of the evidence. *Id.*

14. *Id.* at 415.

15. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117, at 808 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 652B (1977).

16. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

17. *Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716 (La. Ct. App. 1956).

18. *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

19. *Zimmerman v. Wilson*, 81 F.2d 847 (3d Cir. 1936) (decided on constitutional ground of protection against unreasonable search as well as invasion of privacy); *Brex v. Smith*, 104 N.J. Eq. 386, 146 A. 34 (1929).

20. W. PROSSER, *supra* note 15, at 809-12. Prosser's definition has been accepted in case law. *See, e.g., McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 78 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976).

21. *Trammell v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941).

22. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

23. *Mau v. Rio Grande Oil Co.*, 28 F. Supp. 845 (N.D. Cal. 1939).

24. *Williams v. KCMO Broadcasting Div.—Meredith Corp.*, 472 S.W.2d 1 (Mo. Ct. App. 1971).

25. *See RESTATEMENT (SECOND) OF TORTS* § 652D, Comment a at 384 (1977).

publicity in the range between media publication and ordinary conversation largely because this question is seldom faced by courts; most public disclosure cases are based on media publication and turn on whether the matter involved is of legitimate public concern.

In assessing plaintiff's claim as one of intrusion, the Court of Appeals for the Eighth Circuit found two possible bases for an actionable intrusion: (1) the utilization of objectionable snooping techniques by Equifax and (2) the mere collection and retention by Equifax of plaintiff's underwriting history.<sup>26</sup> Because the information disclosed to All-American was already in Equifax's files, and therefore no snooping was necessary to obtain the information, the first hypothetical basis posed by the court was summarily rejected. The court also rejected the second proposed basis of intrusion. After a brief discussion of the role of consumer reports in modern society, the court held that because there may be a legitimate purpose for the collection of an individual's past insurance history in some circumstances, the collection of plaintiff's past insurance history alone was not an intrusion.<sup>27</sup>

Public disclosure of private facts as a basis of recovery by plaintiff was likewise rejected by the *Tureen* court. The court's analysis of this tort focused on the requirement that there be a "public" disclosure; the court ultimately concluded that the submission of plaintiff's investigative report to All-American was not a *public* disclosure and, therefore, not an invasion of privacy.<sup>28</sup> In its analysis of the publicity requirement the court was handicapped by the lack of authority, both in Missouri and other jurisdictions, on the issue of the extent of publicity required to constitute the tort of public disclosure of private facts. The court relied heavily on *Peacock v. Retail Credit Co.*,<sup>29</sup> the only case to address squarely the issue whether submission of credit and investigative reports by consumer reporting firms to its clients constitutes a "public" disclosure of facts. The *Peacock* court held that the "mere submission of a confidential credit report, even when it contains false and libelous information, by a credit information company to its customers, is not a 'public disclosure of embarrassing private facts.'"<sup>30</sup> Adhering to this precedent, the *Tureen* court held that the submission

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26. 571 F.2d at 415-16.

27. *Id.* at 416-17.

28. *Id.* at 419.

29. 302 F. Supp. 418 (N.D. Ga. 1969), *aff'd*, 429 F.2d 31 (4th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971).

30. *Id.* at 423.

of plaintiff's investigative report to All-American was not a public disclosure.

The *Tureen* court's analysis of the torts of intrusion and publication of private facts is in accord with the modern trend of classifying invasion of privacy actions in terms of Prosser's four categories of the tort.<sup>31</sup> While disagreement continues about the exact nature of the right of privacy and the interests it protects,<sup>32</sup> courts have increasingly adopted<sup>33</sup> Prosser's view that the right of privacy spawned a family of four distinct torts that have little in common except the general name "invasion of privacy."<sup>34</sup> Courts have foregone any attempt at a comprehensive definition of the right of privacy, preferring instead to pigeonhole invasion of privacy actions into one of Prosser's categories. Strict application of these categories has rigidified the right of privacy, rendering it incapable of accommodating new fact situations. This development is contrary to the common law<sup>35</sup> origins of the right; initially

31. Prosser classifies invasion of privacy actions into four categories: (1) appropriation of the plaintiff's name or likeness for the defendant's personal advantage or benefit; (2) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity that places the plaintiff in a false light in the public eye. W. PROSSER, *supra* note 15, at 802-14. This classification was adopted by the American Law Institute in RESTATEMENT (SECOND) OF TORTS §§ 652A-652E, at 376-400 (1977).

32. A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) ("Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (right of privacy based on "inviolate personality"); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (privacy not a right in itself but sum of particular interests in mental tranquility, reputation, and one's own identity protected by this right); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964) (right of privacy based on human dignity). See generally Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 233 (1977); Thomson, *The Right To Privacy*, 4 PHILOSOPHY & PUB. AFF. 295 (1975).

33. See, e.g., *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496, 499-504 (1966).

34. "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common . . ." Prosser, *supra* note 32, at 389.

Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.

*Id.* at 407.

35. A common law right of privacy was first recognized by a court of last resort in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). The right of privacy is now acknowledged in either the common law or the statutes of virtually every jurisdiction. W. PROSSER, *supra* note 15, at 804; e.g., N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); OKLA. STAT. tit. 21, § 839 (1971); UTAH CODE ANN. §§ 76-9-402 to -405 (1978); VA. CODE § 2.1-378 (1978).

The common law right of privacy recognized in state tort law is not to be equated with emerging constitutional rights of privacy. Although there is no specific mention of a right of privacy in the Constitution, the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965), recognized the existence of various "zones of privacy" emanating from specific guarantees found

characterized in amorphous terms such as a "right to be let alone"<sup>36</sup> or a right "to determine one's mode of life, whether it shall be a life of publicity or of privacy,"<sup>37</sup> the early right of privacy provided the individual a broad, flexible basis of protection.<sup>38</sup>

*Tureen* exemplifies the inflexible approach to the privacy tort adopted by courts, and the resultant failure<sup>39</sup> of the right of privacy to provide meaningful protection in the modern world of extensive data collection and dissemination.<sup>40</sup> The *Tureen* court narrowly construed the torts of intrusion and public disclosure to deny a remedy for abusive consumer reporting practices.<sup>41</sup> The court could instead have adopted several theories urged upon it that would have expanded the existing conceptual framework of the torts of intrusion and public disclosure to accommodate the *Tureen* facts without doing violence to the recognized elements of these torts.<sup>42</sup>

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in the Bill of Rights. The Supreme Court subsequently held that a constitutional right of privacy is implicit in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" or "in the Ninth Amendment's reservation of rights to the people." *Roe v. Wade*, 410 U.S. 113, 153 (1973). Courts have narrowly construed this right, holding thus far that the constitutional right of privacy protects only the most intimate phases of personal life, such as an individual's marital, familial, and sexual activities, from state interference. *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76-77 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Industrial Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 678-81 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969). For a discussion of the relationship between the tort of invasion of privacy and a constitutional right of privacy, see Note, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543 (1976).

36. *See, e.g.*, *Brents v. Morgan*, 221 Ky. 765, 770, 299 S.W. 967, 969-70 (1927); *Barber v. Time, Inc.*, 348 Mo. 1199, 1205, 159 S.W.2d 291, 294 (1942).

37. *See, e.g.*, *Housh v. Peth*, 165 Ohio St. 35, 38, 133 N.E.2d 340, 343 (1956) (quoting *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 190, 50 S.E. 68, 68 (1905)).

38. Early cases, invoking the common law's capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, recognized violations of a right of privacy in varying fact situations. *See, e.g.*, *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga. App. 662, 184 S.E. 452 (1936) (impersonation of plaintiff by defendant's agent for purpose of procuring confidential information an invasion of plaintiff's privacy); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (conspicuous sign in store window advertising plaintiff's debt an invasion of plaintiff's privacy); *Heinisch v. Meir & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941) (telegram sent to governor bearing plaintiff's unauthorized signature an invasion of plaintiff's right to privacy); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (search of plaintiff by store manager an invasion of plaintiff's privacy).

39. *See Weinberger v. Retail Credit Co.*, 498 F.2d 554 (4th Cir. 1974); *Peacock v. Retail Credit Co.*, 302 F. Supp. 418 (N.D. Ga. 1969), *aff'd*, 429 F.2d 31 (5th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971). *See generally* Note, *supra* note 4.

40. *See generally* A. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS* (1971); A. WESTIN, *supra* note 32.

41. *See* note 5 *supra*.

42. 571 F.2d at 416-17. The court's conclusion that the collection of past insurance information pertinent to the legitimate business needs of a reporting agency's customers is sound; this activity is not offensive to a person of ordinary sensibilities, and is an indispensable accoutrement

Specifically, the accepted definition of intrusion is broad enough to encompass the collection by consumer reporting firms of private information unrelated to any conceivable business need, and the distribution of private information that is relevant to some business need served by consumer reports but is not relevant to any legitimate business need served by the particular report.<sup>43</sup> The collection and distribution of private information by consumer reporting firms is arguably a nonphysical intrusion upon the individual's private affairs or concerns, not unlike prying into an individual's bank account. Unauthorized prying into bank accounts has been held to be an actionable intrusion;<sup>44</sup> it is no great conceptual leap to find that the gathering of personal information unrelated to any business need served by consumer reports is a form of prying into one's private concerns and, hence, an intrusion. This argument can be expanded to include the dissemination of information that is relevant to some business need but is not relevant for the purposes of the particular report. By including such irrelevant information in its report, the firm is in effect forcing its customer to pry into the individual's private affairs. The result in both circumstances is the same: strictly private information has become known to persons having no right to this information.

The *Tureen* court did not consider either facet of this intrusion

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of modern life. Although this conclusion is sound, the court's reasoning in support is faulty: the court confused the elements of intrusion with those of publication of private facts. The court seemingly conceded that the collection and retention of personal data such as underwriting history constitutes an actionable intrusion because it attempted to justify the intrusion on the basis of overriding public interest. A legitimate public interest in publicized information is a defense to a publication of private facts complaint, but it is not a defense to an intrusion action.

Both *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), and *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963), which the *Tureen* court cited in support of its conclusion, involved newspaper publication of facts about plaintiffs. Neither case suggested that an otherwise actionable intrusion may be justified by an overriding public interest in the intrusion. Discussion of public interest as a defense to an invasion of privacy action focused on harmonizing the right of privacy with unabridged freedom of the press and application of the principle that the press may report matters of public interest with impunity. 348 Mo. at 206, 159 S.W.2d at 295; 368 S.W.2d at 389-90.

43. The American Law Institute explained the scope of the tort of intrusion in the *Restatement (Second) of Torts*:

The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself . . . . It may also be by use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone lines. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.

RESTATEMENT (SECOND) OF TORTS § 652B, Comment b at 378-79 (1977).

44. See cases cited note 19 *supra*.



argument, even though a similar argument was raised and rejected in *Peacock*. The *Peacock* court rejected the argument on the ground that Georgia law recognized only physical intrusions analogous to trespass.<sup>45</sup> Missouri law, the controlling law in *Tureen*, imposes no similar restrictions on intrusion actions;<sup>46</sup> thus, the court did not have the barrier to adopting this interpretation faced by the *Peacock* court.

The *Tureen* court's analysis of public disclosure was as routine as its intrusion analysis. Lack of authority on the question of what constitutes publicity forced undeserved reliance on *Peacock*. The *Peacock* court drew on a hodgepodge of Georgia case law to reach its conclusion,<sup>47</sup> apparently operating on the premise that what is not expressly included in the concept of publicity by prior case law is excluded. After cursory examination of a wide variety of invasion of privacy actions, the court declared that none of the cases examined supported the theory that disclosure of private information in credit reports is a "public" disclosure. While it is certainly true that none of the cases cited in *Peacock* lends particular support to the theory that such a disclosure is a "public" disclosure, neither do they lend strong support to the theory that it is not. None of the cited cases dealt specifically with an analysis of the publicity requirement; in fact, the requirement was not even alluded to in a few of these cases.<sup>48</sup> Furthermore, because the cited cases are old, they are not framed in terms of Prosser's categories. Consequently, it is probably inappropriate to apply unqualifiedly the general statements on invasion of privacy in these cases to the distinct branches of the tort recognized today.

Of the cases cited in *Peacock*, *Gouldman-Taber Pontiac, Inc. v.*

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45. 302 F. Supp. at 422.

46. Jurisdiction in *Tureen* was based on diversity of citizenship under 28 U.S.C. § 1332 (1976). Missouri substantive law therefore was controlling. 571 F.2d at 417, 421.

47. Two of the five cases relied upon by the court in *Peacock*, *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956), and *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930), focused on the question of what is a matter of legitimate public concern. The other three, *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957), *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959), and *Davis v. General Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950), involved debtor-creditor situations and application of the principle that a creditor may take reasonable steps to collect outstanding debts without invading the debtor's privacy.

48. *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956), and *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930), involved newspaper publication of photographs and subsequent resale of the published photographs by the newspaper. The courts explored the scope of the legitimate public concern element and, peripherally, the question of survival of privacy actions. Neither case reached the question of publicity, presumably because the publicity requirement was obviously satisfied.

*Zerbst*<sup>49</sup> offers the best support for the *Peacock* holding, and this support is at best ambiguous. The question before the court in *Gouldman* was whether a letter written by a creditor to an employer notifying the employer of his employee's indebtedness to the creditor and seeking the employer's aid in collecting the debt constituted a violation of the employee's right of privacy. The court held that this was not an invasion of the employee's privacy, stating that "in giving this information to an employer, it [the creditor] was not giving to the general public information concerning a private matter in which it had, or could have, no legitimate interest," since an employer has a "natural and proper interest in the debts of his employees."<sup>50</sup> It stretches credibility to infer that the court intended a meaningful exposition of the term "publicity" by this oblique reference to the general public. Any analogy drawn between a creditor and a consumer reporting firm would be inappropriate. The case belongs in a class of debtor-creditor cases<sup>51</sup> that recognizes that creditors can take reasonable steps to collect debts without interfering with the debtor's right of privacy;<sup>52</sup> it did not deal with the specific torts of public disclosure and intrusion as they are recognized today.

*Davis v. General Finance & Thrift Corp.*,<sup>53</sup> also cited in *Peacock*, offered no support for the *Peacock* holding. The issue of publicity was never reached in *Davis*, and there are even implications that disclosure to one or a few individuals may satisfy the publicity requirement. Plaintiff in *Davis* brought an action for libel and for invasion of privacy, both of which were based on publication by telegram of plaintiff's debt to General Finance and Thrift Corporation.<sup>54</sup> The telegram in question was sent by defendant to plaintiff notifying him of his unpaid debt; only Western Union employees who handled the message in the course of its transmission could have seen the message. The *Davis* court raised no objections to the invasion of privacy claim based on "publication by telegram"; instead, the court dismissed the claim on the basis that the telegram was not a flagrant breach of decency and propriety<sup>55</sup> and therefore was inoffensive to a person of ordinary sensibilities.

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49. 213 Ga. 682, 100 S.E.2d 881 (1957).

50. *Id.* at 683-84, 100 S.E.2d at 883.

51. *See* Annot., 33 A.L.R.3d 154, 158 (1970).

52. *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959), reiterated the principle established in *Gouldman* without further clarification. The fact situation in *Haggard* is practically identical to that of *Gouldman*, and the court simply borrowed the *Gouldman* holding.

53. 80 Ga. App. 708, 57 S.E.2d 225 (1950).

54. *Id.* at 708, 57 S.E.2d at 226.

55. *Id.* at 710-11, 57 S.E.2d at 227.

*Tureen* perpetuated this superficial treatment of authority in its examination of Missouri case law.<sup>56</sup> *Biederman's of Springfield, Inc. v. Wright*,<sup>57</sup> cited as support for the proposition that public means "affecting the community at large,"<sup>58</sup> is actually authority for a more circumscribed definition of publicity. The court in *Biederman's* quoted Prosser's expansive definition of publicity,<sup>59</sup> but the facts of the case indicate that such a broad definition of publicity could not have been operative in the court's decision. The invasion of privacy claim in *Biederman's* was based on the conduct of defendant store's collection agent. The agent followed plaintiff around the cafe in which she worked on three separate occasions, loudly declaring that plaintiff and her husband were "deadbeats" and refused to pay their bills.<sup>60</sup> The court found that the agent's oral publication of plaintiff's debt in the cafe satisfied any "reasonable requirement" of publicity.<sup>61</sup>

The *Tureen* fact situation could easily have been brought within the public disclosure of facts tort had the court not placed so much weight on the actual number of persons apprised of particular facts. The tort does not require that a communication actually reach a large number of people, it merely requires that it have that potential.<sup>62</sup> The likelihood of widespread dissemination can be inferred from the medium employed. A consumer reporting firm provides a means of disseminating information as do newspapers, magazines, and public records. Judge Heaney, in his dissenting opinion, argued persuasively that the medium of the consumer reporting firm provides a sufficient likelihood of widespread dissemination to satisfy the publicity requirement of the public disclosure tort.<sup>63</sup> Considering the practices of the

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56. Two cases cited by the court, *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911), and *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), involved publication in a newspaper and magazine respectively, thus obviating the need for analysis of the publicity requirement.

57. 322 S.W.2d 892 (Mo. 1959).

58. 571 F.2d at 419.

59. 322 S.W.2d at 898. Prosser defined publicity as "communication to the public in general or to a large number of persons, as distinguished from one individual or a few." PROSSER ON TORTS § 97, at 641 (2d ed. 1955). The present Restatement definition of publicity is a refinement of Prosser's definition. "Publicity . . . 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." RESTATEMENT (SECOND) OF TORTS § 652D, Comment a at 384 (1977).

60. 322 S.W.2d at 893-95.

61. *Id.* at 898.

62. See RESTATEMENT (SECOND) OF TORTS § 652D, Comment a at 384 (1977) (tort of public disclosure requires "a communication that reaches, or is sure to reach, the public") (emphasis added); *Industrial Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-84 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

63. 571 F.2d at 420 (dissenting opinion).

consumer reporting industry,<sup>64</sup> this is a much more realistic view than that of the majority. Disclosure of private information in credit reports does not end with its disclosure to one customer; information gathered on individuals is retained in the files of the reporting office for use in later reports made to any number of customers. While reporting firms are prohibited by law from giving credit reports to those who do not have a "legitimate" interest in them,<sup>65</sup> this restriction is difficult to enforce because of the vagueness of the term "legitimate business purpose."<sup>66</sup>

In reaching its conservative result, the *Tureen* court may simply have been following the directive to federal courts exercising diversity jurisdiction to apply rather than expand state tort law. Nevertheless, the *Tureen* court had the conceptual framework at its disposal to expand the torts of intrusion and public disclosure of private facts to include the collection and dissemination of private information by consumer reporting firms, but refused to adopt the proffered interpretations. This unfortunate refusal denies individuals a much needed remedy against abusive practices of the consumer reporting industry and presents additional precedent for the narrow interpretation of publicity adopted in *Peacock*. State courts faced with a fact situation similar to the one presented in *Tureen* should consider *Tureen* in its proper jurisdictional posture and not feel constrained by it from expanding state tort law to provide a remedy.

SABRA J. FAIRES

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64. Credit and investigative reports are used extensively by creditors, insurance companies, landlords, employers and numerous departments of the federal government such as the Justice Department, the Civil Service Commission, and the Veterans Administration. Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, *supra* note 5, at 811-12.

65. The Fair Credit Reporting Act prohibits furnishing a consumer report except with the consumer's permission or for specified legitimate purposes. The legitimate purposes enumerated in 15 U.S.C. § 1681b(3) (1976) are credit transactions, employment purposes, insurance underwriting, and the granting of government licenses or benefits. Section 1681b(3)(E), however, contains a catch-all for all purposes not specifically listed; it authorizes consumer reporting firms to give reports to anyone who "has a legitimate business need for the information in connection with a business transaction involving the consumer." *Id.* § 1681b(3)(E).

66. *Fair Credit Reporting Act: Hearings on S. 2360 Before the Subcomm. on Consumer Credit of Senate Comm. on Banking, Housing, and Urban Affairs*, 93d Cong., 1st Sess. 687 (1973) (statement of Albert Foer).