



1971

Liability of Credit Bureaus after the Fair Credit Reporting Act: The Need for Further Reform

Charles M. Ullman

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Business Organizations Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Charles M. Ullman, *Liability of Credit Bureaus after the Fair Credit Reporting Act: The Need for Further Reform*, 17 Vill. L. Rev. 44 (1971).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol17/iss1/2>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

LIABILITY OF CREDIT BUREAUS AFTER THE FAIR
CREDIT REPORTING ACT: THE NEED FOR
FURTHER REFORM

CHARLES M. ULLMAN†

THE FAIR CREDIT REPORTING ACT¹ (the "Act"), which took effect April 25, 1971,² has greatly altered the liability of credit reporting agencies³ to consumers whose credit standing or character is investigated and reported to his actual or prospective creditors or employers.⁴ This new federal legislation, although of limited scope and not wholly apparent effect, nevertheless represents the first breakthrough in long overdue reform. Its passage, however, accentuates the need to further redefine the liability of credit bureaus to both consumer and commercial investigatees.

I. THE CONDITIONAL PRIVILEGE DOCTRINE
AT COMMON LAW

At common law, credit bureau liability as a result of erroneous reporting was quite circumscribed; when sued for defamation, the

† B.A., Oberlin College, 1967; J.D., New York University School of Law, 1971.

1. 15 U.S.C.A. § 1681 (Supp. 1971), amending 15 U.S.C. §§ 1601 to 1677 (Supp. V, 1968) [hereinafter cited as Act].

2. The Act was passed by Congress on October 26, 1970.

3. There is much confusion among the terms "credit reporting agency," "commercial agency," "mercantile agency" and "credit bureau." For purposes of this article, the term "credit bureau" will be used generically to include all types of agencies, although the term has been used by some, not without difficulty, as a word of art. See Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1142 n.195 (1969). Commercial agency or commercial credit bureau sometimes denotes only agencies which are profit-making, as opposed to those which are known as mutual, proprietary or nonprofit. J. SHARP, CREDIT REPORTING AND PRIVACY 6-7 (1970). The term "mercantile agency" is traditionally applied to agencies, ordinarily profit-making, which investigate merchants as opposed to consumers. *State v. Morgan*, 2 S.D. 32, 48 N.W. 314 (1891); BLACK'S LAW DICTIONARY 1138 (rev. 4th ed. 1968). The Act uses the term "credit reporting agency" to refer to profit-making agencies, except insured financial institutions under certain circumstances, and to nonprofit agencies, except local hotel and motel associations under certain circumstances, provided at least some investigation of consumers is performed and any means or facility of interstate commerce is employed. Act, § 1681a(f); 1 U.S. CODE CONG. & AD. NEWS 1316, 1318 (1970). However, although a credit reporting agency may devote part of its time to the investigation of merchants, the Act only regulates the agency to the extent that consumers are investigated by the agency. Act, § 1681a(f). In addition, the purpose of the investigation must be the furnishing of a consumer report to a third party, a subscriber or user. *Id.* Unfortunately, the term "credit reporting agency" is not wholly clear because the term "consumer," included in the definition of the agency, is itself defined in a manner which is latently ambiguous. See pp. 58-59 *infra*. Moreover, the terms "credit reporting agency" and "consumer report" are circular; each is defined in terms of the other. Act, § 1681a(d), (f).

4. The circumstances under which, and the persons to whom reports may be disclosed are set forth in the Act, § 1681b.

bureau was permitted to invoke the defense of conditional privilege. The English case of *Toogood v. Spyring*⁵ is often cited as one of the earliest instances in which a court attempted to clarify that defense.⁶ In *Toogood*, an action for slander, it was held that an employer is conditionally privileged to charge his own employee with misconduct in the presence of a third party. Moreover, although the words used may be defamatory, if the employer uttered them "in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned,"⁷ the privilege will operate to protect him. In order to protect "the common convenience and welfare of society,"⁸ he would not be held liable unless the plaintiff could show actual malice.

The question that arose out of *Toogood* and the other early English decisions was whether the protection afforded the employer in *Toogood* was to be extended to someone who, without duty or interest, conveyed defamatory matter to a communicatee who did have a duty or interest. Although some of the earlier cases may have been somewhat ambiguous on this question,⁹ English law crystallized, and it became settled that not only the communicatee, but also the conveyor or publisher of defamatory material must have a duty or interest if the conditional

5. 149 Eng. Rep. 1044 (Ex. 1834).

6. In an earlier case, *Cockayne v. Hodgkisson*, 172 Eng. Rep. 1091 (1833), the privilege was held to attach upon satisfaction of one of two prerequisites. The jury was charged that "where the writer is *acting on any duty*, legal or moral, towards the person to whom he writes, or where he has, by his situation, *to protect the interests of another*, that which he writes under such circumstances is a privileged communication." *Id.* at 1093 (emphasis added).

The concepts of interest and duty, however, have never been authoritatively defined. In *Toogood*, the interest of the publisher of the statement, the employer, seemed clear; the employer had a direct personal interest in insuring his own employee's adequate performance. In modern times it has been held that a communicatee who has an actual or prospective business relationship with the defamed plaintiff may have the requisite interest for purposes of applying the conditional privilege to the publisher's statement. Thus, a plaintiff's customers, prospective customers, vendees, contractors and creditors are all interested persons. *Stationers Corp. v. Dun & Bradstreet, Inc.*, 40 Cal. Rptr. 146 (Dist. Ct. App.), *rev'd on other grounds*, 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965). The ambiguity of the concept of duty is demonstrated by *Robinson v. Dun*, 24 Ont. App. 287 (1897); see text accompanying note 18 *infra*. In an early case, *Child v. Affleck*, 109 Eng. Rep. 150 (1829), cited in *Toogood v. Spyring*, 145 Eng. Rep. at 1050, it was held that the conditional privilege could be invoked even when the publisher, at the time of the publication, maintained no relationship with the plaintiff. In *Child*, it was held specifically that an employer could, in the absence of malice, publish a defamatory statement concerning the plaintiff, a former employee, even to the extent that the employer's remarks were volunteered. Two of the justices clearly felt that the conditional privilege was applicable because the employer had a duty. 109 Eng. Rep. at 151 (Bayley, J. and Littledale, J.). Justice Littledale stated, "if Mrs. Affleck [the employer] had received such information she was *bound* to state it. . . ." *Id.* (emphasis added). However, whether the duty was thought to exist because of the prior relationship between the employer publisher and the plaintiff, her former employee, or for some other reason, was not made manifest.

7. 149 Eng. Rep. at 1050.

8. *Id.*

9. See, e.g., *Watt v. Longsdon*, [1930] 1 K.B. 130, 141-46 (C.A. 1929).

privilege is to be invoked.¹⁰ Thus, in *Watt v. Longsdon*,¹¹ Lord Justices Greer¹² and Russell¹³ both cited with approval the view taken in *Adam v. Ward*¹⁴ that duty or interest must be reciprocal in the publisher and communicatee. Lord Atkinson, speaking in the *Adam* case, was of the opinion that:

A privileged occasion is . . . an occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.¹⁵

In *Watt*, Lord Justice Scrutton accepted Lord Atkinson's remarks if they be interpreted to mean that a publisher and communicatee must have a duty and an interest, respectively, or an interest and a duty, respectively, or else a "common interest . . . and reciprocal duty."¹⁶ Additionally, Lord Scrutton explicitly stated that the trial judge in *Watt* had erred in holding that an occasion would be privileged if the communicatee were interested but the publisher had no duty.¹⁷

Two early British Commonwealth cases that applied the conditional privilege to credit bureaus were Canadian.¹⁸ In *Robinson v. Dun*,¹⁹ the court accepted the general rule that for the conditional privilege to be invoked as an affirmative defense in a defamation action, it was not enough for the communicatee to have an interest; the publisher must also have a duty to convey the statement. Although the *Robinson* court found that the bureau had such a duty, this term was interpreted so broadly as to render it almost meaningless.²⁰ This position was overruled in *MacIntosh v. Dun*,²¹ an Australian case decided by the Privy Council. In *MacIntosh*, the court found that the credit bureau involved in the litigation, a mercantile agency commercial in nature,²² was not, in fact, motivated by duty as that term

10. *Adam v. Ward*, [1917] A.C. 309; *Watt v. Longsdon*, [1930] 1 K.B. 130 (C.A. 1929); *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524 (C.A. 1890); *Harrison v. Bush*, 119 Eng. Rep. 509 (1855).

11. [1930] 1 K.B. 130 (C.A. 1929).

12. *Id.* at 151.

13. *Id.* at 157.

14. [1917] A.C. 309.

15. *Id.* at 334.

16. 1 K.B. at 147.

17. *Id.* at 148.

18. *Robinson v. Dun*, 24 Ont. App. 287 (1897); *Todd v. Dun, Wiman & Co.*, 15 Ont. App. 85 (1887).

19. 24 Ont. App. 287.

20. The court said that whether or not the publisher has had a past or has a present relationship with the defamed plaintiff is immaterial; a duty is created in the publisher *eo instanti* when one otherwise without duty is questioned about the plaintiff. Thus, in the language of the court, "[e]very one owes it as a duty to his fellow men to state what he knows about a person, when inquiry is made; otherwise, no one would be able to discern honest men from dishonest men." *Id.* at 293.

21. [1908] A.C. 390 (P.C.) (Austl.).

22. See note 3 *supra*.

was properly understood. Rather, the credit bureau was a volunteer of information and was motivated solely by the hope of securing a profit. As such, the bureau did not bring itself within the protective penumbra of *Toogood*. Instead, when sued for defamation, it was unable to invoke the conditional privilege defense, but was liable according to the same standards applied to other businesses.²³

Following British precedent, there is substantial authority in the American courts for the proposition that any publisher of a defamatory statement must have an interest or duty if the conditional privilege is to apply. Thus, in *Johns v. Associated Aviation Underwriters*²⁴ it was said:

A communication made in good faith on any subject, in which the person reporting has an interest and in reference to which has a duty, is conditionally . . . privileged if made to a person having a corresponding interest or duty.²⁵

Similar language has been used by some courts in situations where the defendants were credit bureaus.²⁶ However, at a time before the English law on conditional privilege was fully clarified,²⁷ many early American cases held that a publisher need not have a duty or interest to invoke the conditional privilege.²⁸ This view was continued in later holdings,²⁹ and is maintained by several American authorities.³⁰ Yet

23. In a subsequent case, *London Ass'n for Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A.C. 15, the House of Lords distinguished *MacIntosh* and held that a nonprofit or proprietary credit bureau could invoke the conditional privilege. Although it has been said that after the *Greenlands* decision the ruling in *MacIntosh* should "not be relied on too strongly," *Watt v. Longsdon*, [1930] 1 K.B. 130, 148 (Scrutton, L.J.), it is generally considered that the *Greenlands* opinion in no way overruled *MacIntosh* but, rather, complemented it. See J. SHARP, *supra* note 3 at 50-51.

24. 203 F.2d 208 (5th Cir.), *cert. denied*, 346 U.S. 834 (1953). See also *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App. 1970), *application for writ of error dismissed for want of jurisdiction*, ___ S.W.2d ___ (Tex. Civ. App. 1971).

25. 203 F.2d at 211.

26. *E.g.*, "The communication related to something in which the writer (Dun & Bradstreet) had an interest or duty, to one having a corresponding interest or duty, and was made in protection of that interest or in performance of the duty." *H. E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387, 393 (4th Cir. 1957). See also *Cullum v. Dun & Bradstreet, Inc.*, 228 S.C. 384, 388, 90 S.E.2d 370, 372 (1955).

27. See note 9 *supra*.

28. *Locke v. Bradstreet Co.*, 22 F. 771, 773 (C.C. Minn. 1885); *Erber v. R. G. Dun & Co.*, 12 F. 526, 530 (C.C.E.D. Ark. 1882); *Trussell v. Scarlett*, 18 F. 214, 216 (C.C. Md. 1882) (by implication); *Sunderlin v. Bradstreet*, 46 N.Y. 188, 191-92 (1871).

29. *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160, 161 n.1 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952) (by implication); *Wetherby v. Retail Credit Co.*, 235 Md. 237, 239, 201 A.2d 344, 345 (1964) (by implication), *citing as good authority* *Trussell v. Scarlett*, 18 F. 214 (C.C. Md. 1882); *Shore v. Retailers Commercial Agency*, 342 Mass. 515, 520, 174 N.E.2d 376, 379 n.2 (1961) (by implication), *citing as good authority* *Locke v. Bradstreet Co.*, 22 F. 771 (C.C. Minn. 1885) and other early American cases. In California, the view is incorporated into statute. See *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965).

30. The Restatement of Torts would not require the publisher of a defamatory statement to have an interest so long as there is a legal duty to publish the matter

curiously, the question whether a duty or interest must exist when a credit bureau asserted the conditional privilege proved academic in the American courts. Those courts holding that a publisher must have a duty or interest found that the credit bureau did have such duty or interest,³¹ while those of the apparent disposition that a credit bureau did not have a duty or interest held that such duty or interest was not necessary.³²

The view that a credit bureau is not required to show a duty or interest in order to invoke the conditional privilege was argued at length by Professor Jeremiah Smith in his article³³ attacking the *MacIntosh v. Dun*³⁴ decision. It was his position that, since one merchant is conditionally privileged in answering the question of a second as to the credit standing of a third,³⁵ the conditional privilege should also attach when, in a large and fast moving economy, it becomes practically impossible to convey such inquiries and answers without the aid of a credit bureau as middleman.³⁶ The introduction of the middleman, however, creates a complication. Instead of the one original publication directly between merchants, there is in this instance publication by the first merchant, who answers the inquiry of the credit bureau, followed by republication when the bureau relays that information to the second merchant. It is the republication which is at issue when the credit bureau is sued. By asserting that the credit bureau has a duty, Professor Smith attempts to bring this republication, in which the credit bureau has now become the publisher, within the traditional rule that the publisher must have a duty or interest. The duty, he suggests, is present because the bureau

or so long as the publication to the communicatee is "otherwise within the generally accepted standards of decent conduct." RESTATEMENT OF TORTS § 595 (1938). See generally, Smith, *Conditional Privilege for Mercantile Agencies — MacIntosh v. Dun* (pts. 1 & 2), 14 COLUM. L. REV. 187, 296 (1914).

31. *E.g.*, *H. E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387 (4th Cir. 1957); *Cullum v. Dun & Bradstreet, Inc.*, 228 S.C. 384, 90 S.E.2d 370 (1955).

32. *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952) (by implication); *Wetherby v. Retail Credit Co.*, 235 Md. 237, 201 A.2d 344 (1964) (by implication); *Shore v. Retailers Commercial Agency*, 342 Mass. 515, 174 N.E. 376 (1961).

33. Smith, *supra* note 30. See *H. E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387, 397 n.13 (4th Cir. 1957) (Smith article noted but not followed in applying North Carolina law to issue in question); *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160, 161 n.2 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952) (Smith article cited with approval); *Shore v. Retailers Commercial Agency*, 342 Mass. 515, 520, 174 N.E.2d 376, 379 (1961) (Smith article cited with approval); W. PROSSER, *LAW OF TORTS* 810 n.25 (3d ed. 1964) (Smith article noted).

34. [1908] A.C. 390 (P.C.) (Austl.).

35. Smith, *supra* note 30, at 201.

36. The same basic argument was made in *Trussell v. Scarlett*, 18 F. 214, 216 (C.C. Md. 1882):

If it is permissible for one merchant to inquire of another for his own benefit as to the standing of another merchant, I cannot see how any distinction can be made where one expends money and another receives money for the information, and makes it his business to get the information.

has obligated itself by contract to convey the information it receives to the second merchant who requested it.³⁷ Moreover, the relationship between the credit bureau and the second merchant is likened to that of a stenographer and her employer. A communication between an agent and his principal is conditionally privileged in the latter relationship, and therefore it should be similarly privileged in the former.³⁸ Alternatively, it is argued that the credit bureau has interest. The bureau should be able to stand in the shoes of the second merchant, the bureau's contractee, and assert the latter's interest.³⁹ Finally, this line of reasoning suggests that, apart from theoretical considerations, the conditional privilege should attach to the defamatory publication of a credit bureau because the privilege is essential to the effective functioning of this most important industry. If the privilege does not attach, then it is argued that no one will be willing to furnish the bureau with information.⁴⁰

However, it is questionable whether a credit bureau as publisher has a duty. If duty, as it is understood in defamation, can be self-created by execution of a contract with the communicatee, then the law would afford the conditional privilege to the person who contracted to convey to interested parties only gossip and defamatory material. The stenographer analogy is misleading. As was noted in *MacIntosh*, a credit bureau which holds itself out as one that will furnish information is somewhat of a volunteer.⁴¹ It may be said that the bureau has assumed the risk in deciding to devote all efforts to publishing statements regarding the reputation of others. In any event, while the stenographer is an agent, the credit bureau is an independent contractor,⁴² and the protection afforded the former cannot be extended to the latter. This position is justifiable since "[t]he immunity of a privileged communication is the exception, and he who relies upon an exception must prove all the facts necessary to bring himself within it."⁴³ The only possible reason for extending the privilege is that the credit bureau would not otherwise be able to function effectively.⁴⁴

37. See Smith, *supra* note 30, at 201 (by implication, noting that a contract of agency may entail a communication "in the line of a business duty").

38. *Id.* at 208-09.

39. *Id.* at 297-98.

40. *Id.* at 201.

41. *MacIntosh v. Dun*, [1908] A.C. 390, 399-400 (P.C.) (Austl.).

42. Smith, *supra* note 30, at 204. The difference between agents and independent contractors has been said to be one of control; the user of a credit bureau's services exercises virtually no control over the bureau. Note, *The Mercantile Agency and Conditional Privilege in Defamation*, 11 S.C.L.Q. 256, 261 (1959). Moreover, a credit bureau sells its services to more than one subscriber, and the same basic data may be used for more than one report. Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 510 (1969).

43. *Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc.*, 367 F.2d 625, 631 (3d Cir. 1966).

44. See text accompanying note 49 *infra*.

Nor does the credit bureau have an interest. To allow the second merchant's interest to be imputed to the bureau would again involve an extension of an exception.⁴⁵ An agent cannot always assume the legal status of his principal;⁴⁶ a fortiori, an independent contractor cannot assume the status of his employer. Even if the relationship between the credit bureau and the first merchant, the furnisher of the information, be likened to one of agency, it does not necessarily follow that the credit bureau could assert the conditional privilege afforded that merchant in a direct communication to the second merchant.⁴⁷ Finally, and most importantly, the past half century has belied the underlying premise of Professor Smith's argument — the premise which, if true, might have justified an extension of the principles of defamation and agency. The growth and prosperity of credit bureaus within jurisdictions that do not recognize the conditional privilege now makes it abundantly clear that the privilege is not, after all, essential to the bureaus' effective functioning.⁴⁸

45. See text accompanying note 43 *supra*.

46. Professor Smith argues, "[T]he agent . . . who acts . . . in good faith, is generally allowed by law to set up . . . the interest of his principal . . . as a justification. . . ." Smith, *supra* note 30, at 297-98. Yet as Professor Smith himself admits, the principal is inapplicable where there is *delectus personarum* (*id.* at 297 n.77a), or where, as one commentator has said, the principal's acts are of a "personal" or "special" nature, as, in some circumstances, where privileges are concerned. Gardner, *Agency Problems in the Law of Attorney-Client Privilege*, 42 U. DET. L.J. 1, 2 (1964).

47. Such a conclusion would involve an extension of an exception; see text accompanying note 43 *supra*. Even if the credit bureau could be likened to an agent of the first merchant, the publisher, it does not necessarily follow that the bureau can step into the shoes of its "principal." See note 46 *supra*. The 1938 Restatement of Torts in section 593 takes the position that the privilege to publish false and defamatory matter is not personal. Nevertheless, that does not necessarily mean that an agent *without interest* can assert the privilege of his principal. An agent without interest has been deemed a third party in other contexts. See, e.g., *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514-15 (Tex. Civ. App. 1970), in which the court noted that an employer's statements to an employee are privileged only to the extent that the employee-communicatee has "a corresponding interest or duty in the matter to which the communication relates." Moreover, a credit bureau has *assumed* general control over the process of reconveying information, just as it has assumed control over the initial acquiring of the information; cf. note 42 *supra*. Therefore, it may possibly be held to a stricter standard of liability than the ordinarily passive agent, or even the passive principal. As has been said in a somewhat different context:

As there is no special rule of agency which relieves an agent, liable under the ordinary rules of Tort law, from the legal consequences of his transgressions, neither is there a peculiar rule which causes his liability to be greater. But, by becoming an agent, one usually does increase responsibility under the rule that the assumption of control over any situation creates liability to those whose legally protected interests are injuriously affected by the faulty exercise of that control. . . . In many cases if there is no relief against the agent, there is none at all; in any event the remedy through the principal is a circumlocution. W. SEAVEY, *STUDIES IN AGENCY* 26-27 (1949).

48. See Smith, *supra* note 30, at 201. The headquarters of what has grown to be the largest American credit bureau is located in one of the three American jurisdictions which has exposed merchants to what was once called the "greatest hazard," *viz.*, the failure to afford communications between the merchants and

Unfortunately, however, the implications of this growth have not been fully recognized. In fact, American courts, explicitly or implicitly, continue to decide cases as though the conditional privilege were necessary to the effective functioning of credit bureaus. Thus, a Massachusetts court has justified the privilege on the ground that "[w]ithout such protection few would undertake to furnish the information, and the cost would be high, if not prohibitive."⁴⁹ Similarly, the Court of Appeals for the District of Columbia Circuit has said that "[t]he harm that such [defamatory] statements occasionally do to applicants for credit is believed to be small in relation to the benefits that subscribers derive from frank reports."⁵⁰ This court has thus

credit bureaus the conditional privilege. Retail Credit Co. of Atlanta, Georgia, is said to presently have files on forty-five million Americans. Miller, *The Credit Networks, Detour to 1984*, THE NATION, June 1, 1970, at 648-49. Under Georgia law, a credit bureau is liable for mere negligence. *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886). See also *Pacific Packing Co. v. Bradstreet Co.*, 25 Idaho 696, 139 P. 1007 (1914); N.Y. GEN. BUS. LAW §§ 371(d), 376(1) (McKinney 1970). The entire argument that the conditional privilege is necessary to the effective functioning of the credit bureau is called into serious question by the passage of the Fair Credit Reporting Act which holds credit bureaus to a standard of negligence in those instances where the investigatee is a consumer. Rather than doom the credit bureau industry to extinction, it has been suggested that, to the limited extent the Act is applicable, this legislation will stimulate the industry. *Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. at 54 (1970) [hereinafter cited as *House Hearings*]. If eliminating the conditional privilege across the board, whether the investigatee be a consumer or merchant, would subject the bureau to increased litigation and increased liability, the bureau could protect itself by insurance, the cost of which could be passed along to the user. Comment, *Does A Mercantile Agency Enjoy a Qualified Privilege?*, 36 N.D.L. Rev. 201 (1960). However, the Director General of one of the largest British credit bureaus has recently remarked that British credit bureaus, both commercial and proprietary, have enjoyed healthy growth and no great volume of litigation even though the commercial bureaus, since the *MacIntosh* decision, have not been conditionally privileged in their communications to interested users. Letter from C. McNeil Greig, Dir. Gen. of the United Ass'n for the Protection of Trade, Ltd., to Charles M. Ullman, Apr. 16, 1971, on file at the offices of the *Villanova Law Review*, Villanova, Pennsylvania. See also CONSUMER CREDIT COMMITTEE, FIRST REPORT, CMND. No. 4596, at 101-03 (1971).

Similarly, in Canada, credit bureaus have done exceedingly well. J. SHARP, *supra* note 3, at 9-10, 50-51. In Canada, there have been several recent developments extending the liability of credit bureaus. While still adhering to the *MacIntosh* standard of negligence, rather than to the conditional privilege standard of malice, the Canadian reformers have sought to take a page from the Fair Credit Reporting Act and impose additional liabilities and obligations upon credit bureaus. For example, the Personal Investigations Act, Bill 27, MANITOBA CONSOL. STAT. c. P33 (1971), provides *inter alia*, that its ambit extends not only to consumers, but also to corporate officers and employees. The fact that Canada, if not yet England, appears to view the Fair Credit Reporting Act favorably does not vitiate the thesis that the American majority view that the conditional privilege was necessary to protect credit bureaus is incorrect. For many years, the English speaking world outside the United States existed quite well under a legal system which held the bureaus to a standard of liability based on negligence. By adopting many of the provisions of the Fair Credit Reporting Act, this Canadian jurisdiction is not abandoning its traditional post-*MacIntosh v. Dun* standard, but is merely supplementing the protections that it has heretofore accorded investigatees.

49. *Shore v. Retailers Commercial Agency*, 342 Mass. 515, 520, 174 N.E.2d 376, 379 (1961).

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

implied that the injury sustained must be without redress because the privilege is the *sine qua non* of "frank reports."⁵¹

The predominant view in state courts has thus remained that the conditional privilege may be invoked by a credit bureau. Furthermore, a plaintiff investigatee must show that the bureau had actual or express malice in the communication to a user of its services⁵² and the communication was false,⁵³ or that there was general publication of the communication to persons without interest.⁵⁴ It has been asserted that this burden of proof is so demanding that the credit bureaus have enjoyed virtual immunity from suit.⁵⁵ Certainly, difficulties may arise with respect to a determination of the presence of malice, a somewhat nebulous concept.⁵⁶ Malice appears to connote a highly personal emotion not usually applicable to a large business such as a large credit bureau.⁵⁷ This is especially the case when the contact between the investigatee and the bureau is neither prolonged nor intensive. The bureau may in fact gather the data for its credit report from sources other than the investigatee himself. In the case of a credit bureau, as opposed to another publisher, since the contact between the investigatee and the bureau is not protracted, there may often be little or no subjective interpretation of the credit worthiness of the subject of the investigation. Under such circumstances, the credit bureau is a mere passive clearing house for data received from other sources. Thus, while the plaintiff is attempting to show express malice

51. At least where consumers are being investigated, the Congressional Hearings indicated that the "frankness" of the reports prepared by credit bureaus was sometimes open to question. See generally *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking & Currency*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *Senate Hearings*].

52. *Hooper-Holmes Bureau v. Bunn*, 161 F.2d 102 (5th Cir. 1947); *Pomeroy v. Dun & Bradstreet, Inc.*, 146 F. Supp. 59 (D.C. Ore. 1956); cf. *Johns v. Associated Aviation Underwriters*, 203 F.2d 208 (5th Cir.), *cert. denied*, 346 U.S. 834 (1953), wherein the court said, "The inference to be drawn from the proof of gross negligence cannot be substituted for proof of actual malice." *Id.* at 212.

53. *H. E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387 (4th Cir. 1957); *Wetherby v. Retail Credit Co.*, 235 Md. 237, 201 A.2d 344 (1964).

54. See, e.g., *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952). The case held that actual interest is unnecessary if the defendant's belief that interest existed was reasonable, and noted in dictum that general publication to those without interest constitutes abuse of the privilege. 194 F.2d at 162 n.4.

55. Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 516 (1969).

56. Cf. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80, 293 (1964). In response to the majority's assertion that a statement made with "actual malice" is one made "with knowledge that it was false or with reckless disregard of whether it was false or not," Mr. Justice Black remarked: "The Court goes on to hold . . . such critics [defendants] to damages if 'actual damages' can be proved against them. 'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove." *Id.* at 293 (Black, J., concurring).

57. One particular credit bureau is said to have a staff that includes seven thousand investigators. Miller, *supra* note 48, at 649.

by a preponderance of the evidence, the defendant can explain away occasional errors as statistically inevitable and intensive probing into the background of the investigatee as special dedication to the bureau's client. As one court has said, "[t]he reports [of credit bureaus] are gathered from all parts of the country, and in the ordinary course of business there is no such thing as malice in the transaction."⁵⁸ If, then, malice is not a relevant criterion in ascertaining the culpability of a credit bureau, it would be illogical to apply the conditional privilege to the bureau's communications and require the plaintiff to show actual malice in order to succeed in his action.

Under the majority rule, where the defendant invokes the conditional privilege, the courts will refuse not only to impute malice from false publication, but will additionally refuse to infer damages.⁵⁹ This is true even though it is held, in cases not involving the conditional privilege, that damages will be conclusively presumed where the defendants' statements are actionable per se, or, as some courts have said, perhaps incorrectly,⁶⁰ defamatory per se.⁶¹ Certainly, it is generally held that an erroneous publication which damages a plaintiff's credit standing in his business is actionable⁶² or defamatory per se.⁶³ It has even been held that damages will be presumed where credit standing is adversely affected whether or not the plaintiff is a merchant.⁶⁴ The rationale for the presumption of damages is probably that:

[the] evil report is insidious, that it travels and does damage in the dark, meandering in ways whereof it is difficult for man to find out, or because . . . cases may arise where, from the nature of the business in which the party is engaged, it would be almost impossible to prove the loss of trade by witnesses who had dealt with the party bringing the suit.⁶⁵

This same rationale is equally apposite when the defendant's statement, actionable per se, is conditionally privileged. Yet, by the majority

58. *Douglass v. Daisley*, 114 F. 628, 637 (1st Cir. 1902), criticized in *H. E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387, 397-98 (4th Cir. 1957).

59. *E.g.*, *H. E. Crawford, Inc. v. Dun & Bradstreet, Inc.*, 241 F.2d 387 (4th Cir. 1957).

60. *See* *Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc.*, 367 F.2d 625 (1966); *W. PROSSER, supra* note 33, at 782.

61. *E.g.*, *Diplomatic Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377, 382-83 (5th Cir. 1967) (actionable per se); *Ragland v. Household Fin. Corp.*, 254 Iowa 976, 119 N.W.2d 788 (1963) (defamatory per se).

62. *Diplomatic Elec. Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377 (5th Cir. 1967).

63. *Ragland v. Household Fin. Corp.*, 254 Iowa 976, 119 N.W.2d 788 (1963).

64. *Hinkle v. Alexander*, 244 Ore. 267, 417 P.2d 586 (1966).

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

view, the plaintiff is denied benefit of the presumption,⁶⁶ and a credit bureau invoking the privilege is thus afforded additional protection.

II. LIABILITY OF CREDIT BUREAUS AT COMMON LAW OTHER THAN FOR DEFAMATION WITH ACTUAL MALICE

Perhaps in reaction to the harsh effect of requiring a defamed plaintiff to show actual malice and actual damages when the conditional privilege is invoked as a defense, or perhaps simply as a result of occasional ambiguity found in the language of some early cases,⁶⁷ various courts have attempted to introduce the element of negligence in defamation actions.⁶⁸ This approach has actually been somewhat extraordinary, for the courts that have adopted it have professed not to deviate from the traditional standard of malice. While the stricter courts have denied that malice may be inferred from gross negligence,⁶⁹ as well as from simple negligence,⁷⁰ others have admitted evidence indicating a degree of culpability which, while falling somewhat short of malice, has acted as a basis from which it may be implied. Inference may be piled upon inference, until the gap between negligence and malice is bridged:

It has long been recognized that an absence of good faith may tend to prove ill will and thus actual malice. . . . Moreover, if a defendant makes a report which he asserts to be true . . . when he

66. That is, where "[t]he publication in question . . . [is] defamatory on its face and of such a nature that proof of special damages is unnecessary, the plaintiff is entitled to recover unless the defendant can establish the defense of . . . privilege." *Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc.*, 367 F.2d 625, 631 (1966).

67. See, e.g., *Locke v. Bradstreet Co.*, 22 F. 771 (C.C. Minn. 1885). The *Locke* court noted that in some instances malice may be implied, but that "[i]f it is a privileged communication, then . . . actual malice must be proved." *Id.* at 773 (emphasis added). The court then suggested that malice could, after all, be implied from lesser culpability and could, specifically, be implied from the "absence of probable cause." However, this implication would only arise if the words were "calculated" to do damage and were "false," or if the defendant, "without exercising ordinary care and caution in collecting it [the information it published], unfairly, and without reason to believe its truth, imparted the information to others recklessly. . . ." *Id.* at 774.

68. As *Locke v. Bradstreet Co.* suggests, the courts have often distinguished between culpability in collecting information, and culpability in publishing it to persons without interest. The disagreement as to whether the standard of a defendant's liability should be negligence or malice has centered on the collection and preparation of information. Although it may have been thought that the rule with regard to dissemination of information was one of strict liability where publication was made to persons without interest, this view was rejected by the Court of Appeals for the District of Columbia which held the defendant to a standard of negligence. *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160 (D.C. Cir.), cert. denied, 344 U.S. 821 (1952).

69. E.g., *Johns v. Associated Aviation Underwriters*, 203 F.2d 208 (5th Cir.), cert. denied, 346 U.S. 834 (1953). *Contra*, *Cullum v. Dun & Bradstreet, Inc.*, 228 S.C. 384, 90 S.E.2d 370 (1955).

70. E.g., *Mil-Hall Textile Co. v. Dun & Bradstreet, Inc.*, 160 F. Supp. 778 (S.D.N.Y. 1958) (mere allegation of negligence must be struck as prejudicial).

has no reasonable grounds or probable cause for so doing, it could be found that he has not acted in good faith, and has abused the privilege.⁷¹

This curiously roundabout process has been criticized as such.⁷² It underlines the fact, however, that the courts, perhaps in simple deference to the weight of stare decisis,⁷³ have been unwilling to do directly what they accomplish indirectly.

Another means the courts have contemplated in order to subject credit bureaus to liability for negligence has been liability for negligent misstatement. This theory was originally rejected when an action was brought by a plaintiff who was not an investigatee or subject of the defendant's statement or report, but merely one who relied on the defendant's statement in extending credit to such subject.⁷⁴ By extension, it has been asserted that, in the absence of privity, there is no such cause of action for a plaintiff investigatee or a plaintiff who is the subject of the defendant's report.⁷⁵ Such a view is, however, questionable; the decision in *Ultramares*, denying recovery to a plaintiff who extended credit, can be distinguished from cases involving a plaintiff investigatee.⁷⁶ In any event, the *Ultramares* decision has been

71. *Shore v. Retailers Commercial Agency*, 342 Mass. 515, 521, 174 N.E.2d 376, 380 (1961). It has been held that the concept of negligence is inherent in any action without probable cause, and that action without probable cause may indicate malice. *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965). See also *Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc.*, 367 F.2d 625 (3d Cir. 1966). Liability for conscious indifference has served as another court's standard. *Dun & Bradstreet, Inc. v. Nicklaus*, 340 F.2d 882 (8th Cir. 1965).

72. The process is noted as:

a remarkably circuitous way of bringing a segment of the law of defamation into line with the rest of the tort field where negligence . . . is the predicate of liability. One might just as well say that the automobile driver has a qualified privilege with respect to causing physical accidents but that the privilege will be lost if he drives with malice and this, in turn, will be taken to mean if he drives negligently.

F. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 1134 (2d ed. 1969).

73. Out of apparent deference to stare decisis, one court has felt constrained to deny recovery against a bureau even where justice so demanded. *Serino v. Dun & Bradstreet, Inc.*, 267 F. Supp. 396 (D.S.C. 1967). One commentator has even suggested that the conditional privilege be at least nominally retained in order to avoid upsetting the great weight of authority upholding the privilege. The privilege would be applied, however, only where the defendant could show an absence of negligence. Note, *The Mercantile Agency and Conditional Privilege in Defamation*, 11 S.C.L.Q. 256, 266 (1959).

74. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

75. Note, *Liability for Misstatements by Credit Reporting Agencies*, 43 U. VA. L. REV. 561 (1967).

76. In *Ultramares*, a suit for fraudulent misrepresentation and negligence, defendant-accountants carelessly certified a balance sheet of their employer without knowing that the particular plaintiff, a factor and prospective creditor of the employer, would rely to his detriment on the certification. The court held, *inter alia*, that the plaintiff could not maintain an action based on negligence since the defendant's

much criticized, in part for being inconsistent with *Palsgraf v. Long Island Railroad Company*.⁷⁷ Moreover, it has been suggested by the Court of Appeals for the Fourth Circuit that a plaintiff suffering actual damages, such as a denial of credit, as a direct result of an erroneous credit bureau report, might sue for negligent misstatement.⁷⁸ This position seems consistent with the principle that a duty to act with due care to a particular plaintiff is created where it is reasonably foreseeable that such plaintiff would otherwise be directly or proximately injured.⁷⁹ The rule is particularly applicable where there is no question that the particular type of damage that may result — such as a denial of credit where the plaintiff is attempting to expand his business and the credit bureau prepares the report for plaintiff's prospective creditor — clearly falls within the scope of the risk that had been foreseeable.⁸⁰

A final means at common law for holding a credit bureau liable is based on an asserted invasion of the plaintiff's right to privacy. In those jurisdictions where this cause of action has been recognized, it has, however, been of little utility to plaintiffs who have been investigated by credit bureaus. The plaintiff cannot prevail unless the

liability was "bounded by the contract, and is to be enforced between the parties by whom the contract has been made." 255 N.Y. at 189, 174 N.E. at 448. The court reached this conclusion, in part at least, because it felt that allowing the possibility of recovery to the plaintiff might ultimately result in subjecting the defendant to excessive liability — liability for negligence to a large and indeterminate number of similarly unforeseen plaintiffs who, however, as members of the public, did rely to their detriment on the defendant's certification. Where the plaintiff is an investigatee, on the other hand, he is clearly a "foreseeable plaintiff." Moreover, it might be asserted that such plaintiff was a third party beneficiary to the contract between the credit bureau and the person requesting the bureau report. See Note, *supra* note 55, at 517 n.60.

77. 248 N.Y. 339, 162 N.E. 99 (1928). See *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85, 90-91 (D.R.I. 1968).

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

79. Thus, in *Serino v. Dun & Bradstreet, Inc.*, 267 F. Supp. 396 (D.S.C. 1967), the court said:

[D]efendant knew that its reports about plaintiff would probably be acted upon by some of its subscribers in matters of importance; and it should have reasonably foreseen that plaintiff would likely suffer financial loss or damage if defendant published false or erroneous information. . . . Even though there was no privity or contractual relationship between plaintiff and defendant . . . it was incumbent upon it [defendant] to exercise due care in obtaining and publishing credit information about her [plaintiff], and justice demands the imposition of liability for damages resulting proximately from its negligent breach of such duty.

Id. at 398. Surprisingly, however, the court then went on to state that the demands of justice, whose cause it had pleaded so eloquently, must be denied. Since the court was unwilling to admit that a cause of action against a credit bureau for negligent misstatement would in effect overrule the body of authority affording credit bureaus the conditional privilege in defamation, it felt that the resulting coexistence of both standards of liability would be "anomalous." *Id.* at 399.

80. See *Smith v. London & S. W. Ry.*, L.R. 6 C.P. (1870).

credit bureau's report was true,⁸¹ and was given publicity.⁸² Even after a plaintiff has shown that the facts disclosed by the bureau were of a private or personal nature, and that the disclosure would have been offensive to a person of ordinary sensibilities,⁸³ the plaintiff suing for invasion of the right to privacy may be met with the same assertion of conditional privilege raised in defamation actions.⁸⁴

In short, the common law, as it has traditionally been interpreted in the United States, has afforded plaintiff investigatees little protection against credit bureaus. Only a minority of courts have attempted, through various means, to correct the practical effect of misapplied legal theories.⁸⁵ At the present time, except to the extent that the

81. Some courts have stated simply that truth is no defense in an action for invasion of privacy. *E.g.*, *McKinzie v. Huckaby*, 112 F. Supp. 642 (W.D. Okla. 1953). It is clear, at least in theory, that in situations involving invasion of privacy suits against credit bureaus, if the accuracy of a statement is not established, the plaintiff will not be able to sue for invasion of privacy, but must bring his action for defamation. *Miller, supra* note 3, at 1158.

Further debilitating is the fact that it is not always simple to classify a statement as true or false. A rating of "slow pay" may be misleading where a dispute exists as to the quality of goods or services received. *Miller, supra* note 48, at 650. A plaintiff winning a civil suit may nonetheless be given a poor rating for being "litigious." *The Horror Side of Credit*, *TIME*, Dec. 20, 1968, at 79. The dichotomy between truth and falsity, in some cases perhaps no more than a legal fiction, may result in a plaintiff "subject to the risk of falling between the conceptual stools." *Miller, supra* note 3, at 1159.

82. Publicity means more than publication, as the latter term is understood in the law of defamation. Publicity means disclosure of information to a large group or to the general public rather than to a single individual or even to a few persons. *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962). Thus, the right to sue for invasion of privacy would not generally arise where a credit bureau makes a report in confidence to a single subscriber. Most cases based on this cause of action have involved collection agencies. *See, e.g.*, *Hawley v. Professional Credit Bureaus*, 345 Mich. 500, 76 N.W.2d 835 (1956) (no publicity by disclosure of a disputed debt to the plaintiff's employer). In two-thirds of the nation's largest cities, credit bureaus do maintain collection agency operations. *Hearings on S. 823 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. of the Judiciary*, 91st Cong., 1st Sess. 1, 42 (1968). There appears to be no societal interest in the communication of a highly private matter to one who has no interest in the matter — communication which, though true, may cause offense to a potential plaintiff of ordinary sensibilities. The requirement of publicity, or publication to a large number of persons rather than one or several individuals, seems unjustified, and has, in fact, been criticized. *Note, supra* note 55, at 513. It is submitted that the concept of the right to privacy should not depend on a showing of publicity, since, as one commentator has noted, "[t]he type of information that is obtained may itself constitute a threat to privacy." *Id.* (emphasis added).

83. *Prosser, Torts*, 48 CAL. L. REV. 383, 396-97 (1960).

84. This view was first maintained by the coauthors of the law review article that is also said to have created the right to privacy: *Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193, 216 (1890). This position subsequently received acceptance by some courts, *e.g.*, *Brents v. Morgan*, 299 S.W. 967, 221 Ky. 765 (1927), and is maintained by other authorities, *RESTATEMENT (SECOND) OF TORTS*, § 652H (Tent. Draft No. 13, 1967); *W. PROSSER, supra* note 33, at 851. *But see Pinkerton Nat'l Detective Agency v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963) (express malice in action based on invasion of right to privacy deemed immaterial).

85. The Georgia and Idaho courts have not applied the conditional privilege to communications involving credit bureaus. *See* note 48 *supra*.

force of the law has been eroded in such jurisdictions, and except where modified by legislation,⁸⁶ the common law and all its shortcomings remains in general effect.

III. THE FAIR CREDIT REPORTING ACT

The common law liability of credit bureaus to plaintiff investigatees has been altered, in various degrees by four state statutes⁸⁷ and by the Fair Credit Reporting Act.⁸⁸ The Act, however, is limited in scope; it is perhaps as noteworthy for what it fails to encompass as for what it does in fact regulate. The Act affects only certain credit bureaus,⁸⁹

86. See note 87 and accompanying text *infra*.

87. MASS. GEN. LAWS ANN. ch. 93, §§ 44 to 46 (Supp. 1970); N.M. STAT., §§ 50-18-1 to 18-6 (Supp. 1969); N.Y. GEN. BUS. LAW, §§ 370 to 376 (McKinney 1970); OKLA. STAT. tit. 24, §§ 81 to 85 (1951). The New York legislation is the most comprehensive.

88. 15 U.S.C.A. § 1681 (Supp. 1971), amending 15 U.S.C. §§ 1601 to 1677 (Supp. V, 1968).

89. See note 3 *supra*. The clarification of the definitions, as well as of some words or phrases which are not defined in the Act, may become critical. Under section 1681s of the Act, the Federal Trade Commission is authorized to have "such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter. . . ." It has been suggested that this provision does not grant enabling power to define "the substance of the new law" and the many vague terms that appear throughout it. CONSUMER REPORTS, April 1971, at 256, 259.

The Act's definition of a "consumer reporting agency" presumably excludes governmental agencies, since a consumer reporting agency must assemble or evaluate information for fees and dues on a cooperative nonprofit basis, the reports to be furnished to "third parties." Act § 1681a(f). The fact that a governmental agency will generally not be considered a consumer reporting agency has only incidental interest in ascertaining the obligations imposed upon the governmental agency when it takes adverse action against the consumer. These obligations are determined by the provisions of section 1681m. See note 108 *infra*. The inapplicability of the definition has perhaps a more interesting consequence in determining the obligations imposed upon the governmental agency in disclosing information to a potential recipient other than to a consumer or the subject of the governmental agency's report. Precisely because of this inapplicability, section 1681b of the Act, which permits disclosure by consumer reporting agencies to recipients only under certain circumstances, does not control disclosure of information by governmental agencies, whether the information is obtained directly from the field or from a consumer reporting agency. Other laws do, however, apply. For example, under 5 U.S.C. § 552(a)(3) (Supp. V, 1967), part of the Freedom of Information Act, governmental agencies are required to disclose information in their files to "any" person. See Miller, *supra* note 3, at 1195. This broad language is modified, *inter alia*, by 5 U.S.C. §§ 552(b)(3) and (b)(4), providing that disclosure shall not be made where prohibited by statute, or in other circumstances including where "financial information obtained from a person and privileged or confidential" is sought. Unfortunately, the meaning of "financial information obtained from a person and privileged or confidential," even before the Fair Credit Reporting Act, was far from clear. See Hoerster, *The 1966 Freedom of Information Act — Early Judicial Interpretations*, 44 WASH. L. REV. 641, 646 n.27, 649 n.41 (1969); Miller, *supra* note 3, at 1197-98. Whether soft or hard data which indirectly or directly bears on a person's credit and financial standing will be considered exempted from disclosure after the Fair Credit Reporting Act which, where applicable, does away with the concept of privilege with respect to the requests of creditors and others for information, if not with the concept of confidentiality, may be an even more difficult question. It is possible that the type of information disclosed by governmental agencies pursuant to the Freedom of Information Act will be influenced

and regulates those bureaus affected only to the extent that the bureaus report on "consumers,"⁹⁰ defined as individuals.⁹¹ Partnerships, cor-

by the knowledge that the recipient of the information may subsequently be required to give notice to the consumer of the nature of the information where the recipient takes adverse action against the consumer and section 1681m(b) of the Fair Credit Reporting Act is applicable. The provisions of the Freedom of Information Act themselves do not guarantee that any notice be given to a consumer or other subject of a report when a potential recipient attempts to require disclosure of information from the governmental agency. See Miller, *supra* note 3, at 1196-98. It is difficult to predict whether standards regulating disclosure under the Freedom of Information Act will generally be construed to permit or require greater or lesser disclosure than that provided for in the Fair Credit Reporting Act. Certainly, in the past, the courts have often construed the disclosure requirements of the Freedom of Information Act narrowly. See generally Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150 (1969); Note, *The Freedom of Information Act — The Use of Equitable Discretion to Modify the Act*, 44 TUL. L. REV. 800 (1970). But see 5 U.S.C. §§ 552(a)(2), 552(b)(6) (Supp. V. 1967), authorizing nondisclosure or exempting from disclosure under certain circumstances information which would constitute "a clearly unwarranted invasion of personal privacy." (Emphasis added.)

90. Not all investigations and reports on consumers are actually within the ambit of the Act or are uniformly regulated by it. Direct transactions or experiences between the person making the report and the consumer, when reported on to any person, are not considered consumer reports. Thus, for example, when a bank relates information to a third party about one of its depositors, the bank is not acting as a consumer reporting agency, and disclosure will not be regulated by section 1681b of the Act. Act, §§ 1681a(d), (f); 2 U.S. CODE CONG. & AD. NEWS 4414 (1970). Unauthorized disclosure of information may, of course, subject the bank to liability under other law. See, e.g., *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961). Second, extensions of credit by the issuer of a credit card or similar device do not constitute consumer reports. Act, § 1681a(d). Third, when a third party requests a prospective creditor to advance credit to a consumer, the creditor's report to the third party is not considered a consumer report, provided that the name and address of the prospective creditor are disclosed to the consumer, and certain disclosures are made to the consumer if adverse action is taken against him pursuant to section 1681m of the Act.

Certain other types of information are not excluded from the definition of consumer reports, but may not be disclosed in consumer reports to section 1681b authorized users. Thus, certain adverse but obsolete information may not be reported if the information antedates the report by more than seven years. Bankruptcies, however, may be reported for fourteen years. Act, § 1681c. One problem in the past has been the reporting of bankruptcies without distinguishing between straight bankruptcies and chapter XIII wage earner plans. See Note, *Discharge Provisions in Consumer Bankruptcy: The Need for a New Approach*, 45 N.Y.U.L. REV. 1251, 1269 (1970). The legislative history of the Act indicates that it is the intent of the House conferees that section 1681e(b) of the Act requires that, when bankruptcies are reported, straight bankruptcies be duly distinguished from chapter XIII proceedings. 2 U.S. CODE CONG. & AD. NEWS 4415 (1970).

91. It is not clear from the Act whether the term "individual" is to apply to sole proprietors in their capacity as merchants. Under section 1681d, as modified by section 1681b, consumer reports are defined broadly enough to potentially include reports on sole proprietors. Thus, section 1681d states that consumer reports include not only reports bearing on credit or insurance for personal, family, or household purposes or for employment purposes, but also reports for "other purposes authorized under 1681b of this title." Section 1681b, which defines the purposes for which reports may be disclosed rather than the purposes for which they may be prepared, includes as a permissible purpose disclosure to one who has "a legitimate business need for the information in connection with a business transaction." There is no language limiting such business transactions to those which are undertaken by the consumer for his personal, family or household purposes.

A specific suggestion that the term "individual" be further defined to exclude sole proprietors was, in fact, made. *Senate Hearings, supra* note 51, at 13 (testimony

porations, trusts, estates, cooperatives, associations and other entities must seek redress at state law.⁹²

Generally speaking, the Act makes a credit bureau liable for negligent or willful violation of the statute's provisions with respect to the preparation and disclosure of reports,⁹³ provided, however, that actual damages can be proved.⁹⁴ A violation of the Act is also deemed to

of Virginia Knauer, Special Assistant to the President). The dialogue in the Senate included the following:

Senator BENNETT: Does this bill go only to credit reports made on individuals and not to credit reports made on businesses?

Senator PROXMIRE: That's correct.

Senator BENNETT: So if a man operates a business as a single proprietor, he is not protected by this legislation?

Senator PROXMIRE: The staff advisor, Mr. McLean, tells me if the report is on the individual proprietor, then he is covered. If the report is on the business he is not.

Senator BENNETT: It is pretty hard to separate the two in that situation.

Id. at 16-17.

It is interesting to note that the term "individual" is also used in section 1681a(b) of the Act, which defines the term "person." In section 1681a(b), the term "individual" is presumably intended to encompass the sole proprietorship since the term "person" is defined to include "any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity."

92. Act, § 1681a(c) defines the word "consumer," as used in sections 1681a(d) and 1681a(f) to exclude such entities. Section 1681a(d) and 1681a(f), defining, respectively, "consumer reports" and "consumer reporting agencies," establishes that the protected class of plaintiffs under the Act are consumers.

93. Sections 1681n and 1681o of the Act predicate liability on willfulness and negligence, respectively. Under section 1681o, negligence may occur when there is a failure to adopt reasonable procedures, pursuant to section 1681e(b), to insure the accuracy of reports; or, for example, where there is failure, pursuant to section 1681e(a), to adopt reasonable procedures to insure that reports will only be disclosed to section 1681b users and not to unauthorized users. However, the burden of showing by a preponderance of the evidence that reasonable procedures were not maintained pursuant to section 1681e(b) or section 1681e(a) apparently is imposed upon the plaintiff. Neither section 1681e(b) nor section 1681e(a) expressly provides that the burden is on the defendant to show that reasonable procedures were maintained, although such language appears elsewhere in the Act, *e.g.*, section 1681d(c), imposing such burden on a defendant alleged to be violating provisions of the Act affecting disclosure of investigative consumer reports. This result may be unfortunate, for a defendant credit bureau would generally appear to have better access to and control over the type of evidence which would indicate whether reasonable procedures were in fact maintained. As one commentator suggested in discussing problems related to the common law action for negligent misstatement: "[b]ecause proving negligence is extremely difficult for the subject of a credit investigation, a false or misleading report should create a presumption of negligence which could be rebutted by a showing that a credit bureau used some care. . . ." Note, *supra* note 55, at 578.

It is important to realize that, with respect to safeguarding consumer reports from unauthorized users, what are reasonable procedures for one credit bureau may not constitute reasonable procedures for another. For example, the credit bureau that uses a computer should have to adopt special safeguards. *See, e.g., House Hearings, supra* note 48, at 67-68 (statement of Dr. Alan F. Westin).

94. Act, §§ 1681n, 1681o. Plaintiff's recovery in a successful action is not limited to actual damages, but includes costs and attorney's fees, as well as punitive damages if willfulness is proved.

It could be argued that these provisions do not go far enough. Specifically, the provision in section 1681o requiring a plaintiff suing for negligence to show actual damages even where the defendant's report would have been actionable *per se* at common law, preserves a questionable common law exception. This exception provided that where the defendant asserted a conditional privilege, the plaintiff was required to show actual damages even if the statements were actionable *per se*.

be an unfair or deceptive act or practice subject to appropriate action by the Federal Trade Commission or, where applicable, by other federal agencies.⁹⁵ The general thrust of the Act is to afford protection to the consumer both by making the credit bureau's liability more expansive than at common law, as well as by imposing certain affirmative obligations on the bureau itself. The imposition of these obligations will, it is hoped, insure the accuracy of credit bureau reporting, thus eliminating the need to bring a suit which, using traditional terminology, would have sounded in defamation. Compliance with the Act's provisions restricting general disclosure of bureau reports to persons without interest will, it is hoped, eliminate the publicity requirement for a suit sounding in invasion of the right to privacy.⁹⁶

See text accompanying note 66 *supra*. On the other hand, it might be argued that since liability is imposed for negligent violation of the Act, the provision requiring a showing of actual damages is consistent with prior law requiring such a showing under the doctrine of negligence per se. Thus, under common law, although a defendant's violation of a statute was sometimes held to constitute negligence per se, the plaintiff was required to show both injury, or actual damage, and causation. *H.R.H. Const. Corp. v. Conroy*, 411 F.2d 722 (D.C. Cir. 1969); *accord*, *Richardson v. Gregory*, 281 F.2d 626 (D.C. Cir. 1960).

The draftsmanship of section 1681n, if not section 1681o, leaves open the possibility that a plaintiff may be successful without a showing of actual damages. Thus; section 1681n provides for liability "in an amount equal to the sum of (1) any actual damages . . . ; (2) such amount of punitive damages as the court may allow; and (3) costs . . . [and] attorney's fees. . ." (emphasis added). On the other hand, the language of section 1681o, allowing recovery "equal to the sum of (1) any actual damage . . . ; (2) costs . . . [and] attorney's fees. . ." would surely not authorize an action where only costs and attorney's fees were provable. The language of section 1681n should probably be interpreted in light of this fact.

95. Act, § 1681s.

96. In one respect the Act significantly improves the common law action for invasion of the right to privacy: in effect, it replaces the requirement of publicity with the requirement of mere publication, as understood in the law of defamation. *See* note 82 *supra*. Thus, liability may be imposed upon a credit bureau where there is disclosure to a single unauthorized user. Act, §§ 1681b, 1681o. On the other hand, the Act in another respect fails to strengthen the plaintiff's rights at common law; no liability is imposed upon a credit bureau by the Act for investigating and reporting on highly private matters which, though true, may cause offense to a person of ordinary sensibilities if disclosed even only to section 1681b authorized users. *See* note 82 *supra*. In addition, it appears that no liability may be imposed upon credit bureaus by the Act where the credit bureau uses questionable means to obtain information. Section 1681e(b), requiring a bureau to adopt "reasonable procedures to assure maximum possible accuracy of . . . information," seems primarily concerned with the accuracy of information rather than with the means employed to assure and increase that accuracy. Yet agencies that have adopted questionable means of obtaining what may have been accurate information have been held to violate a right to privacy at state law. *See, e.g., Pinkerton Detective Agency v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963) (detective agency continuously kept plaintiff under surveillance).

Section 54 of the House Bill, subsequently deleted from the Act, might well have provided some safeguards against both the reporting of highly private or personal information, as well as questionable procedures in gathering any information. That section would have prohibited the reporting of information "not reasonably relevant to the purpose for which it is sought or which constitutes an undue infringement of the individual's right to privacy." H.R. REP. No. 16340, § 54, 91st Cong., 2d Sess. (1970). Admittedly, the language of the section appears to be rather vague, yet it was criticized during the House hearings not because its vague language may have imposed too great a burden on credit bureaus, but rather, because the section may not have gone far enough in clearly vindicating a consumer's

Where, however, the plaintiff feels he has been defamed by a credit bureau, but cannot show that the Act has been violated, his remedy to sue at state law may be circumscribed by section 1681h(e) of the Act.⁹⁷

The affirmative obligations imposed upon credit bureaus by the Act are numerous and complex.⁹⁸ A credit bureau's reports are divided into two categories, consumer reports and investigative consumer reports.⁹⁹ The latter category is in fact a subcategory of the former.¹⁰⁰ Special provisions of the Act affect investigative consumer reports only. Thus, under section 1681d, a person¹⁰¹ who "procures or causes to be

right to privacy. Thus, section 54 was criticized, in part, because the term "reasonably relevant" "enables the continued reporting of highly dubious information from questionable sources." *House Hearings, supra* note 48, at 189 (statement of Professor Arthur Miller). The view that the reporting of irrelevant information may tend to invade an individual's right to privacy was also recognized by the Senate. S. REP. NO. 91-517, 91st Cong., 1st Sess. 4-5 (1969). At least in theory, the Act still preserves the goal of relevancy in reporting: "It is the purpose of this subchapter [the Act] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce . . . with regard to the relevancy . . . of such information. . . ." Act, § 1681(b). *But see* Act, § 1681h(e), discussed briefly in text at p. 69 *infra*, providing *inter alia*, that unless negligent or willful violation of the Act may be proved, no consumer may bring any action for invasion of privacy when, upon request, he receives disclosure from the credit bureau of any kind of accurate information on the consumer that the bureau has reported.

97. Section 1681h(e), in addition to its provisions with respect to invasion of the right to privacy, also provides that, unless negligent or willful violation of the Act be proved, no consumer may bring any action against the credit bureau when, upon request, he receives disclosure from the credit bureau of any kind of inaccurate information on the consumer that the credit bureau has reported. However, the consumer is not barred from an action at state or federal law where inaccurate ("false") information has been furnished by a third party to the credit bureau, if the information was furnished with malice or willful intent to injure the consumer. *See* p. 69 *infra*.

98. It is beyond the scope of this article to restate and explain in detail the full provisions of the Act with regard to the obligations imposed upon credit bureaus.

99. Act, §§ 1681a(d) and (e), respectively.

100. Investigative consumer reports are consumer reports dealing with soft data including a consumer's "character, general reputation, personal characteristics, or mode of living." Such information is gleaned from interviews with the consumer's neighbors, friends, associates and other contacts. Consumer reports may deal with either soft data, or with hard financial data, where either type of data is acquired through interviews, public records or other sources. Act, §§ 1681a(f), (d), respectively.

101. In contrast with section 1681e, imposing obligations and liability upon credit bureaus with respect to the preparation and disclosure of consumer reports, section 1681d imposes obligations and liability upon any "person who procures or causes to be prepared an investigative consumer report. . . ." (emphasis added). There is no question that the term "person," as defined in section 1681a(b), does not refer exclusively to a prospective credit grantor. The term is broadly defined, and could well include a credit bureau. *See* note 91 *supra*. For example, section 1681b, which regulates the disclosure of a consumer report by a credit bureau to "a person . . ." is presumably intended to encompass disclosure from one credit bureau to another. The term "credit bureau" itself — or, more properly, "consumer reporting agency" — is defined in section 1681a(f) in terms of "any person. . . ." *See* note 3 *supra*. Thus, the questions arise, whether both the prospective credit grantor as well as the consumer reporting agency furnishing the report must give notice and disclosure to the consumer pursuant to section 1681d to avoid the possibility of liability; whether the consumer reporting agency need not give notice

prepared" an investigative consumer report must, except in certain instances,¹⁰² inform the consumer within three days of the date on which the report was requested that such a request has been made and

and disclosure in any case; or whether disclosure by either the person requesting the report or the consumer reporting agency absolves the other from liability.

It has yet to be fully established whether a consumer reporting agency is the type of "person" upon which obligations and liability are imposed by section 1681d. That section does not, after all, impose liability on any person, but only on certain persons, i.e., those who "procure or cause to be prepared an investigative consumer report." (emphasis added). Although the definition of consumer reporting agency, Act, § 1681a(f), does mention the word "prepare" rather than "cause to prepare," it is not wholly clear that a distinction is intended between the two expressions in sections 1681a(f) and 1681d, or, if such distinction is intended in section 1681a(f), that the definition of consumer reporting agency does in fact exclude the concept of "causing to prepare." A consumer reporting agency is simply defined in section 1681a(f) as "any person which . . . regularly engages . . . in the practice of assembling or evaluating . . . information . . . for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." (Emphasis added.) Assuming that a credit reporting agency is a "person" for the purposes of section 1681d, it would appear that if disclosure is made to a consumer pursuant to section 1681d(a) by either the person requesting the investigative consumer report or by the consumer reporting agency, the other party need not duplicate the process. According to the language of section 1681d(a): "A person may not procure or cause to be prepared an investigative consumer report on any consumer unless (1) it is clearly and accurately disclosed to the consumer . . ." (Emphasis added.) Once one party makes disclosure, the consumer has received all the information he needs. On the other hand, even though one party makes disclosure, the other party apparently may still be held liable according to the literal language of section 1681d(c), which states that "[n]o person may be held liable for any violation . . . if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures. . ." Even though the consumer, who received disclosure from one party, would presumably not be able to show actual damages, if section 1681d(c) is literally construed to require compliance by both the person requesting the report and by the consumer reporting agency, there would still be liability for committing an unfair or deceptive act or practice.

102. Section 1681d of the Act does not apply to reports "to be used for employment purposes for which the consumer has not specifically applied." Act, § 1681d(a)(2). However, if public record information is used in a report furnished for employment purposes, the provisions of section 1681k, which require certain other disclosures be made to the consumer, may be applicable.

The term "employment purposes," as used in section 1681d, is defined as including "employment, promotion, reassignment or retention as an employee." Act, § 1681a(h) (emphasis added). Presumably, disclosure must be made under section 1681k where a present employee is investigated even though he does not "specifically apply" for retention. Where an employer requests an investigative consumer report on an employee who desires a promotion, but who, perhaps due to lack of formal application procedures within the company, has not "specifically applied" for the promotion, the question arises whether disclosure is required. Even if such formal procedures exist, however, apparently the employer who succeeds in anticipating the employee's move can request an investigative consumer report without making disclosure. Of course, disclosure must ultimately be made to the consumer if adverse action is taken against him and section 1681m(a) is applicable. That section applies, *inter alia*, "[w]henever . . . employment involving a consumer is denied. . ." Query whether the word "employment" in section 1681m(a) is intended to mirror the definition of "employment purposes" under section 1681a(h). For example, if an employer requests an investigative consumer report to be made on an employee "to be used for employment purposes [*e.g.*, promotion or reassignment] for which the consumer has not specifically applied," (Act, § 1681d(a)(2)), and if, based on the report, the employer denies the employee a promotion or transfer he might otherwise have received if the report had been favorable, has there been "employment . . . denied" requiring disclosure to the consumer of the existence of the report, pursuant to section 1681m(a)? Whether or not the term "employment" in section 1681m(a) is intended to incorporate the definition of "employment purposes"

that the consumer has a right¹⁰³ to request disclosure of the "nature and scope"¹⁰⁴ of the investigation. In contrast, when a consumer report is prepared, the credit bureau is required to disclose the "nature and substance" of all nonmedical information on file if the consumer so requests.¹⁰⁵

in section 1681a(h) will also determine whether the disclosure requirements of the former section will be applicable when a promotion or reassignment is denied based wholly or partly on a consumer report.

103. Although the Act grants many new rights to the consumer and imposes many duties on the consumer reporting agency, some duties need only be fulfilled if the consumer first asserts his right. Yet the Act is inconsistent in its provisions requiring the consumer reporting agency to inform the consumer of his rights. The contrast between the provisions affecting disclosure of consumer investigative reports, on the one hand, and consumer reports, on the other, are a case in point. Under section 1681d, the consumer reporting agency must disclose to the consumer the latter's right to request, in turn, that the nature and scope of a consumer investigative report be disclosed to him. In contrast, when a consumer report is prepared, there is no parallel obligation imposed upon the agency to inform the consumer of the latter's right to be informed of the nature and substance of the consumer report. Compare Act, § 1681d(a) (1), with Act, § 1681g. Although it might be argued that the cost of imposing such a parallel obligation would be high, particularly if it be assumed that many of those previously uninformed of their rights would take advantage of their knowledge and flood the bureaus with their complaints, this cost could be passed along to the user of the report or charged directly to the consumer, as already provided under certain circumstances in section 1681j. Perhaps one unfortunate result of the Act's failure to uniformly require that consumers be advised of their new rights will be that those who can least afford the damage caused by inaccurate reporting, such as lower income, less educated groups, will never fully realize the potential of the new protections of the Act.

104. The term is not further defined in the Act, although it obviously differs from the term "nature and substances," appearing in section 1681g(1). See note 100 *supra* and note 105 *infra*. Disclosure of the nature and scope of information does not include disclosure of the sources of investigative information; disclosures of such sources need only be made if an action is brought against the credit bureau. Compare Act, § 1681d(b) with Act, § 1681g(2).

105. Disclosure to consumers of consumer reports is regulated by section 1681g. Being informed of the nature and substance of a consumer report means that the consumer may examine all the information in his file, except sources of investigative information, but he may not physically handle his file. 2 U.S. CODE CONG. & AD. NEWS 4415 (1970).

The disclosure to the consumer of the nature and substance of a consumer report need only be made if a consumer is aware of his right to request disclosure and if he then exercises that right. See note 103 *supra*. Unless a consumer actually receives some kind of notification that a report is being prepared, however, he may not become aware of the actual existence of a report, even if he be fully aware of his rights. The Act provides that notification of the fact that a report is being prepared be given to the consumer only when certain types of consumer reports — investigative consumer reports, and, under certain circumstances, reports containing public record information — are prepared or furnished to section 1681b authorized users. See Act, § 1681k. Even when a transaction does not involve an amount in excess of \$25,000 and the Truth-in-Lending Act is applicable, a person extending credit to a consumer need not always itemize the finance charge to reveal the existence and cost of a credit report. Although the charge must be itemized pursuant to open-end consumer credit plans, where sales or consumer loans are not made under open-end credit plans, no separate disclosure of the cost of a credit report is required. 15 U.S.C. §§ 1603, 1605, 1631, 1637, 1638, 1639 (Supp. V, 1968). Nor may a consumer normally expect that the person requesting the report will voluntarily disclose that fact to the consumer. Credit bureaus very often require a user of the report not to disclose the bureau's identity or even that a report is being prepared. J. SHARP, *supra* note 3, at 104. See Miller, *supra* note 3, at 1144-45; Note, *supra* note 55, at 511-12.

Moreover, unless or until a consumer receives notification that a report is in existence, and that it has been prepared by a particular credit bureau, the consumer who suspects the existence of a report may not know which one of any

When the accuracy of any material disclosed to the consumer is disputed by him, the credit bureau must, as a general rule, reinvestigate the information.¹⁰⁶ The Act also provides that in certain circumstances¹⁰⁷ the name and address of the credit bureau is to be supplied to the consumer by a person taking adverse action against him based

number of credit bureaus has actually prepared or has been preparing the report. Even the disclosure of the cost of a credit report required pursuant to open-end consumer credit plans proves of no avail in this respect. 15 U.S.C. § 1637(a)(3) (Supp. V, 1968).

106. If a credit bureau has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant, the rights of the consumer, if any, are not made wholly clear by section 1681i of the Act. Under section 1681i(a), a credit bureau must reinvestigate information to redetermine its completeness or accuracy "unless it has reasonable grounds to believe . . . the dispute . . . frivolous or irrelevant." (Emphasis added.) Under section 1681i(b), it would appear that the consumer's right to file a short supplementary statement explaining his version of the dispute is accorded only if the dispute were not frivolous or irrelevant and reinvestigation was made. Yet the language of section 1681i(c) seems to indicate that reinvestigation is not a requisite for the filing of the brief supplementary statement: "Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof." That is, the phrase "unless there is reasonable grounds to believe that it [the dispute] is frivolous or irrelevant" would constitute mere surplusage in section 1681i(c) if reinvestigation were a condition precedent to the consumer's right to file a statement. Moreover, if reinvestigation were a condition precedent, every statement filed would ipso facto be of a relevant and nonfrivolous nature.

If the language of section 1681i(a), (b) and (c) is interpreted to mean that a consumer may file a statement even though the credit bureau may have reasonable grounds to believe the dispute frivolous or irrelevant, it is not clear what kind of victory the consumer has actually won. Although the language of section 1681i(c) may indicate that the statement may be filed, the credit bureau apparently will be under no obligation to note the dispute and include the statement or a summary thereof in subsequent consumer reports.

The meaning of the phrase "reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant" is itself not clear. Is one to assume, for example, that a credit bureau has reasonable grounds to believe that a dispute is irrelevant if the consumer claims that the *information* reported is irrelevant? Since the deletion of section 54 of the bill, a credit bureau may report on information even if it has reasonable grounds to believe the information is not relevant or reasonably relevant to the purpose for which the information was requested. See note 96 *supra*. If the credit bureau does in fact have such a right, a claim that the information on file is irrelevant for the purpose of the report is indeed an irrelevant claim.

107. No disclosure is required to be made to a consumer by any governmental agency when such agency takes adverse action against a consumer who applies for a license or other governmental benefit, excluding, however, credit, insurance or employment benefits as outlined in section 1681m(a). Where a governmental agency takes adverse action with respect to a license or other governmental benefit, excluding credit used for personal, family, or household purposes, and the action is based on information other than from a credit bureau, no disclosure must be made to the consumer. Act, § 1681m(b). Thus, the standards affecting disclosure by the governmental agency depend, in part, on the source of the information. See also note 108 *infra*.

Investigative governmental agencies, which are not section 1681b authorized users, will normally not be required to make any disclosures to consumers since they do not take adverse action against the consumer pursuant to section 1681m. Section 1681f, which modifies section 1681b, permits such governmental agencies to receive information concerning a consumer's present and past address and place of employment. A full consumer report will, of course, be disclosed if a court order is obtained. Act, § 1681b(1).

upon a consumer report.¹⁰⁸ Upon request, the credit bureau must disclose to the consumer the recipients of past reports during a preceding two year or six month period, depending on whether or not, respectively, the report was used for employment purposes.¹⁰⁹

Perhaps the most troublesome portion of the Act is section 1681b which authorizes disclosure of consumer reports only to certain potential recipients, including persons whom the credit bureau has "reason to believe . . . has a legitimate business need . . . in connection with a business transaction involving the consumer."¹¹⁰ This language, because of its vagueness,¹¹¹ may prove to be the weak link in the Act vitiating other provisions designed to protect the consumer from invasion of privacy and defamation. The vagueness could have an even harsher effect on the credit bureau itself. Criminal penalties may be imposed upon a credit bureau officer or employee who, in the opinion of the court interpreting section 1681b after the fact, determines that the recipient of the information was in fact beyond the line separating those who had and those who did not have "legitimate business need," as the term is used in 1681b.¹¹² Finally, the vagueness of section 1681b,

108. Act, § 1681m(a). Where, however, a consumer takes adverse action against another consumer based on information received other than from a credit bureau, the name and address of the source of the information need not be disclosed. As already indicated, when the source of the information is not a credit bureau, only the nature of the information need be disclosed pursuant to section 1681m(b). See notes 89 & 103 *supra*. Section 1681m(b), when compared with section 1681m(a), is measurably weaker, prompting Professor Arthur Miller to remark: "The purveyor of gossip does not deserve any more protection than the consumer reporting agency." *House Hearings, supra* note 48, at 189.

It is unfortunate that the difficulties involved in a consumer's attempt at effective exercise of his rights under the Act may well be resolved only after adverse action is taken against him pursuant to section 1681m. See note 105 *supra*. Unless a consumer has received prior notification of the existence of a report and of the identity of the credit bureau pursuant to section 1681m(a), each consumer must suffer one bite. The severity will be completely fortuitous and dependent upon which section 1681b authorized user first takes adverse action.

109. Act, § 1681g(3). *But see* Act, § 1681k(1).

110. Act, § 1681b(3).

111. The meaning of both "reason to believe" and "legitimate business need" are open to question. The phrase "reason to believe" in section 1681b contrasts with the language of section 1681e, prohibiting a credit bureau from furnishing a report "if it has *reasonable grounds* for believing that the consumer report will not be used for a purpose listed in section 1681b of this title." Act, § 1681e (emphasis added). The question is then presented what steps a credit bureau must take in order to have "reason to believe," or "reasonable grounds for believing," that a potential recipient is not acting under false pretenses in order to receive the information.

112. Section 1681r prohibits any credit bureau officer or employee from knowingly and willfully providing information to a person not authorized to receive it, on pain of imprisonment not exceeding one year, or fine of not more than \$5,000, or both.

Assuming that the Federal Trade Commission does have power to define the term "legitimate business need," it does not necessarily follow that the court will look to such a definition in determining whether a credit bureau has disclosed information to a person without legitimate business need and is criminally liable under section 1681r. The problem in looking to any definition which might be forthcoming from the Federal Trade Commission is that Congress did not apparently intend

may adversely affect the potential user of credit bureau reports. It is possible that the user may subject himself to criminal liability under section 1681q. That section, however, imposes criminal liability only under limited circumstances, and while it may not represent a real danger to the user, the very fact that the section's application may be rather strictly circumscribed does represent a danger to the consumer for whose benefit it was presumably intended.¹¹³ A more likely danger

that any violation of the regulations should result in criminal liability. In this respect, section 1681s provides that:

a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 45(a) of this title. . . . Any person violating any of the provisions of this subchapter shall be subject to the penalties . . . provided in the Federal Trade Commission Act. . . .

Civil penalties may be imposed by the Federal Trade Commission when a cease and desist order, issued pursuant to an unfair or deceptive act or practice as defined in 15 U.S.C.A. § 45(a), has been violated. Federal Trade Commission Act, 15 U.S.C.A. § 45(1) (1963). Thus, it is questionable whether the criminal sanctions of section 1681r will apply to a credit bureau which releases information to a person not having "legitimate business need" as that term might be defined by the Federal Trade Commission. In any event, the criminal sanction of section 1681r will presumably be sparingly imposed, since, as previously mentioned, the disclosure to unauthorized recipients must be made knowingly and willfully.

113. Section 1681q prohibits the willful and knowing obtaining of information from a credit bureau under false pretenses, on pain of imprisonment not exceeding one year, or fine of not more than \$5,000, or both. The requirement of knowledge and willfulness probably restricts application of this section to a small percentage of users who obtain information for unauthorized purposes. Where a potential user honestly certifies the purpose for which he desires the information, he incurs no liability even if that purpose is unauthorized since the elements of willfulness and false pretenses are lacking. Where the potential user is required to certify that his purpose is an authorized purpose and the user does so certify, although such certification may be false, the element of willfulness may be wanting. The Act does not expressly provide that an attempt at committing the substantive crime is also punishable. The requirement that false pretenses are maintained appears inconsistent with the view that the section expressly prohibits the obtaining of information by such subtle means as eavesdropping on electromagnetic energy emanating from a credit bureau's computer. *See generally* Miller, *supra* note 3, at 1109-14. Presumably, more direct methods such as larceny will be governed by statutes already in force.

So long as information is initially obtained for an authorized purpose, or at least without false pretenses, there is apparently no criminal liability imposed by the section if the user decides after receiving the information that he will not use it for his originally intended purpose, but for another purpose which may or may not be authorized. It would appear that the culpable intent to use the information for a purpose other than that stated and certified is to be determined at the time the information is obtained. Otherwise, a person who has multiple dealings with the consumer, and who initially intends to use the information for the certified purpose, might not be able to carry on further transactions with the consumer. Whatever the nature of such transactions, if they were not anticipated at the time the information was first obtained, they will be inconsistent with the certified purpose of the information. If such transactions happen to be purposes which would have authorized disclosure pursuant to section 1681 had they been revealed at the time the request for information was made, the element of willfulness may perhaps be lacking. But even if the subsequent transactions would not have constituted authorized purposes, the recipient can hardly be expected to clear from his mind the knowledge he has acquired from the information, and not rely on such knowledge in his subsequent transaction with the consumer.

Section 1681q does not prohibit the willful and knowing acquisition of information under false pretenses from a user. For example, a person could falsely

to the user will be that he will simply be denied access to consumer reports where there is even the faintest suspicion that his need to receive the information may not be a "legitimate business need," as the credit bureau thinks the courts will interpret that term.

The concept that a potential user must have a legitimate reason for acquiring a credit bureau report is merely a reaffirmation of the common law concepts of duty and interest.¹¹⁴ Prior to the adoption of the Fair Credit Reporting Act, this concept was embodied in guidelines adopted by the Associated Credit Bureaus of America.¹¹⁵ The association required that persons requesting credit bureau reports first certify their purpose as "credit granting or other bona fide business transaction. . . ."¹¹⁶ However, the guidelines proved poorly enforced, if not loosely interpreted.¹¹⁷ In the Senate version of the Act, credit bureaus were permitted to disclose reports:

to persons with a legitimate business need for the information and who intend to use the information in connection with a prospective consumer credit or other transaction with the individual on whom the information is furnished; and . . . for the purposes disclosed in the collection of the information.¹¹⁸

The Senate bill was subsequently criticized for allowing market researchers, detective agencies, lawyers and various investigative groups access to credit bureau files.¹¹⁹

state to the user that he is a representative of the credit bureau, and acquire the information from a user who may or may not be a trifling naive.

Finally, section 1681q imposes no criminal penalty if a recipient knowingly and willfully rediscloses information to another who may or may not have qualified as an authorized user. Only creditors who "regularly" redisclose information are regulated as consumer reporting agencies. *See* S. REP. No. 91-517, 91st Cong., 1st Sess. 5 (1969); Act, § 1681a(f). It would seem only fair that the user should incur the same penalty imposed upon a credit bureau if the former knowingly and willfully rediscloses information to an unauthorized user. *See* Act, § 1681r. By redisclosing the information he has obtained from the credit bureau, the user may be violating his contract with the bureau. *See* note 105 *supra*. The protection of the consumer, however, should not depend on the threat of a civil suit instituted by another party, the credit bureau.

114. *See, e.g.,* Stationers Corp. v. Dun & Bradstreet, Inc., 40 Cal. Rptr. 146, *rev'd on other grounds*, 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965) (interested persons held to include customers, prospective customers, vendees, contractors and creditors of the investigatee).

115. The Associated Credit Bureaus of America is a nationwide organization consisting of over two thousand independent credit bureaus which serve 365,000 credit grantors. Miller, *supra* note 48, at 648, 649.

116. Miller, *supra* note 3, at 1143.

117. *Id.* at 1143-44. The author described the creation of an entirely fictional company to which credit bureaus disclosed reports. The ruse, conceived by a television company, was later the subject of an exposé by the television company. The broadcast itself gave rise to a law suit instituted by a credit bureau against the company. *See House Hearings, supra* note 48, at 123-24.

118. S. REP. No. 823 § 164(f), 91st Cong., 1st Sess. (1969).

119. Miller, *supra* note 48, at 669.

The House bill permitted disclosure to those with "legitimate economic need."¹²⁰ The meaning of that term was specifically limited to insure that disclosure would not be made for market research and market purposes, or to private detectives or attorneys, except in a legal matter where the attorney's client was the subject of the report, and where the client had given his written consent.¹²¹ However, any clarity which such definition might have provided was obscured by adoption of the Senate's "legitimate business need" language in the final Act, and by the dropping of the House's language clarifying "legitimate economic need."

The effect of the Act on state laws is governed by sections 1681h(e) and 1681t. Section 1681t provides that state laws are not superseded by the Act "except to the extent that those laws are inconsistent with any provision of this subchapter [the Act], and then only to the extent of the inconsistency." From this language it is clear that the overall congressional intent is that state law be complemented, not supplanted. Except where Congress has clearly indicated that part of the Act is to provide an exclusive remedy for suits sounding in defamation and invasion of the right to privacy, state common law and state statutory law remain in effect.¹²² Exclusive language, however, does appear in section 1681h(e):

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 1681g, 1681h, or 1681m of this title*, except as to false information furnished with malice or willfull intent to injure such consumer.¹²³

Sections 1681g and h govern the disclosure of consumer reports to consumers. Section 1681m, on the other hand, governs disclosure to consumers by users of consumer reports where adverse action is taken against the consumer based on the report. Furthermore, it is clear that section 1681h(e) does not provide for an exclusive federal remedy when information is disclosed pursuant to section 1681b, the section governing disclosure of consumer reports by credit bureaus to users. Hence, state law remains effective as a complementary remedy in this critical area.

120. H.R. REP. NO. 16340 § 34, 91st Cong., 2d Sess. (1970).

121. *Id.*

122. *See, e.g., House Hearings, supra* note 48, at 102.

123. Act, § 1681h(e) (emphasis added).

A remaining problem area is present in situations where states have adopted legislation as strict as or stricter than the Act. For example, while section 1681g, the exclusive federal remedy with respect to disclosure of consumer reports to consumers, provides that such reports are to be furnished to the consumer only upon the latter's request, an Oklahoma statute requires a credit bureau, before furnishing a credit rating to any user, to first request a statement from the consumer regarding the latter's assets and liabilities.¹²⁴ Moreover, before submitting a written opinion to a user, a bureau must first mail a copy to the consumer irrespective of whether the consumer had specifically requested such a copy.¹²⁵ Unlike the Truth in Lending Act,¹²⁶ there is no provision in the Fair Credit Reporting Act allowing an administrative agency by regulation to exempt any class of credit transactions from any requirement of the law in situations where state law subjects the transactions to substantially similar regulation and adequate enforcement.¹²⁷ The suggestion was made to Congress that "[p]rovision should be made to allow more strict state consumer protection [than that of the Fair Credit Reporting Act] to remain in force in all cases."¹²⁸

The effect of the Act is to create an unusual bifurcation of the law; consumers may recover against credit bureaus where provisions of federal law are violated with negligence, but merchants whose privacy is invaded or who are defamed must seek their remedy at state law, and must generally show actual malice.¹²⁹ Yet traditionally, the law as a general rule has favored the merchant rather than the consumer when the credit standing of either was adversely affected. The reasoning is clear: "The merchant's entire livelihood may be affected more seriously than one whose credit standing may have no direct bearing to make a living."¹³⁰ It is true that where a defendant raised the defense of conditional privilege, the plaintiff still had to show actual damages even though the defendant's statement was actionable per se and injured the plaintiff in his trade.¹³¹ This result, how-

124. OKLA. STAT., tit. 24 § 81 (1951).

125. *Id.* § 82.

126. 15 U.S.C. § 1601 (Supp. V, 1970).

127. *See* 15 U.S.C. § 1633 (1968). *See also* 15 U.S.C. § 1675 (1968).

128. *House Hearings, supra* note 48, at 98 (statement by Berlin, Roisman & Kessler, counsel to the Consumer Federation of America).

129. The New York legislature has decided that merchants are entitled to the same protection as consumers. *See* N.Y. GEN. BUS. LAW §§ 370 to 376 (McKinney 1970) (actual and punitive damages afforded both merchant and consumer investigatees upon a showing of violation or willful violation of the statute).

130. Note, *Tort Aspects of Reflections on Credit*, 14 St. Louis U.L.J. 283, 286 (1969).

131. *See* note 66 *supra*.

ever, is an exception in the law of defamation and is inconsistent with the general rule that damages need not be shown where a plaintiff is injured in his trade by defamation that is actionable *per se*.¹³² The exception is only justifiable on policy grounds that underlie the concept of conditional privilege itself. As Congress has seen fit, by the Fair Credit Reporting Act, to discard the conditional privilege and the policy reasons that underlie it, at least where the investigatee is a consumer, a fortiori, it would seem that the reasons for upholding the conditional privilege at common law should be called into question.

Moreover, Congress itself has at least indirectly questioned whether the conditional privilege, as it affects the merchant at common law, affords justice and equity to the merchant. It is difficult to conceive that the same system of law which Congress found did not insure fairness, impartiality, and respect for the right to privacy with respect to consumer investigatees, does insure such ends to the merchant investigatee.¹³³

The need for reforming the law with respect to merchant investigatees is surely as great as, if not greater than, the need Congress felt to complement the common law conditional privilege doctrine as it applied to credit bureaus' investigation and reporting on consumers. Just as credit bureaus exercise "grave responsibilities" in reporting on consumers,¹³⁴ so too do they exercise grave responsibilities in reporting on merchants. Just as an "elaborate mechanism" has developed for reporting on consumers,¹³⁵ so too has such a mechanism developed for the reporting on merchants. Just as unfair and inaccurate credit reporting methods with respect to consumers "undermine the public confidence which is essential to the continued functioning of the banking system,"¹³⁶ the same methods have the same effect when applied to the merchant investigatee.

132. See pp. 53-54 *supra*.

133. Until Congress finally decided that the common law did not, in fact, insure fairness in credit bureau reporting on consumers, it was argued that the inherent nature of the credit bureau industry itself at least insured fair reporting on merchant investigatees:

[A] mercantile agency looks for permanent employment from the same people. They count upon annual renewals on the part of subscribers. And, in this connection, it should be borne in mind that mercantile agencies have no pecuniary motive for making their report unfavorable to the applicant, rather than the opposite. Their compensation would be just the same in either event.

Smith, *supra* note 30, at 208. But it was also conceded that the nature of the credit bureau was such that pressure was sometimes put on credit bureau employees to slant credit reports unfavorably. The credit bureau is, after all, "in business to find bad risks. If everybody comes out clean, we [the credit bureau] don't justify our existence." M. BRENTON, *THE PRIVACY INVADERS* 49 (1964).

134. Act, § 1681(a)(4).

135. *Id.* § 1681(a)(2).

136. *Id.* § 1681(a)(1).

IV. CONCLUSION

The passage of the Fair Credit Reporting Act, an important if imperfect statute, provides the consumer for the first time in most states with more than a theoretical opportunity to protect his reputation and privacy. Judge-made law of doubtful pedigree and necessity, which in the main all but insulated an industry from liability for its occasional abuses, has been overruled by a court which, in this instance, proved more accessible to the practical needs of the people. The conditional privilege still afforded at common law to credit bureaus investigating merchants should now be reconsidered in light of the broad principles and findings of the Act. The attempt by some courts to find means of avoiding the harsh effects of the conditional privilege doctrine, as applied to credit bureaus, should serve as a guidepost toward "the discovery of new interests which the law can protect, as well as the changes in specific rules made necessary by changing economic situations and theories of justice."¹³⁷

137. Seavey, *Can Texas Courts Protect Newly-Discovered Interests?* 31 TEX. L. REV. 309, 311 (1953).