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STATUTE LAW AND COMMON LAW: THE FAIR CREDIT REPORTING ACT

ROGER D. BLAIR* AND VIRGINIA MAURER**

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I. INTRODUCTION

Scholars have recently developed evolutionary models that have improved our understanding of the economic efficiency of the common law.[1] These models describe the conditions under which inefficient rules of law are apt to be relitigated and overturned. The most recent explication of the theory maintains that the common law will be driven toward efficient rules only where the parties to a particular case represent symmetrically all future interests in disputes of the same nature.

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1. The theory that the common law precedent promotes efficient exchange in the market has been debated vigorously in the legal and economic literature. *See, e.g.,* R. POSNER, ECONOMIC ANALYSIS OF LAW 404 (2d ed. 1977); Goodman, *An Economic Theory of the Evolution of the Common Law,* 7 J. LEGAL STUD. 393 (1978); Landes & Posner, *The Positive Economic Theory of Tort Law,* 15 GA. L. REV. 851 (1981); Landes & Posner, *Adjudication as a Private Good,* 8 J. LEGAL STUD. 235 (1979); Priest, *The Common Law Process and the Selection of Efficient Rules,* 6 J. LEGAL STUD. 65 (1977); Rubin, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977); *see also* Cooter & Kornhouser, *Can Litigation Improve The Law Without the Help of Judges?,* 9 J. LEGAL STUD. 139 (1980); Hirschleifer, *Evolutionary Models in Economics and Law: Cooperation versus Conflict Strategies,* 4 RES. L. & ECON. 1 (1982). Critics of the theory and of the debate include Epstein, *The Social Consequences of Common Law Rules,* 95 HARV. L. REV. 1717 (1982), and Michelman, *A Comment on Some Uses and Abuses of Economics in Law,* 46 U. CHI. L. REV. 309 (1979). Judge (then Professor) Posner responded to these criticisms in Posner, *The Value of Wealth: A Comment on Dworkin and Kronman,* 9 J. LEGAL STUD. 243 (1980) and Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law,* 9 HOFSTRA L. REV. 775 (1981).

Symmetry occurs when each party expects to be involved in similar cases in the future, and, therefore, each has an interest in precedent. When either party lacks an interest in the precedent that the case creates, the common law tends to develop in favor of the party with a continuing interest in cases of the same sort, irrespective of whether the resulting rules are economically efficient.[2] This may result from spending in litigation that is disproportionate to the amount at stake in the case.[3] Alternatively, it may result from the tendency of the litigant with the continuing interest to adopt strategies in litigation that place greater emphasis on the development of legal principle.[4] Finally, it may result from the tendency of the party with an ongoing interest to selectively settle, litigate, and appeal cases, and to use techniques afforded by the judicial process for obtaining favorable precedent and avoiding unfavorable precedent.[5]

The efficiency of statutory rules of law has been examined as well. Professor Rubin has suggested that the common law and legislatures may be equally efficient in making law.[6] If an effective lobbying group has an ongoing interest in a particular side of future disputes, the resulting legislation will bear no predictable relationship to economically efficient rules of liability.[7]

Whether the common law or statutes produce more efficient results varies with the symmetry of the parties' continuing interests in a rule and the extent to which the courts will uphold attempts to alter the effect of the rule. So, for example, where parties have a contract that the courts will enforce, they will alter the effect of inefficient rules of liability—common law or statutory—through contractual provisions.[8] Where the parties have no contractual relationship, but represent symmetrically all future interests in similar disputes, there should be incentives for the interest groups to press for legislation, or the parties to a dispute to litigate, toward efficient rules of liability. Where the parties have no contractual relationship and they represent asymmetrically the future interests in similar disputes, the law, whether judge-made or statutory, should evolve in favor of the party with an ongoing interest in a particu-

2. *See* Rubin, *supra* note 1, at 55.

3. *See* Goodman, *supra* note 1, at 402.

4. *See* Rubin, *supra* note 1, at 55-56.

5. *See* Rubin, *Common Law and Statute Law,* 11 J. LEGAL STUD. 205, 212 (1982).

> [D]isputants who are in the market will tend to litigate until they reach a favorable decision. They may achieve such a decision by spending more on litigation; by relitigating cases whenever issues arise until a favorable decision is reached; by waiting to litigate until a particularly apt case for establishing precedent occurs; and by using other techniques aimed at obtaining favorable precedents. . . .

Id.; see also Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change,* 9 LAW & SOC. REV. 95 (1974).

6. *See* Rubin, *supra* note 5, at 207.

7. *See id.* at 213.

8. So long as courts will enforce contract provisions that alter the effect of the common law or statutory rule, the form of the law is almost irrelevant. *Id.* at 214.

lar rule. In this event, there will be no predictable connection with efficiency.

Rubin has suggested that parties with an ongoing interest in the rules tend to turn to legislation when further litigation will be unlikely to change an adverse rule.[9] Professor Epstein has asserted more broadly that as the stakes in repetitive disputes become higher, the parties recognize that the changes that can be achieved through the common law are limited.[10] As a result, they turn to the legislative arena to effect changes in the rules. Epstein advanced this hypothesis as part of his argument that observers should be cautious in attributing major social and economic consequences to common law rules. This hypothesis is apparently consistent with Rubin's analysis of the predictable efficiency of the common law and statute law.

The law's treatment of injury in the consumer credit reporting context[11] provides an excellent example of Rubin's hypothesis. The injury occurs when a credit agency reports inaccurate information about a consumer to a potential creditor, insurer, or employer. Prior to the federal Fair Credit Reporting Act (FCRA),[12] state common law treated the injury as a defamation,[13] usually clothing the agency with a qualified privilege to defame. In 1970, the FCRA supplanted the state law of defamation.[14] Congress addressed the problem of injury to consumers by mandating certain behavior of credit reporting agencies and by creating a statutory cause of action in negligence for failure to maintain reasonable procedures for assuring accuracy in credit information. The common law action remained relatively stable from the late nineteenth century to 1970, when the FCRA effectively barred the action and substituted a statutory action. The common law action and the statutory action are sufficiently distinct that they can be described and compared within Rubin's theoretical framework.

9. *Id.* at 213.

10. Epstein, *The Social Consequences of Common Law Rules,* 95 HARV. L. REV. 1717, 1720 (1982).

11. This Article addresses injury to consumers in the credit reporting context in order to confine the example to a reasonably consistent pattern. Common law defamation cases governing injury to reputation by credit reporting agencies made no apparent distinction between injuries to consumers and injuries to businesses. The Fair Credit Reporting Act protects consumers. A "consumer" is defined as "an individual." 15 U.S.C. § 1681a(b) (1982).

12. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (current version at 15 U.S.C. §§ 1681-1681t (1982)).

13. Defamation has been defined as 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. W. PROSSER, HANDBOOK ON THE LAW OF TORTS §111, at 737 (4th ed. 1971). The Restatement of Torts describes a communication as defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT OF TORTS § 559 (1938).

14. *See* 15 U.S.C. § 1681h(e) (1982); notes 94-97 and accompanying text *infra; see also* Maurer, *Common Law Defamation and the Fair Credit Reporting Act,* 72 GEO. L.J. 95 (1983) (comparison of the common law and statutory actions).

II. The Economics of Accuracy in Consumer Credit Reporting

Consumer credit reporting agencies collect and disseminate information as a service to their subscribers, who are usually creditors, employers, and insurers.[15] The subscribers normally contract to receive this service and to provide the agency with information regarding their experience with individuals. Thus, when an individual applies for credit, a job, or insurance, the creditor, employer, or insurer may turn to a reporting agency for a standard credit report on the applicant. In many cases, the credit report is used simply to corroborate information solicited from the applicant.

The information typically reported to subscribers by the agency relates to identification, length of residence, length and place of employment, public records of judgments against the subject, and information about the subject's credit history.[16] Credit history information, which is gathered largely from subscribers, includes the identities of past creditors, the type of account, the credit extended to the subject, the amount owing, amounts past due, and any late payment history.[17] Creditors use consumer reports to assess the default risks in dealing with a prospective debtor. Employers use the information to predict the stability and reliability of prospective employees. Insurers use the information to verify applications and to predict the extent of the insurance risk. Subscribers who want more detailed or more extensive information than that provided in the standard credit report may obtain an investigative consumer report.[18] To produce an investigative consumer report, the agency makes inquiries of neighbors and associates regarding the moral reputation, drinking habits, sexual preferences, lifestyle, and other personal characteristics of the subject.[19]

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15. *See* Note, *Commercial Credit Bureaus: The Right to Privacy and State Action,* 24 AM. U.L. REV. 421, 426-38 (1975); Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy,* 57 GEO. L.J. 509, 510-11 (1969).

16. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 56-57 (1977).

17. *Id.*

18. Under the FCRA, an "investigative consumer report" is a report "in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews." 15 U.S.C. § 1681a(e) (1982). Investigative reporting is a specialized area of consumer reporting, and the greatest domestic share of these reports is produced by a single firm. *See Hearings on S.1840 Before the Subcomm. on Consumer Affairs of the Sen. Comm. on Banking, Housing and Urban Affairs,* 94th Cong., lst Sess. 290-95 (1975); *The Georgia Fact-Finder,* NATION'S BUS., Dec. 1978, at 41-44.

19. Report subjects and commentators charge that investigators lack incentives to produce accurate and unbiased reports. *See* Millstone v. O'Hanlon Reports, 383 F. Supp. 269, 273 (E.D. Mo. 1974) (thirty minutes spent to assemble personally damaging credit report), *aff'd,* 528 F.2d 829 (8th Cir. 1976). For comment on the potential damage to reputation and privacy posed by investigative credit reports, see McLaughlin & Vaupel, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother is Watching You,* 2 HASTINGS CONST. L.Q. 773 (1975); Note, *Protecting The Subjects of Credit Reports,* 80 YALE L.J. 1035 (1971).

At first blush, one would assume that the provision of accurate information would be important to everyone involved. The subscribers should want accurate information to help assess the risks that they face. Presumably, the credit reporting agency that provides the most accurate and complete information will get most of the business. Finally, most individuals are reasonably good risks and they will prefer informational accuracy. Only those who are bad risks will prefer inaccuracy and then only if the error favors their application.

This happy state of affairs ignores the fact that errors are apt to occur in collecting and disseminating information. It also ignores the nature of the decision process and the role that information plays. Consider the problem faced by a creditor in assessing the default risk associated with extending a loan to a particular individual. The creditor cannot get information on whether the applicant will default on the loan in question. The information in the credit report does not answer this question. Instead, it provides signals[20] that the creditor can use to infer the likelihood of default or slow payment. The link between these signals and actual experience is necessarily imperfect,[21] and this imperfection affects the incentives for providing accurate information.

For the loan officer, there may be a certain degree of risk aversion[22] due to the asymmetric impact of error on his part. If he approves a loan and the borrower defaults, his superior will know that a mistake was made and take that into account in evaluating his performance. If the loan officer fails to make a loan to a prospective borrower who would not have defaulted, no one will know.[23] The optimal default rate is not zero because too many profitable loan applications will have to be rejected to achieve a zero default rate.[24] Nonetheless, one should expect the loan officer to prefer to commit the second sort of error.

For the credit reporting agency, reporting false negative information will lead to undetectable errors because the errors take the form of safe loans not

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20. *See* A. SPENCE, MARKET SIGNALING 76-87 (1974) (signals and the transfer of information in screening processes).

21. A signal is unlikely to be perfectly correlated with actual experience. For example, although the public takes a lawyer's admission to the bar as a signal of competence, some lawyers are incompetent.

22. A risk averter will refuse all actuarially fair gambles and even pay something to avoid risk. This payment can take the form of a lower average income with less variation rather than an actual market transaction. In other instances, it may take the form of buying insurance. *See* K. ARROW, THEORY OF RISK BEARING 90-109 (1971).

23. This is a clear example of the difficulties inherent in monitoring the performance of subordinates. For a discussion of monitoring in a variety of contexts, see R. BLAIR & L. KENNY, MICROECONOMICS FOR MANAGERIAL DECISION MAKING 244-47, 272-75, 385-90 (1982).

24. The optimal default rate for the maximization of expected profit is found by accepting higher risks of default until the increment in total revenue is just equal to the increment in the expected cost of the loan, including the expected loss due to default.

made. In contrast, reporting false positive information will lead to loan approvals that are more likely to result in defaults. These will be detected immediately. The fact that an error was made by the agency will not be obvious, but the loss will be. As subscribers have cumulative bad luck with this sort of report, the agency will begin to lose business; the market will discipline the agency that produces too many false positive reports.

The agency and its subscribers have a continuing interest in the credit information enterprise. In providing information, errors will be made. The risk of error can be allocated between the agency and its subscribers through the service contract.[25] The competitive market and the service contract ought to generate a level of accuracy in the information transfer that is acceptable, at the contract price, to both parties.[26] Both parties, however, will probably prefer to avoid false positive reports more than false negative reports. A false positive report may cause subscribers to expend resources and undertake costs of doing business with a subject, which can result in out-of-pocket losses. If perfect information cannot be produced and sold at a price the subscribers are willing to pay,[27] the subscribers and the agency should prefer error on the side of producing false negative reports. The bias in the type of error is not without cost to the subscriber because of the resulting opportunity losses, but risk aversion may lead the individuals within the firm to prefer opportunity losses that are hard to detect.

There is evidence in the case law[28] and in the Federal Trade Commission's investigations into the credit reporting industry[29] that agencies produce

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25. *See generally* Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case,* 6 J. LEGAL STUD. 119 (1977); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis,* 6 J. LEGAL STUD. 83 (1977).

26. If the market is not competitive, one party can exploit its market power to the detriment of the other. For an analysis of contract terms that recognizes the role of competition in the market, see Epstein, *Unconscionability: A Critical Reappraisal,* 18 J.L. & ECON. 293 (1975).

27. Ordinarily, perfect information is not optimal because information is costly to produce and transmit. A decision maker will increase his or her information set until the incremental value of further information is equal to the incremental cost of obtaining the extra information.

28. *See, e.g.,* Collins v. Retail Credit Co., 410 F. Supp. 924 (E.D. Mich. 1976).

29. Following an extensive investigation of the practices of Equifax, Inc., a major credit reporting agency, the Federal Trade Commission issued a complaint alleging that Equifax's practice of rewarding investigators for the production of negative information violated the FCRA. In 1977, the administrative law judge found for the FTC. Equifax, Inc., 96 F.T.C. 844, 1034 (1980). In December, 1980, the FTC ordered Equifax to cease pressuring investigators to produce negative information. Equifax, Inc., 96 F.T.C. 844, 1035-36 (1980), *rev'd in part,* 678 F.2d 1047 (11th Cir. 1982). The theory of the FTC's decision was that pressure to produce adverse information increased the likelihood of employees falsifying negative information. The Eleventh Circuit set aside part of the FTC's order on the ground that the evidence produced in the investigation did not warrant the inference that Equifax's practice posed an unreasonable risk of inaccuracy. Equifax, Inc. v. FTC, 678 F.2d 1047 (11th Cir. 1982).

a set level of negative information as a structural feature of their service, even though that tends to increase the incidence of false negative reports. It is reasonable to assume that this practice is known to agencies and users alike and that it is a response to market pressure by users to avoid false positive information. No doubt, this is privately optimal; the economic interaction between the credit reporting agency and its subscribers will result in the *privately* optimal degree of accuracy. An agency will improve the accuracy of its report until the cost of additional accuracy is just equal to the added value of the report, as measured by the subscriber's willingness to pay.[30] Since the credit reporting agency will consider the private costs and benefits of greater accuracy, the *privately* optimal degree of accuracy will be produced.

The subject of the credit information report is not represented in this decision process.[31] The potential consequences are serious for the individual who is injured by the mistake or accident. False negative reports may result in an inability to obtain credit, employment, or insurance. Since these external costs[32] of a false negative report are ignored by the producer, the accuracy of the report will not be *socially* optimal. This social harm will continue as long as the subject's interests are ignored.

It is useful to think of a false negative report issued by a credit reporting agency as an accident with two victims: the agency's subscriber and the subject of the false negative report. Both suffer costs, but the subscriber's accident costs are considered in the agency's decision calculus. The subject of the false negative report is like an innocent bystander. A rule of liability that forces the contracting parties to recognize the costs imposed upon the subject is needed for social optimality.

A simple negligence standard of liability requires that the credit reporting agency improve the accuracy of its reports as long as the cost of doing so is less than the expected accident cost that would be avoided.[33] The expected

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30. An agency that failed to do this would not maximize its profits. Economists usually assume that firms attempt to maximize profit. *See, e.g.*, R. BLAIR & L. KENNY, *supra* note 23, ch. 1.

31. For a discussion of social optimality when the adverse effects on third parties are not considered in the firm's decision calculus, see Buchanan & Stubblebine, *Externality*, 29 ECONOMICA 371 (1962).

32. When a transaction between two parties has a deleterious effect upon a third party, it is said to have an external cost. Economic remedies for external costs involve procedures to internalize them. These costs were first analyzed in Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

33. In United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), Judge Hand expressed what has become a classic standard of fault in negligence: the court should consider the magnitude of the loss if an accident occurs, discounted by the probability of the accident occurring. *Id.* at 173. If the product exceeds the burden of taking precaution to avoid the accident, the defendant should be found negligent. If the cost of avoidance exceeded the product, the defendant should not be held accountable. The negligence standard requires taking only cost-justified precaution. From this formulation has developed the theory that the fault system of liability should produce rules that bring about efficient levels of accidents. *See, e.g.*, Posner, *A Theory of Negli-*

accident costs will include those of the subject, not just those of the subscriber. The negligence standard will lead to more accurate reports and fewer accident costs. Since greater accuracy will lead to higher costs for the agency, the price of the agency's service will rise and fewer credit reports will be purchased. Some accident costs will persist because the optimal accident rate is not zero.

From the subscriber's perspective, the improved accuracy is not worth the increased cost.[34] From the subject's perspective, the accuracy is still inadequate because the expected accident costs are still positive. Since the subject does not pay the agency directly for improved accuracy, the subject will demand greater accuracy. The subject pays for the greater accuracy indirectly through higher costs for credit and insurance as the higher prices for credit reports are passed on to the subscribers' customers.

A standard of strict liability makes the credit reporting agency responsible for the accident costs imposed upon subjects without regard to whether the agency had taken cost-justified precautions to avoid the injury.[35] As a result, the accuracy of the reports should be the same as under a negligence standard. When a cost-justified improvement in accuracy is possible, the agency will embrace the opportunity just as it would under the simple negligence standard. The major change that will occur involves a wealth transfer from the agency to the subject of a false negative report. The residual expected accident costs will not be borne by the subject as they would under a negligence standard. Instead, they would be borne by the credit reporting agency. This would further increase the price of credit reports and reduce the quantity purchased at the margin. In turn, the costs will be reflected in the price of credit and insurance to the consumer.

Simple negligence and strict liability[36] would be improvements over a rule eliminating liability for publishing false negative credit reports. As far as the allocation of resources to improved accuracy is concerned, there is no difference between these two standards. Simple negligence and strict liability result in the same degree of accuracy. The difference between the two resides in the resulting wealth distribution. Under simple negligence, the subject of the report bears some expected accident costs that will not be compensated because

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gence, 1 J. LEGAL STUD. 29, 32-33 (1972); Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); *cf.* Epstein; *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980).

34. If it were worth the increased cost, the agency would have improved the accuracy without the threat of a negligence action.

35. *See* R. POSNER, *supra* note 1, at 137-42.

36. Neither contributory nor comparative negligence appears to be a useful concept in this context. The subject is a third party—an innocent bystander—who plays no role in the whole affair. He cannot take actions to mitigate his injury except to refrain from applying for credit, insurance, or employment.

the agencies will choose not to be negligent. The strict liability standard, in contrast, will fully compensate the accident victims and the agencies will bear the costs. In the credit reporting situation, there is another effect: the expected accident costs will be reflected in the prices paid by the agency's subscribers. Thus, subscribers will recognize some social costs that would be ignored under the negligence standard. Accordingly, a standard of strict liability should be preferred as better protecting subjects.

The rule of liability that actually will emerge has significance for social welfare and wealth distribution. As a result, the agency, its subscribers, and subjects have conflicting interests in the rules that govern the allocation of the risk of harm. These conflicting interests provide a test of Rubin's evolutionary theory.

III. The Common Law

Prior to the FCRA, the victim of a false credit report had to rely upon a common law theory of action. The principal legal theory available was a tort action for defamation. The heart of the defamation action is that the defendant has invaded the plaintiff's reputation and good name by a communication to a third party that affects the community's opinion of him.[37] Communication that deters third parties from associating or dealing with the plaintiff also may be the basis for a defamation action.[38]

In the classic American common law defamation case, the plaintiff needed to show that the defendant published[39] defamatory matter[40] concerning the plaintiff[41] that was understood by the recipient to be defamatory.[42] The plaintiff was then entitled to a verdict unless the defendant asserted and proved an affirmative defense.[43] The principal defenses[44] were truth[45] and priv-

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37. *See* note 13 *supra.* "Defamation is made up of the twin torts of libel and slander—the one being, in general, written, while the other in general is oral. . . . In either form, defamation is an invasion of the interest in reputation and good name." W. PROSSER, *supra* note 13, § 111, at 737.

38. A communication is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1976).

39. The defamation must be communicated to someone other than the person defamed. W. PROSSER, *supra* note 13, § 113, at 766.

40. *Id.* § 111, at 739 ("Defamation is . . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.").

41. *See* L. ELDREDGE, THE LAW OF DEFAMATION § 10, at 50-64 (1978); W. PROSSER, *supra* note 13, § 111, at 744-46.

42. W. PROSSER, *supra* note 13, at 746-48. It is not necessary that the words were believed by the recipient or that the language took any particular form. *Id.* at 746; *see* L. ELDREDGE, *supra* note 41, § 7, at 31-41.

43. *See* RESTATEMENT (SECOND) OF TORTS §§ 582-592A (1977); L. ELDREDGE,

ilege.[46] The plaintiff was not required to prove falsity; the defendant had the burden of pleading and proving truth as a defense.[47] If the defendant showed a *prima facie* case of a qualified privilege to defame, however, the plaintiff assumed the burden of proving that the defendant abused the privilege[48] and that the plaintiff had in fact sustained injury.[49] To overcome the qualified priv-

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supra note 41, § 6, at 25; W. PROSSER, *supra* note 13, § 114, at 776.

44. One general class of legal defenses includes consent, truth, and other absolute privileges, which confer complete immunity from civil liability. The other class includes the conditional privileges, which may constitute a complete defense. L. ELDREDGE, *supra* note 41, at 315-16. The factual defenses are that the defendant never published the words, the words were not "of and concerning" the plaintiff, or the words did not bear and were not understood to bear defamatory meaning. *Id.* at 315. Special defenses to slander include that the words are not actionable without special damages and none are alleged, the publication is not the proximate cause of the damage, the words were not calculated to disparage the plaintiff in his office, profession, calling, trade, or business, or the words were merely vulgar abuse or spoken in heat. *Id.* (citing C. GATLEY, LIBEL AND SLANDER 165 (6th ed. 1967)).

45. *See* RESTATEMENT OF TORTS § 582 (1938); RESTATEMENT (SECOND) OF TORTS § 581A (1977).

46. There are absolute and conditional privileges to defame. The principal absolute privileges apply to statements made in the course of judicial, legislative, and executive proceedings. A spouse is immune with respect to defamatory matter published to the other spouse. L. ELDREDGE, *supra* note 41, § 72, at 340. The conditional privileges are numerous and varied. The policy behind conditional privileges recognizes that true information must be given when it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. In order that the information may be freely given, it is necessary to protect against liability for misinformation given in an appropriate effort to protect or advance an interest. Otherwise, true information that should be given or received would not be communicated because of fear of defamation liability. RESTATEMENT (SECOND) OF TORTS § 594 comment d (1977). "One who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused." *Id.* § 593.

Beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court has conferred a qualified first amendment-based privilege to defame, at least to protect the press and possibly nonmedia defendants. *See, e.g.,* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1966); *see also* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology,* 25 UCLA L. REV. 915 (1978); Note, *Mediaocracy and Mistrust: Extending* New York Times *Defamation Protection to Nonmedia Defendants,* 95 HARV. L. REV. 1876 (1982). A "private" person defamed by the press may be compensated under state defamation law if the standard of liability requires a showing of fault at least as great as negligence. Compensation may not include presumed or punitive damages unless liability is based on a showing of fault or reckless disregard of the truth. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

47. *See* W. PROSSER, *supra* note 13, § 116, at 798 ("[T]he law presumes in the first instance that all defamation is false, and the defendant has the burden of pleading and proving its truth."); *see also* RESTATEMENT (SECOND) OF TORTS § 613 comment f (1979); L. ELDREDGE, *supra* note 41, §§ 63-65, at 323-31.

48. *See* W. PROSSER, *supra* note 13, § 115, at 796.

49. *See* RESTATEMENT (SECOND) OF TORTS §§ 569, 570 (1981); L. ELDREDGE, *supra* note 41, § 95, at 537-41.

ilege, the plaintiff had to prove that the privilege was abused by excessive publication or used for purposes other than that of furthering the interest which was entitled to protection.[50] Animus or actual malice on the part of the defendant also could overcome the privilege defense.[51]

Two major obstacles decreased the likelihood of a subject recovering damages from a credit reporting agency. First, credit reporting agencies operated in almost complete secrecy.[52] Often they contractually obligated a user not to disclose to the subject the source of its reports or even that it used reports.[53] Consequently, the subject was unlikely to discover the existence of the erroneous information at the root of his credit problems. Second, beginning in the 1860's and extending into the early twentieth century, all but two American jurisdictions[54] adopted a qualified privilege for credit reporting agencies in defamation suits.[55]

The rationale for the privilege was that the requirements of merchants for accurate information would tend to maintain a generally high level of accuracy in the industry and that the extent of the occasional harm to credit applicants was slight in comparison with the benefit accruing to commerce.[56] Most courts that recognize the qualified privilege have adopted this reasoning.[57]

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50. W. PROSSER, *supra* note 13, at 795. The qualified privilege may be overcome if abused "by excessive publication, by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what is said." *Id.* at 796; *see note* 46 *supra.*

51. *See* W. PROSSER, *supra* note 13, at 792-96.

52. *See* Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy,* 57 GEO. L.J. 509, 511-12 (1969); Note, *supra* note 19, at 1037.

53. *Hearings on S.823 Before the Subcomm. on Financial Institutions of the Sen. Banking and Currency Comm.,* 91st Cong., 1st Sess. 91 (1969). Neither credit reporting agencies nor users were obligated to notify the subject that a report existed or that a report was the basis for denying credit, insurance, or employment. *Id.; see* Note, *The Fair Credit Reporting Act,* 56 MINN. L. REV. 819, 821-22 (1972).

54. Idaho and Georgia did not adopt the qualified privilege for credit reporting agencies. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 31-32 (5th Cir. 1973), *cert. denied,* 415 U.S. 985 (1974); Retail Credit Co. v. Russel, 234 Ga. 765, 218 S.E.2d 54 (1975); Johnson v. Bradstreet Co., 77 Ga. 172 (1886); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 704-05, 139 P. 1007, 1010 (1914).

55. See cases collected in Note, *supra* note 19, at 1050 nn.86-87; *see also* Comment, *The Time of Discovery Rule and the Qualified Privilege Defense for Credit Reporting Agencies in Illinois After* World of Fashion v. Dun & Bradstreet, Inc., 10 J. MAR. J. PRAC. & PROC. 359, 379-80 (1977).

56. Smith, *Conditional Privilege for Mercantile Agencies,* 14 COLUM. L. REV. 187 (1914). Smith reasoned that the credit reporting agency performed services which, if performed by the merchants' servants, would be privileged under the common law privilege for communications made in the line of business duty. *See* W. PROSSER, *supra* note 13, § 115(3), at 789.

57. *See* Watwood v. Stone's Mercantile Agency, 194 F.2d 160, 161 (D.C. Cir.), *cert denied,* 344 U.S. 821 (1952); H.E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387, 393 (4th Cir. 1957); Wetherby v. Retail Credit Co., 235 Md. 237, 239, 201 A.2d 344, 345 (1964); Shore v. Retailers Commercial Agency, Inc., 342 Mass. 515,

Some courts have reasoned that in applying for credit the applicant impliedly consents to the use of credit reports.[58]

This qualified privilege almost immunizes the agencies to adverse judgments because it is exceedingly difficult for a plaintiff to prove malice. Courts have differed on what conduct constitutes malice, but most have rejected simple negligence[59] and have required proof of ill will, bad faith, or conscious or reckless disregard for the truth or the rights of others.[60] It is unlikely, however, that a credit reporting agency and its employees harbor ill will toward the subject. Rather, the errors probably are the result of carelessness or inadequate procedures.

The agency establishes its procedures so as to provide information at a privately optimal level of depth and accuracy. Except in the egregious case where the agency's conduct does involve improper motives, the qualified privilege confers nearly complete immunity from suit. Thus, Rubin's prediction regarding precedent is confirmed in the consumer credit reporting context. A rule of liability developed that favored the party with a continuing interest in cases of the same sort. In the late nineteenth century and the early twentieth century, when the privilege was developed, large credit reporting agencies liti-

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520, 174 N.E.2d 376, 379 (1961); Hartman & Co. v. Hyman & Lieberman, 287 Pa. 78, 83, 134 A. 486, 487-88 (1926); Barker v. Retail Credit Co., 8 Wis. 2d 664, 665, 100 N.W.2d 391, 392 (1960).

58. *See, e.g.,* Harrison v. Humble Oil & Ref. Co., 264 F. Supp. 89, 92 (D.S.C. 1967).

59. ABC Needlecraft Co. v. Dun & Bradstreet. Inc., 245 F. 2d 775, 777 (2d Cir. 1957); Bloomfield v. Retail Credit Co., 14 Ill. App. 3d 158, 168, 302 N.E.2d 88, 95 (1973); Shore v. Retailers Commercial Agency, Inc., 342 Mass. 515, 522, 174 N.E.2d 376, 380-81 (1961). Since the FCRA was passed, some courts have been willing to refine the standard of malice necessary to defeat the qualified privilege in cases involving commercial credit. *E.g.,* Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972); Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975); Krumholtz v. TRW, Inc., 142 N.J. Super. 80, 360 A.2d 413 (1976). Most courts, however, have been unwilling to permit an action under a theory of negligence where the effect could be to avoid a qualified defamation privilege, or to offer jury instructions that recite the due care standards of malice. *E.g.,* Anderson v. Dun & Bradstreet, Inc., 543 F.2d 732, 736-39 (10th Cir. 1976). *But see* Pan Am. Bank of Miami v. Osgood, 383 So..2d 1095 (Fla. Dist. Ct. App.) (negligence action allowed), *review denied,* 392 So. 2d 1377 (1980).

60. ABC Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F.2d 775, 777 (2d Cir. 1957); H.E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387, 395 (4th Cir. 1957) ("[A]ll definitions in substance come down to the equivalent of 'bad faith' "). *See generally* Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation,* 25 ILL. L. REV. 865 (1931); *Developments in the Law—Defamation,* 69 HARV. L. REV. 875, 930 (1956) (collecting definitions of malice); Note, *supra* note 19, at 1051 n.88. Attempts by defendants to impose a higher standard of malice under the first amendment have failed. *See* Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 33 (5th Cir. 1973), *cert. denied,* 415 U.S. 985 (1974); Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647, 650 (10th Cir. 1971), *cert. denied,* 405 U.S. 1026 (1972); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d. Cir.), *cert. denied,* 404 U.S. 898 (1971).

gated cases on essentially the same facts in many different jurisdictions. Several firms, such as the predecessor firms to Dun & Bradstreet, appeared repeatedly as defendants in cases that established the qualified immunity.[61] It is reasonable to assume that the firms, guided by counsel, selectively settled, litigated, and appealed cases with a view toward developing favorable rules of liability.[62]

The parties did not represent symmetrically the future interests in disputes of the same nature. The defendant preferred a particular rule of liability in every case. The plaintiff then, as now, typically was an individual or a business person seeking redress for a particular harm. Unlike the agencies, plaintiffs had no expectation of future litigation on the issue and no continuing interest in the precedent established or advanced by the case. Consistent with Rubin's theory, rules evolved to favor the credit reporting agencies, with no predictable connection with efficiency.

If the agency acts without malice, a false negative credit report is an "accident." Economic efficiency requires making the credit agency liable for the accident when it is the most efficient accident-avoider.[63] The qualified immunity that became embedded in American common law prevents this assignment of liability and results in economic inefficiency. It imposes the full risk of inaccurate negative information on the subject, the party least able to prevent the error or to insure against it. The agency is free to disregard the costs to the subjects in its decision to spend money on increasing accuracy. Thus, an economically inefficient level of accuracy will result.

IV. The Fair Credit Reporting Act

The credit reporting industry and its subscribers were satisfied with their status under the common law. The Fair Credit Reporting Act was an unwelcome intrusion into their world. The circumstances surrounding the FCRA's birth are interesting and well-documented.[64] Popular literature[65] of the 1960's had catalogued the horrors of computerized data banks without drawing congressional attention specifically to the credit reporting industry. In 1968, the House Subcommittee on Invasion of Privacy held hearings on a proposed government national data bank.[66] When the subcommittee became aware of the

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61. *E.g.*, Erber v. Dun, 12 F. 526 (C.C.E.D. Ark. 1882); Mitchell v. Bradstreet Co., 116 Mo. 226, 236-40, 22 S.W. 358, 360 (1893); *see* cases collected in Note, *supra* note 19, at 1050 nn.86-87.

62. For a description of techniques available for influencing the development of law through successive cases, see Galanter, *supra,* note 5, at 98-103.

63. *See* Landes & Posner, *Causation in Tort Law: An Economic Approach,* 12 J. LEGAL STUD. 109 (1983).

64. *See* Note, *The Fair Credit Reporting Act,* 13 SUFFOLK L. REV. 63, 67-70 (1979).

65. *See, e.g.,* E. LONG, THE INTRUDERS 48-63 (1966); V. PACKARD, THE NAKED SOCIETY 29-30, 168-206 (1964).

66. *Hearings on Retail Credit Co. of Atlanta, Georgia, Before the Subcomm.*

extent of private computerized data banks, it called for further hearings on the industry.[67]

In preparation for these hearings, and at the behest of the subcommittee chair, the credit reporting industry's trade association promulgated a set of guidelines to govern its members.[68] Soon after these guidelines were submitted to Congress, Senator William Proxmire introduced the first version of the FCRA to the Senate.[69] Over a year later, the bill emerged from the Senate Subcommittee on Financial Institutions in a form quite different from Proxmire's original bill. It was a product of compromise hammered out between the industry lobby and Senator Proxmire's staff.[70] To protect the compromise from a more stringent version of the bill in the House,[71] and at the urging of the industry, Senator Proxmire added his bill as an amendment to a popular bill.[72] The House conferees, faced with the impending close of the session, agreed to the bill and the FCRA was signed into law in October, 1970.[73]

Although the FCRA was a compromise, it was identifiably a product of the consumer movement of the 1960s.[74] It is not surprising that the consumer

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on Invasion of Privacy of the House Comm. on Government Operations, 90th Cong., 2d Sess. (1968). Between 1965 and 1971, congressional committees conducted several investigations that involved the credit reporting industry. These hearings focused on the threat to privacy rather than the risk of inaccuracy. *See* McLaughlin & Vaupel, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You,* 2 HASTINGS CONST. L.Q. 773, 784 n.60 (1975).

67. *Hearings on Commercial Credit Bureaus Before the Special Subcomm. on the Invasion of Privacy of the House Comm. on Government Operations,* 90th Cong., 2d Sess. (1968).

68. *See* Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability,* 76 COLUM. L. REV. 458, 465 n.43 (1976).

69. S. 823, 90th Cong., 2d Sess., 114 CONG. REC. 24902-04 (1968).

70. *See* A. MILLER, ASSAULT ON PRIVACY 86-87 (1971); Comment, *The Fair Credit Reporting Act Amendments: Enforcement of the Legislative 'Trust'?,* 45 MISS. L.J. 95 (1974).

71. H.R. 16340, 91st Cong., 2d Sess. (1970); *see* Note, *supra* note 68, at 465 n.45.

72. 116 CONG. REC. 32639 (1970).

73. 83 Stat. 1127, 1136; *see* Note, *supra* note 68, at 465 n.47.

74. Perhaps, as Professor Rubin has suggested, it was a reduction of organizational costs. The revolution in technology and communication that made possible a nationwide computerized credit reporting industry also may have lowered the cost barriers to effective consumer organization and lobbying. Moreover, the ideological climate emphasized the value of individual privacy and distrust of aggregation of wealth or power.

The FRCA was accompanied by a series of judicial decisions in which courts indicated an unwillingness to recognize the qualified privilege at all. These opinions appeared in cases that involved either commercial credit rather than consumer credit or in fact situations not covered by the FCRA. The opinions reflect a solicitude for the helplessness of the victim and a sense of outrage at the inequity inflicted upon the victim by the qualified privilege. One state appellate court declined to follow 1918 authority for the privilege, stating, "Times change and principles of law change with

lobbying groups turned to legislation to effect change. The common law rule was far too entrenched to yield quickly and easily to strategic litigation. It is in the nature of consumer groups that the focus of attention changes rapidly. Consequently, the legislative arena became more attractive. Nor is it surprising that the credit reporting industry would embrace the opportunity to negotiate the least objectionable statute. In the 1960's, the industry was transforming into a modern electronic information network. With increasing economic stakes and lower marginal costs of political organizing, it too may have recognized and embraced the potential—and perhaps the inevitability—of change through the legislative arena.

The FCRA redefined the standards for credit reporting agencies and the rights of those who are subjects of credit reports.[75] The Act gives the Federal Trade Commission enforcement responsibility[76] but not the authority for issuing regulations.[77] The Act also provides for criminal penalties[78] and civil liability[79] for negligent and willful violations. The legislation reflects three broad goals. First, it is designed to reduce secrecy in credit reporting by informing

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them." Vinson v. Ford Motor Credit Co., 259 So. 2d 768, 771 (Fla. Dist. Ct. App. 1972). Other courts noted the "apparent shift in emphasis" from protection of the agency to the protection of the individual or business enterprise that was the subject of a credit report. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 32 (5th Cir. 1973), *cert. denied,* 415 U.S. 985 (1974). In rejecting the qualified privilege, the Georgia Supreme Court refused to weight "the scales against the individual who stands alone facing a commercial Goliath with the power to destroy—not necessarily through malice but perhaps merely from carelessness—his credit rating, commercial advantages, insurance protection and employment, all through the publication of erroneous reports concerning affairs." Retail Credit Co. v. Russell, 234 Ga. 765, 770, 218 S.E.2d 54, 58 (1975).

75. *See generally* Note, *The Fair Credit Reporting Act,* 56 MINN. L. REV. 819 (1972); Comment, *The Impact of the Fair Credit Reporting Act,* 50 N. CAR. L. REV. 852 (1972).

76. The Federal Trade Commission has the power to enforce the FCRA under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1982), "except to the extent that enforcement . . . is specifically committed to some other government agency." *Id.* § 1681s(a). A violation of the Act constitutes an unfair or deceptive act under § 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1982), regardless of other jurisdictional tests. Violation of the provisions and prohibitions of the FCRA constitutes violation of various regulatory acts, with enforcement responsibility vested in the respective agencies for activities subject to the agencies' control. *Id.* § 1681s(c).

77. The Federal Trade Commission is authorized to issue only procedural rules and "to require the filing of reports, the production of documents, and the appearance of witnesses" as under the Federal Trade Commission Act. 15 U.S.C. § 1681s(a) (1982). The FTC has promulgated a compliance pamphlet. BUREAU OF CONSUMER PROTECTION, DIV. OF CONSUMER CREDIT AND SPECIAL PROGRAMS, FTC, COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT (2d rev. ed. 1977).

78. The criminal provisions forbid any "knowingly and willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses," 15 U.S.C. § 1681q (1982), and "knowingly and willfully provid[ing] information concerning an individual from the agency's files to a person not authorized to receive that information." *Id.* § 1681r. Both provisions carry maximum penalties of a $5,000 fine or not more than one year of imprisonment, or both.

79. *See* notes 89-90 *infra.*

the consumer that a credit report about him or her exists.[80] If a subscriber requests an investigative report, the credit reporting agency must so inform the consumer.[81] If a subscriber denies credit or insurance to a consumer based on adverse information in a credit report, the subscriber must inform the consumer and give the consumer the name and address of the credit reporting agency that provided the information.[82] If a consumer is the subject of an adverse credit or insurance decision, the agency must disclose to the consumer, on request, the nature and substance of most of the information in the file.[83]

A second goal is to reduce the potential damage to the consumer by providing a means for the consumer to correct errors in the report. If the consumer believes that information in the report is false or misleading, he may require the agency to conduct another investigation.[84] If the dispute continues after reinvestigation, the consumer may file a statement of his view of the facts in dispute, and the statement must be distributed in future reports to users.[85] In addition, the consumer may require that the agency send a notice of the deletion or of the consumer statement to users who have received reports containing the adverse material.[86] These requirements assist the consumer in satisfying himself or herself about the accuracy of information kept by the credit reporting agency. While not empowered to change the data, the

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80. 15 U.S.C. § 1681a(d) (1982) defines the "consumer report" as:

> 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, a mode of living which is used or expected to be used or collected . . . 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.

See Henry v. Forbes, 433 F. Supp. 5, 7 (D. Minn. 1976); Ley v. Boron Oil Co., 419 F. Supp. 1240 (W.D. Pa. 1976); Gardner v. Investigators, Inc., 413 F. Supp. 780, 781 (M.D. Fla. 1976). Although the FCRA defines "consumer" to mean "an individual," 15 U.S.C. 1681a(c) (1982), the term "consumer" is used consistently in the Act to refer to the subject of a "consumer report" or an "investigative consumer report." *E.g., id.* § 1681g(a)(1).

81. 15 U.S.C. § 1681d(a)(1) (1982); *see* notes 18-19 *supra.* Investigative consumer reports may not be procured or created unless written disclosure is given to the subject. *Id.* § 1681d(a)(1).. The subject is entitled to receive "a complete and accurate disclosure of the nature and scope of the investigation." *Id.* § 1681d(b). The consumer is entitled to request disclosure of "the nature and substance of all information . . . in its files on the consumer" and the names of recipients of that information. *Id.* § 1681g. This provision has been held to include substantially all information in the agency's possession. Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693, 697 (10th Cir. 1980).

82. 15 U.S.C. § 1681m(a) (1982).

83. *Id.* § 1681g(a). The agency is not required to reveal medical information in its files or the source of information acquired and used for preparing an investigative consumer report. *Id.* § 1681g(a)(1), (2).

84. *Id.* § 1681i(a).

85. *Id.* § 1681i(b), (c).

86. *Id.* § 1681i(d).

consumer is provided a means of counteracting the effect of negative information, either by adding a personal statement to the file or by explaining the negative information directly to a prospective creditor, insurer, or employer.

A third goal of the Act is to increase accuracy in consumer reports. The Act requires the agency to create, maintain, and follow procedures that are subject to a general standard of reasonability. Agencies must maintain reasonable procedures designed to avoid reporting information that the Act deems obsolete[87] and to avoid furnishing consumer reports to ineligible recipients or for impermissible purposes.[88] In addition, the Act establishes a general statutory duty to "follow reasonable procedures to assure maximum possible accuracy" of information.[89] If the agency negligently fails to comply with the Act, it may be liable under section 1681o for actual damages resulting to the consumer, costs, and reasonable attorneys' fees.[90] If the failure to comply is willful, the defendant is liable under section 1681n for actual damages, costs, attorneys' fees, and such punitive damages "as the court may allow."[91]

Read together, sections 1681e(b), 1681n and 1681o create a cause of action for negligent or willful failure to follow reasonable procedures to assure maximum possible accuracy of the information. Cases interpreting these statutes have established that the plaintiff may allege and prove: that the agency's procedures, however reasonably calculated to assure accuracy, were not fol-

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87. The FCRA forbids inclusion of certain information in a credit report unless the report is to be used in connection with a credit or life insurance transaction involving principal or face amount of more than $50,000 or employment at a salary that exceeds $20,000 per year. The information includes bankruptcies more than 10 years old; suits and judgments, paid tax liens, and accounts placed for collection more than seven years old; and most adverse items of information that antedate the report by more than seven years. *Id.* § 1681c. The duty to maintain reasonable procedures designed to avoid reporting obsolete information is imposed by *id.* § 1681e.

88. *Id.* §§ 1681(c), 1681e(a). The agency must maintain reasonable procedures designed to limit furnishing of consumer reports to use of the report in connection with a credit transaction with the subject of the report, employment, underwriting of insurance, a determination of eligibility for a license or other benefit granted by government, and other business transactions involving the subject. *Id.* §§ 1681b(3), 1681e(a). The report may be released to a court having jurisdiction or on written instructions of the subject. *Id.* § 1681b(1); *see In re* TRW, Inc., 460 F. Supp. 1007, 1009-10 (E.D. Mich. 1978).

89. The reporting agency "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b) (1982).

90. *Id.* § 1681o provides:

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

91. *Id.* § 1681n.

lowed with respect to a particular individual;[92] or that given the seriousness of the resulting harm, the agency's procedures were not reasonably calculated to assure sufficient accuracy.[93]

The Act provides the foundation for a statutory negligence action that replaces state actions in defamation.[94] To a limited extent, the consumer still may redress his injury through common law actions in defamation. If the report that injured the subject has been obtained pursuant to the disclosure provisions[95] of the Act, state law actions in negligence, privacy, and defamation are precluded, except where the information is false and is furnished with malice or willful intent to injure.[96] Since most injuries to credit report subjects result from mistake or accident, state law actions will be unavailable. The statutory immunity from state law actions does not apply where the consumer has not requested the information through the FCRA.[97] Usually, however, that is the only way the consumer can gain access to the the file. Consequently. the Act effectively bars state actions in defamation and substitutes a statutory negligence action.

V. CONCLUSION

Through the FCRA negligence action, Congress relegated to the courts the task of further developing the industry's legal duty to subjects. In the judicial arena, however, the interests of the parties continue to be asymmetric. Typically, the defendant is a major firm in the credit industry. The plaintiff is an injured consumer who has no ongoing interest in the case as precedent. Evolutionary theory suggests that there will be no predictable development of the legal rules toward efficiency; the rules will develop so as to favor the industry, the party with the ongoing interest.[98] Development of the rules, however, will be constrained by the language and purposes of the Act. The Act sets

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92. *See* Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829, 833-34 (8th Cir. 1976).

93. *See* Bryant v. TRW, Inc., 487 F. Supp. 1234, 1240-43 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982).

94. For a comparison of the treatment of consumer injury in credit reporting under the common law and the FCRA, see Maurer, *supra* note 14, at 72.

95. 15 U.S.C. § 1681g(a) (1982); *see* notes 81-83 and accompanying text *supra*.

96. *Id.* § 1681h(e) provides:

> 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.

97. Retail Credit Co. v. Russell, 234 Ga. 765, 772, 218 S.E.2d 54, 59 (1975).

98. *See* notes 1-5 and accompanying text *supra*.

minimum duties for the industry[99] and presents a clear statement of legislative purpose to guide the courts.[100] The statute, therefore, erects a barrier to the industry's achieving favorable rules through litigation and limits the industry's options in litigation.[101] The industry defendant may selectively settle and litigate cases that involve statutory interpretation or the standards of duty in the negligence action. Presumably, firms do that to the extent that it is feasible. Alternatively, the defendant may attack the statute using collateral legal principles, as the firms in the industry have done with some success using the first amendment.[102] On balance, however, the appellate cases under section 1681e(b)[103] have tended to define high standards of liability for the industry.

Under the common law, the interests of a credit reporting agency and the subject of one of its reports were asymmetric. The agency had a continuing interest in the outcome, while the subject was only concerned about the instant case. The common law evolved in favor of the credit reporting agency. The rule of liability that emerged was economically inefficient. When the issue of report accuracy and standards of care entered the legislative arena, the interests of both groups were represented symmetrically. As Rubin has pointed out, there is no *a priori* reason why statutes that are the product of legislative lobbying by interest groups should be any more or less efficient than common law litigation.[104] No doubt, the credit reporting industry would have preferred the status quo—a qualified privilege to defame, which insulated the industry from successful attack. At the other extreme, consumer groups would have preferred a standard of strict liability, which would have been economically

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99. *See* notes 80-89 and accompanying text *supra*.

100. The statement of congressional findings under the Act recites the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681a(4) (1982). The legislative purpose of the Act is 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, the proper utilization of such information." *Id.* § 1681b.

101. The industry's litigation options will be limited in the sense that agencies may not challenge the reasonability of a defendant's action where that action violates the substantive legislative standard. In a civil action under 15 U.S.C. § 1681o or § 1681n, the defendant may claim that its failure to achieve the substantive legislative standard was not negligent.

102. *See, e.g.*, Equifax Servs., Inc. v. Cohen, 420 A.2d 189 (Me. 1980) (invalidated under the first amendment sections of the Maine Fair Credit Reporting Act that are similar to provisions of the federal FCRA), *cert. denied*, 450 U.S. 916 (1981); *see also* Maurer, *supra* note 14, at 105-11; Comment, *The New Commercial Speech and the Fair Credit Reporting Act*, 130 U. PA. L. REV. 131 (1981). A current case, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 143 Vt. 66, 461 A.2d. 414, *cert. granted*, 104 S. Ct. 389 (1983) poses the issue of whether a commercial credit reporting agency is entitled to the protection of the first amendment.

103. *See, e.g.*, Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693 (10th Cir. 1980).

104. Rubin, *supra* note 5, at 218.

efficient. The compromise was the FCRA negligence standard.

A standard of strict liability would be socially optimal. In the context of the FCRA, however, the negligence rule may be nearly as good. First, those who are injured by a false negative report can correct the error. They must be informed of the basis for adverse decisions on credit or insurance and provided with the source of the credit report. The FCRA provides the basis for correcting entries in the file. As a result, this sort of mistake is different from most products liability accidents. To some extent, the victim can undo the accident and restore the status quo. This is not to say that there is no cost to being denied credit or insurance temporarily, but it is not the same cost as that imposed under the common law.

The FCRA has the effect of structuring the conduct of the credit reporting agencies and the subjects. The agencies must develop procedures that will minimize the likelihood of injury. Accidents will continue to occur because the optimal degree of accuracy will not lead to zero accidents. When accidents occur, however, the subject has a means to report it and get the error corrected. In time, the case law may impose a duty to mitigate damages on the subjects, which will serve to reduce current and future losses.

The history of the law governing accidents in consumer credit reporting lends weight to the evolutionary theory that there is no *a priori* reason why statutes that are the product of legislative lobbying by interest groups should be any more or less efficient than common law litigation. In either event, efficiency will depend upon the symmetry of the parties' continuing interests in a rule.