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Protection of the Consumer Interests and the Credit Rating Industry

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The California Legislature, by enacting the Consumer Credit Reporting Act, has declared that consumers are entitled to minimum due process rights when denied credit as a result of a credit report. In reviewing the factors leading to the need for this legislation this comment discusses the major abuses that are most frequently leveled against the credit rating industry and the traditional consumer remedies that have sometimes been effective. Will this legislation provide the appropriate protection for the consumer when his rights are abused? Though cognizant of the important value of this Act, the comment points out that some major omissions may have severely reduced the protection the Act might have provided for the consumer. In conclusion, specific recommendations for amending the Act are discussed.

The credit rating industry has, in recent years, come under attack with allegations that the members of this industry in one way or another have abused the rights of consumers. In turn the industry has been the subject of consideration by legislative investigating committees resulting in the introduction of several proposals for governmental regulation.[1] Though these proposals vary from narrow to all-encompassing attempts at regulation, they all imply one central theme—the consumer has rights that may be subject to infringement by reports of credit standing and at present these rights are not adequately protected.

Background

The best starting point is to review the important facts of the credit rating industry now of public knowledge. In 1966, a proposal origi-

1. California legislation: Assembly Bills 1021, 1081, 1238, Senate Bills 501, 674, 1968 Regular Session; Assembly Bills 985, 1368, 1768, Senate Bills 762, 1142, 1969 Regular Session; A.B. 149, CAL. STATS. 1970, c. 1349; Assembly Bills 799, 2367, 1970 Regular Session. U.S. Congress: S. REP. NO. 823, 91st Cong., 1st Sess. (Jan. 31, 1969); H. 16340, 91st Cong., 2nd Sess. (March 5, 1970).

nated from the executive branch of the federal government that a computerized data bank be established on a national level. The announced objective of this centralized data bank was to consolidate all known personal information on every U.S. citizen.[2] Many Congressmen felt this proposal had overtones of Orwell's "1984" and the idea was quickly abandoned.[3] However, prior to the demise of the proposal some legislative inquiries were conducted. As a result, the enormous size of the credit rating industry was brought to the attention of Congress.[4] This awareness motivated several Congressional committees to shift their focus of study from the feasibility of a centralized computer bank to an inquiry into the credit rating industry itself.[5]

The Congressional studies uncovered some astonishing figures.[6] For example, as of September, 1967, national consumer credit totaled $95.886 billion.[7] This figure alone might have little meaning but it is phenomenal when one learns that this figure is over seventeen times as large as it was in 1945, and the growth of consumer credit since 1945 has been at a rate of four and one half times the growth rate of our national economy.[8] Statistics for the credit rating industry are no less amazing. The largest individual organization, Retail Credit Company of Atlanta, Georgia, has 1800 offices in the United States and Canada. As of January, 1969, Retail Credit was reported to have had credit files on 45 million individuals.[9] The second largest individual credit rating organization is Credit Data Corporation. This is a California based corporation whose operations are almost totally computerized.[10] Credit Data has files on 27 million persons and they are reported to be adding one half million new persons per month.[11] The largest amalgamation is Associated Credit Bureaus of America which combines over 2200

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2. Report on Credit and Personnel Reporting Practices in California, submitted to Governor Ronald Reagan of California on January 19, 1970. 115 CONG. REC. S1163 (Jan. 31, 1969).
3. 115 CONG. REC. S1163 (Jan. 31, 1969).
4. *See* note 2 *supra*, and 1968 U.S. CODE CONG. & AD. NEWS 1965, 66.
5. *Hearings before the Special Subcomm. on Invasion of Privacy of the House Comm. on Government Operations*, 90th Cong., 2d Sess. (May 16, 1968).
6. 114 CONG. REC. S10029 (Aug. 2, 1968); Report on Credit and Personnel Reporting Practices in California, submitted to Governor Ronald Reagan of California on January 19, 1970.
7. 114 CONG. REC. S10029 (Aug. 2, 1968).
8. 1968 U.S. CODE CONG. & AD. NEWS 1965-66.
9. *See* Sesser, *Big Brother Keeps Tabs on Insurance Buyers*, NEW REPUBLIC 11 (April 27, 1968).
10. A.C.B.'s (Associated Credit Bureaus of America) computer system, when implemented, will differ from Credit Data Corporation's mainly in accessibility. Credit Data has several offices nationwide that use its computerized information, but A.C.B. has over 2200 affiliated offices.
11. *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. at 227 (1969). [Hereinafter cited as *Hearings*].

credit rating agencies serving 400,000 credit grantors in 36,000 communities.[12] The stated purpose of this association is to provide an interlocking exchange of information and thereby expedite the granting of credit.[13] Hence, each of these 400,000 credit grantors can obtain the information possessed by any other credit grantor simply by asking.

Credit Report Profile

The information contained in an average credit rating report will vary according to the purpose for which the original rating was made. There are three general reasons for the initiation of a credit rating report: retail credit, personnel selection, and insurance.[14] Retail credit ratings usually contain a person's address, family status, place of employment, approximate salary, credit history, where the applicant has charge accounts and what his payment record has been. In addition, most banks will usually divulge to credit bureaus the approximate size of a customer's checking account and, in some instances, the size of a customer's savings account.[15] The file also includes information of public record such as court judgments, liens, indictments, and convictions.[16] Personnel credit ratings contain most of the information outlined above as well as the applicant's employment record and reasons for job changes.[17] Insurance credit ratings are the type that draw the most stinging criticism, for they usually contain information concerning the applicant's marital life, private morals, drinking habits, extramarital affairs, and any tendencies toward deviate sexual behavior.[18]

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12. 115 CONG. REC. S1163 (Jan. 31, 1969).

13. *See* Wall Street Journal, Feb. 5, 1968, at 1, col. 6, and 12, col. 1,

> Eventually any of A.C.B.'s 110 million files will be available to local bureaus at the touch of a button. A.C.B., working with International Business Machines Corp. and the Dallas and Houston credit bureaus, is designing a computerized system that it expects to become nationwide in time. A central switching system will connect computers at all local bureaus.

14. *See* Wall Street Journal, Feb. 5, 1968, at 1, col. 6. Since there are almost as many reasons for applying for credit as there are people, the average consumer, in his lifetime, will undoubtedly apply to several different places for credit. And, inasmuch as the credit rating agency owes his client and the consumer the duty of accurately rating the consumer's credit, he will have to obtain information from other credit rating agencies. The result is that information given by the consumer to different persons for distinct reasons is assimilated into one "super-file."

15. Interview with Mr. John Collins, Assistant Manager, Retailers Credit Association of Sacramento, California, July 8, 1970.

16. *Hearings*, at 91.

17. 57 GEO. L.J. 509, 510 (1969).

18. Wall Street Journal, Feb. 5, 1968, at 12, col. 1. In many instances these types of files are kept separate. However, as stated by W. Lee Burge, President of Retail Credit Co., on May 20, 1969,

> . . . if you are asking the question would we put information that is pertinent to a credit report from an insurance file; yes sir . . . our endeavor is to include pertinent information that would be pertinent to the particular transaction.

Hearings, at 178.

Areas of Alleged Abuses

There are four basic areas, the focus of critical challenge, that allegedly constitute significant infringements to the rights of consumers. They are *inaccurate information, irrelevant information, difficulty in correcting erroneous information,* and *invasion of privacy.*[19]

Inaccurate information is probably one of the most frequently voiced of the alleged abuses. It is argued that inaccuracies may arise in one of several different ways. The first is confusion of file information among different consumers.[20] There are literally hundreds of people in the United States with identical names or names that are so substantially similar that confusion frequently results. Thus credit reporting inaccuracies arise when the adverse data of one consumer is inadvertently reported as applying to another.

Biased information is also credited as a cause of inaccurate credit reports.[21] Authorities have pointed out that many credit files contain remarks such as "slow pay," or "litigious."[22] Proponents of industry regulation argue that credit rating agencies frequently engage in the discriminatory practice of recording that a consumer may be "slow in payment" without investigating all of the surrounding circumstances. These proponents charge that failure to make complete investigations may often result in the use of biased information.[23] Thus, in doubtful situations and often without justification the consumer is labeled "slow pay."[24]

A third cause of inaccurate information is the collection of malicious gossip and hearsay.[25] Credit rating agencies frequently rely upon hearsay[26] especially when compiling information for an insurance credit rat-

19. 114 CONG. REC. S10029 (Aug. 2, 1968); 115 CONG. REC. S1163 (Jan. 31, 1969); 57 GEO. L.J. 509 (1969).

20. *Id.*

21. *See* 115 CONG. REC. S1163 (Jan. 31, 1969), where it says

> A record of slow or nonpayment . . . does not necessarily mean he is a poor risk . . . . While merchants have a wide variety of collection weapons, about the only bargaining power consumers have is the threat to hold up payment. Unfortunately, the consumer's side of the story does not find its way as easily into the files of the credit bureau as does the merchant's version.

22. *See Hearings,* at 91.

23. 115 CONG. REC. S1163 (Jan. 31, 1969).

24. 115 CONG. REC. S1164 (Jan. 31, 1969).

25. *Id.*

26. *Hearings,* at 184. Insurance investigators do not deny that they rely heavily upon this source of information. Rather, they deny their reliance and, at least one insurance official has charged that there is nothing improper in this practice. Hearsay is a common practice in our way of life, he alleges. Our form of civilization is built around hearsay. It is a way of life and a source of information that should not be ignored. 115 CONG. REC. S1163, 1164 (Jan. 31, 1969); *Hearings,* at 194. Whether or not one chooses to follow this line of reasoning, it is an undisputed fact that much information for credit rating reports comes from interviewing neighbors and fellow employees of the consumer.

ing.[27]

Critics charge that computer errors also contribute to the collection of inaccurate information.[28] They argue there are always many "bugs" to be ironed out when a new computer system is implemented and these defects frequently increase the amount of inaccurate information contained in a consumer's credit rating file. The example that is typically cited is the California credit reporting agency that mistakenly labeled a whole file drawer of good credit risks as bad credit risks.[29] In response, the industry points out that computers actually tend to reduce errors and with sufficient time the overall number of mistakes will be reduced.[30] In evaluating the merits of this controversy it seems that the industry does have the better argument. To remain competitive credit rating agencies must modernize their operations and the fact that computer implementation errors will occur is not sufficient reason for stifling progress.

The final condition allegedly contributing to inaccurate information is that credit rating files often contain incomplete information. Critics argue this problem often arises through the use of items of public record.[31] As part of the normal information gathering process credit rating investigators generally search the public records for any information on the applicant. Many state statutes require the recording of certain information, *e.g.*, liens, indictments, convictions, bankruptcies, arrests, suits, and the like, but very few states require the recording of the disposition of these actions.[32] The result is that an applicant may often be subjected to eternally poor credit although the matter may have been resolved in his favor. In line with this problem many of the credit rating organizations have urged legislators to introduce legislation requiring that dispositions of certain suits be recorded in the public record.[33]

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27. Insurance credit ratings are those credit ratings made on consumers who have made application for the purchase of liability or life insurance. Insurance companies consider monthly insurance payments to be a credit purchase of insurance, and, therefore request credit ratings on the applicant before they will insure him.

28. 115 CONG. REC. S1163, 1164 (Jan. 31, 1969).

29. *Id.*

30. *Hearings*, at 229.

31. *See* 115 CONG. REC. S1163, 1164 (Jan. 31, 1969).

32. Although every state evidently requires the recording of this information, no state appears to require the recording of the dispositions of such actions. Governor Reagan's Task Force on January 19, 1970, pointed out this problem and called for state legislative action. Report on Credit and Personnel Reporting Practices in California, Jan. 19, 1970, at 9.

33. *Id.* The recommendation of Governor Reagan's Task Force to have California implement requirements for the recording of dispositions as well as initiation of legal actions is particularly forceful when one examines the lopsided composition of the Task Force. The Task Force had eighteeen chairs. One was filled by a representative of the general business community, six were credit grantors, four were representa-

The second major area of alleged abuse by the credit rating industry to the rights of consumers is said to be the inclusion of *irrelevant information* in the consumer's credit file.[34] It is argued that this situation often arises in at least two different ways. The first point of contention has already been briefly touched upon; outdated information which is often derived from matters that become public record is claimed to be irrelevant.[35] A second way in which irrelevant information may be included in the consumer's credit file is through the use of too many extrinsic facts.[36] The proponents for regulation of the credit rating industry argue that only the facts pertinent for credit grantors are those that are relevant to their business purposes. Under the present system, however, an employer requesting a personnel rating may not only confirm the applicant's prior residences and former places of employment but may also learn most, if not all of the personal details obtained from an insurance investigation.[37] Consequently, the proponents for regu-

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tives of various credit rating agencies, and seven may be described as representatives of consumer interests.

34. 115 CONG. REC. S1163, 1165 (Jan. 31, 1969).

35. *See* text following note 29 *supra.*

36. 115 CONG. REC. S1165 (Jan. 31, 1969). Perhaps an example would best illustrate this problem. Suppose a young man, age 21, has just married and he and his bride want to buy a few furnishings for their new home. In all likelihood this couple will have, at best, only a limited cash reserve. Therefore, to purchase their desired furnishings, they will need to establish a credit rating. The credit grantor will contact a local credit rating agency and the agency, using the information obtained from the young man, will make the credit investigation. Since this would be a rating for retail credit, the information obtained would most likely be composed of former residences, length of stay, employment history, reasons for leaving, cash on hand, and credit history, if any. Again let us suppose the investigation proves to be favorable and the young man is granted credit.

Continuing our hypothetical situation, six months later an insurance salesman calls on the young couple and convinces them of the merits of life insurance. The young couple signs the insurance application and the salesman turns the information obtained from it over to his credit rating agency. Since this would be a credit rating for insurance, there would be added to the young man's general credit rating file such information as marital troubles, drinking habits, and any tendencies toward deviant sexual behavior. Again continuing the example, the young bride is now pregnant and our hypothetical young man decides it is time he did something about improving his employment opportunities. He would visit an employer and fill out an employment application. This employer, who is desirous of obtaining the best employee possible, would then forward the information obtained from the employment application to his favorite credit rating agency. The details that the employer would, in all likelihood, receive back from the credit rating agency would include the irrelevant details obtained from the insurance investigation as well as details from investigations made for retail credit. It is this type of irrelevancy that the proponents for regulation object to. *See also* 57 GEO. L.J. 509, 510 (1969); *Hearings,* at 74, 194; and the statement of Ira A. Brown, Jr., General Counsel and Secretary of Credit Data Corporation, to the Governor's Task Force to Investigate Credit, Personnel and Insurance Reporting, at 8, 9;

> I do not think (a very) compelling argument can be made that when an individual applies for credit he tacitly consents to the supplying of his record with respect to that transaction to a prospective employer, various insurance companies, or anyone, other than a credit grantor.
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> Credit Data Corporation has, therefore, taken the position that credit information contained in its files will be available only to bona fide credit grantors. *The basic principle is that information gathered for one purpose should not be made available for other purposes.* [Emphasis added].

37. This result does not always follow. For example, Credit Data Corporation

lation charge that this type of procedure violates the consumer's right of privacy. They urge the enactment of legislation that would force credit rating agencies to maintain separate files on consumers. These separate files would contain only the types of details pertinent to each of the three types of credit ratings.[38]

The third major area of infringement upon the rights of consumers is said to result from the difficulty the consumer has in correcting the inaccurate or irrelevant information contained in his credit file.[39] The main thrust of the problem is that many consumers do not know when and if their credit rating files contain inaccurate or erroneous information. Most credit rating agencies assert that if a consumer informs their office of a possible error in the consumer's file they will investigate the allegation and if necessary correct the mistake.[40] Proponents for regulation counter that the answer given by the industry is inadequate and nonresponsive. How is a consumer to take advantage of the opportunities supposedly available to him if he does not know (1) what a credit rating agency is, or (2) that his file may contain inaccurate data? These proponents charge that the industry's failure to adequately inform the public of the existence and operation of the credit rating industry has amounted to an overt attempt to keep the industry and its mistakes a secret from consumers.[41] In support of their allegation, proponents cite many examples, the most damaging of which is the credit rating agency—credit grantor contract.[42] As now written these contracts typically bind the credit grantor to a conspiracy of silence. The credit grantor is prohibited from disclosing to the applicant either the reason for refusal of credit or the identity of the agency which made the credit rating. Consequently, the applicant is effectively blocked in any attempt he might wish to make to correct inaccuracies in his credit rating file. In defense, the industry alleges that the use of the secretive covenants in these contracts is on the decline. The larger agencies such as Retail Credit Company have discontinued the use of such covenants.[43] Agencies that continue to use the secret covenants device argue that the sources of information that must be relied on are not always the most

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makes a commendable effort to keep information obtained from insurance investigations separate from credit and personnel rating files. However, for contra practices, see note 18 *supra*.

38. *See* note 36 *supra*.

39. 115 CONG. REC. S1163, 1164 (Jan. 31, 1969).

40. *Hearings*, at 233; *Credit Bureau Policies to Protect Consumer Privacy*, Associated Credit Bureaus of America. Interview with Mr. Charles J. Benson, Vice-President, Credit Bureau Metro, Inc., of San Francisco, California, Aug. 12, 1970.

41. 115 CONG. REC. S1163, 1164 (Jan. 31, 1969).

42. *Id.*

43. *Hearings*, at 189, 190.

reliable and the defenses to defamation are not always defined with sufficient clarity to assure protection of the industry in light of the large number of lawsuits that might be initiated.[44]

The preparation of most credit rating reports take an average of thirty minutes, and the fee charged the credit grantor is nominal.[45] Most credit rating agencies say that they want to have correct information in their records and they feel sympathetic to consumers, but that they also want the consumers to be sympathetic to their problems. The industry asks that when a consumer requests that his credit rating file be checked for accuracy, the consumer should realize that the agency is performing this service at a cost.[46] More so than most other businesses, managers of credit rating agencies must be cognizant of the production of their employees. When a consumer takes the time of an employee in confirming the accuracy of the information contained in a credit report, the production of the employee is lost to the agency. It is for this reason, the industry alleges, that some agencies schedule appointments with consumers for the purpose of checking the consumer's file, or charge them a nominal fee for the employee's time.[47] The proponents of regulation charge that these answers given by the industry are merely fictions created to perpetuate the industry's policy of secrecy. Many of these proponents argue that the consumer has a *right* to have only correct information in his credit rating report; that good credit is not a mere *privilege.*[48] Also it is argued that these answers are not justification for the present policies. Rather, they are "roadblocks" to any attempt by consumers to correct inaccuracies.[49]

The fourth, and undoubtedly most serious of the alleged abuses to the rights of consumers, is the invasion of the consumer's *right of privacy.*[50] The right of privacy has been defined as the *right* to be let alone; the right of a person to be free from unwarranted publicity.[51] It is charged

44. *See* remarks of Ira A. Brown, Jr., General Counsel and Secretary of Credit Data Corporation, to the Governor's Task Force to Investigate Credit, Personnel and Insurance Reporting, where he noted this argument.

45. *Privacy; The Horror Side of Credit,* TIME, Dec. 20, 1968, at 79; 115 CONG. REC. S1163 (Jan. 31, 1969); *Hearings,* at 176. The minimum charges levied by Retailers Credit Association of Sacramento, California for their standard credit reports are: Verbal—$1.10; Written—$1.75. "Schedule of Reporting Services and Charges," R.C.A. of Sacramento, California.

46. Interview with Mr. Charles Benson, Vice-President, Credit Bureau Metro, Inc., San Francisco, California, Aug. 12, 1970.

47. Sallee, *The Credit Bureau's Obligation to the Consumer,* MANAGEMENT, January, 1968, at 4.

48. 115 CONG. REC. S1163, 1167 (Jan. 31, 1969).

49. *Id.*

50. *Hearings,* at 74, 82. *See also* 57 GEO. L.J. 509 (1969).

51. 1 HARPER & JAMES, THE LAW OF TORTS § 9.6, at 681 (1956).

that invasion of the consumer's right of privacy occurs in several different ways. The first aspect of the alleged invasion results from the absence of any substantial guidelines concerning to whom the credit material will be distributed.[52] Though it is argued the consumer impliedly gave permission for the collection of information about him when he applied for credit,[53] this implied permission is not an unlimited license. Rather, it is only a limited implied consent and the credit rating agencies abuse this limited privilege by not formulating guidelines concerning the distribution of the information in their possession.[54] It is the argument of proponents for regulation that this failure to act by the credit rating industry violates the consumer's right to be free from unwarranted publicity.[55] The large and vocal credit rating agencies have responded to this charge with an unqualified denial. Spokesmen for Credit Data Corporation and the Associated Credit Bureaus of America contend they do have specific guidelines to whom consumer credit information may be distributed.[56] Credit Data Corporation lists its guidelines on this point as follows:[57]

> (1) Credit information is available only to bona fide credit grantors; (2) Credit information is available to credit grantors only for credit purposes; (3) Credit information should consist only of factual information pertaining to credit performance; (4) Credit information must be accurate and fair; (5) Credit information must be timely and purged of out-of-date facts.

Credit Data Corporation is undoubtedly correct when it says that its self-imposed guidelines are much more restrictive than any legislation that has been given serious consideration in Washington, D.C., or Cali-

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52. 115 CONG. REC. S1163, 1165 (Jan. 31, 1969).

53. Some persons have suggested that it is permissible to imply that the consumer has given his consent to be investigated when he made application for credit, but that the implied consent cannot be carried beyond the original purpose for giving the consent. This is to say that an implied consent to be investigated for insurance credit is not a continuing implied consent to distribute the information obtained to other types of credit grantors who do not have a legitimate business interest in the information. 115 CONG. REC. S1163, 1165 (Jan. 31, 1969); *Hearings* at 231.

54. 115 CONG. REC. S1163, 1164 (Jan. 31, 1969); note 18 *supra.*

55. U.S. Senator William Proxmire of Wisconsin recited a vivid example of this charge while introducing S. 823:

> [A] Columbia law professor . . . wrote a credit bureau to see whether the agency would supply information about a research assistant on the grounds that she was being considered for a promotion. The credit bureau quickly responded, supplying information on her marital and financial status, previous employment record, police record, character, habits, and morals. All this was freely given despite the fact that Columbia was not a credit grantor and was not a member of the local bureau.

115 CONG. REC. S1163, 1165 (January 31, 1969).

56. For the position of Retail Credit Co., see note 18 *supra.* Associated Credit Bureaus enumerates its guidelines in *Credit Bureau Policies to Protect Consumer Privacy* (1969).

57. *Hearings,* at 224.

fornia.[58] By creating these voluntary guidelines the credit rating industry hopes the federal and state legislators will accept the position that the industry is willing and able to regulate itself; that statutory regulation is unnecessary. Unfortunately, however, these well intentioned credit rating organizations cannot speak for the entire industry and the guidelines that Credit Data Corporation and Associated Credit Bureaus of America have set forth are simply a self-imposed code of morality establishing no legal duties.[59]

An absence of adequate internal security measures is another way in which credit rating organizations allegedly violate the privacy of consumers.[60] Because of the low fees charged for credit reports, the industry is only able to hire people willing to work for low salaries. In so doing, the industry does not obtain that quality of employee who is sympathetic to the industry's efforts to protect the consumer's privacy.[61] Proponents for regulation argue that the credit rating industry has only a limited license to collect and retain information pertaining to a consumer's credit standing. This limited license imposes a duty upon the credit rating industry to provide adequate security measures to prevent perverted snooping by unauthorized employees.[62] The credit rating industry admits this is a problem but denies that it has taken no action. Industry officials counter that when new employees are hired part of their orientation includes a presentation regarding the obligation they owe to protect the privacy of consumers. If employees are caught in the act of perverted snooping for personal pleasure, they will be immediately fired.[63] Though spokesmen for the industry concede there would be an advantage to employing special security guards, they are quick to assert the cost-profit limitation.[64]

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58. *See* note 1 *supra.*

59. [A]lthough we are convinced that all the agencies we studied strive earnestly to achieve the highest possible level of accuracy, there will always be a substantial possibility, while the profession remains unregulated, of irresponsible persons setting up reporting agencies and conducting them in a careless manner.

PRIVACY AND COMMERCIAL REPORTING AGENCIES, LEGAL RESEARCH INSTITUTE OF THE UNIVERSITY OF MANITOBA 16 (October, 1968).

60. 115 CONG. REC. S1163, 1166 (Jan. 31, 1969).

61. *Id.* The recommendation of the California State Personnel Board is that there be at least one chief supervisor, with other subordinate supervisors, for every group of ten to twenty-five employees. Such a requirement is necessary to maintain proper employee efficiency and office internal security. A PROGRAM MANUAL FOR IMPROVING CLERICAL UTILIZATION (California State Personnel Board, April 1968); *Specifications for Supervising Clerk I.* Many credit rating agencies already meet these recommendations. Retailers Credit Association of Sacramento, California, for example, has one general supervisor and two subordinates for thirty employees. Interview with Mr. John Collins, Assistant Manager, Retailers Credit Association of Sacramento, California, August 17, 1970.

62. *See* note 60 *supra.*

63. Interview with Mr. John Collins, Assistant Manager, Retailers Credit Association of Sacramento, California, July 8, 1970.

64. *Id.*; 115 CONG. REC. S1163, 1166 (Jan. 31, 1969).

The third way the industry allegedly violates the privacy of consumers is by having a loose policy or procedure for investigating the prospective users of the credit information.[65] The proponents for regulation charge the industry is interested more in their profit margin than in the privacy of consumers; that credit rating agencies conduct little if any investigation to determine if the person requesting the information is a credit grantor, or indeed, if he has any legitimate business interest in the information.[66] It is charged that anyone, by paying the required fees, can become a subscriber of a credit rating agency and obtain personal information on consumers simply by asking. As noted earlier, proponents for regulation assert that the credit rating agency owes a duty to the consumer not to disclose the information to anyone who does not possess a legitimate business interest[67] and this duty extends to an obligation, voluntarily assumed by the credit rating agencies, to make a proper and adequate investigation into the legitimate business interest of any party requesting the information.[68]

Although there is some dissent,[69] most industry officials agree that credit rating agencies owe some duty to be familiar with the agencies who request information. The main area of disagreement appears to be the extent of the duty.[70] Critics of the industry demand that agencies make thorough investigations.[71] The position of the industry officials is that the term "thorough" is difficult to define. Thus they are left with no choice of alternatives other than those they consider reasonable and practical in light of their own problems. The remedies considered reasonable and practical by industry officials are the procedures presently used by most credit rating agencies. Basically, these procedures involve an initial investigation into the character of the business requesting the services of a credit rating agency. If the business is a credit grantor, it will usually be accepted as a subscriber. After acceptance, if the subscriber is ever found by the agency to be using the credit files for reasons other than bona fide credit purposes, the subscriber will either be reprimanded or refused further service.[72] The

65. 115 CONG. REC. S1163, 1165 (Jan. 31, 1969).
66. *Id.*
67. *Id.* *See* text at note 53 *supra.*
68. *Hearings* at 98.
69. *See* note 56 and accompanying text *supra.*
70. There appears to be no authority that characterizes the objective procedural process used by credit rating agencies for qualifying an applicant as a credit grantor. However, it has been suggested that the process is, at best, a cursory one. *Hearings,* at 98.
71. Proxmire, *Unregulated Credit Reporting Could Ruin Your Life,* FAMILY WEEKLY, February 16, 1969, at 6.
72. The *Application For Membership and Service Contract* of Retailers Credit Association of Sacramento, California, specifies that the credit grantor may be canceled as a member of the agency's files are used for reasons other than bona fide credit purposes.

industry argues these procedures are as stringent as practically possible; that it is economically impossible for agencies to make detailed follow-through investigations into the intended use of information each time a request for a credit rating is made.[73]

In summary it would appear the consumer certainly has a valid right to insist that credit rating agencies act with reasonable care when they are distributing personal information. On the other hand, it is unrealistic to suggest the imposition of an obligation upon the industry which would be economically impractical since this would probably be destructive of what is now an important and necessary commercial service. Some large firms have made significant efforts to impose strict self-control on the industry and to the extent that self-policing now is practiced by these agencies, the consumer is adequately protected. The main problem, however, is that self-regulation is voluntary, without universal application in the industry, and cannot be imposed upon unwilling firms.

There is a major disagreement within the industry concerning the propriety of opening credit files to non-credit granting governmental agencies.[74] The problem is created by such governmental agencies as the Federal Bureau of Investigation and the Internal Revenue Service. At present both make extensive use of the information possessed by credit rating agencies. The questions raised, therefore, concern the logic of admitting, in the first instance, that the consumer has extended only a limited privilege over the use of his personal information, and then, on the other hand, allowing non-credit granting governmental agencies the right to use the information.[75] The alleged justification for permitting government use of credit rating information is two-fold. First, the information is necessary for the maintenance of national security. Second, perhaps the particular agency does not subscribe to the theory that the consumer has merely extended a *limited* privilege over the distribution of his personal information, but rather that a credit application is an *implied* form of consent to an investigation. Once the information is collected, these agencies feel it becomes their property.[76] As

73. Interview with Mr. John Collins, Assistant Manager, Retailers Credit Association of Sacramento, California, July 8, 1970.

74. For example, Retail Credit Co. of Atlanta, Georgia, feels it is perfectly proper to allow governmental agencies the unrestricted use of its files. Retail Credit feels it is in the public interest to voluntarily cooperate with these agencies. *Hearings*, at 221. However, Credit Data Corporation feels it is an undesirable practice to disclose credit information to other than bona fide credit grantors "except in response to valid legal process." *Code of Ethics and Operating Rules of Credit Data Corporation.*

75. Remarks of Ira A. Brown, Jr., General Counsel and Secretary of Credit Data Corporation to the Governor's Task Force to Investigate Credit, Personnel and Insurance Reporting (Aug. 26, 1969).

76. This position is evidently harmonious with the precepts of copyright law. It

property the information may then be distributed freely and without limitation. The opposite view has been taken by, among others, Credit Data Corporation of California. It is the policy of this corporation to liberally construe the consumer's right of privacy. In this vein, Credit Data has determined not to release any credit information to a governmental agency unless it is compelled to do so under court order.[77]

It would appear that both arguments possess some merit. It is true that the action of invasion of privacy involves the right of a consumer to be free from unwarranted publicity; however, the right is not absolute. According to some authorities the right exists only to the extent it is consistent with law or public policy.[78] Since, in the absence of controlling statutes, the courts will determine public policy, it is important to note the tendency of judicial decisions to expand the remedy for invasion of privacy and to give preference to individual rights in those cases where they conflict with business interests.[79] The right of government agencies to obtain access to credit investigation files may very likely be constrained in the future with or without legislation.

JUDICIAL REMEDIES

Prior to the 1970 Session of the California Legislature, California consumers had only common law remedies available to redress wrongs inflicted upon their credit reputations. The 1970 California Legislature attempted to add significant statutory relief, though not intended

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has been said,

> [T]here is a common law property [right] in facts and information collected and utilized by skill, labor and expense, although the same information is available to anyone who chooses to collect it. Such property had been recognized and protected in . . . credit ratings . . . .

18 C.J.S. *Copyright and Literary Property* § 10(d) at 142 (1939); Ladd v. Oxnard, 75 F. 703 (C.C.D. Mass. 1896); Jewelers Mercantile Agency v. Jewelers Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

77. *See* note 75 *supra*. Also, in his remarks before Governor Reagan's Task Force on Credit, Personnel and Insurance Reporting, Ira C. Brown, General Counsel for Credit Data stated that he believed the "limited, implied consent" theory applied to credit rating agencies and that it probably would be an invasion of the consumer's right of privacy for an agency to release credit information to persons other than bona fide credit grantors.

78. 1 HARPER & JAMES, THE LAW OF TORTS § 9.6, at 683 (1956); 77 C.J.S. *Right of Privacy* § 2, at 399 (1952).

79. Melvin v. Reed, 112 Cal. App. 285 (1931) (Motion picture showing incidents from murder trial held not actionable); Lillie v. Warner Bros., 139 Cal. App. 724 (1934) (Act in breach of contract is not an invasion of privacy); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304 (1939) (Publication of a picture of a person who has unwillingly become of general public interest is not an invasion of privacy); Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207 (1942) (Circulating a handwritten letter that falsely bore an immoral innuendo was an invasion of privacy); Stryker v. Republic Pictures, 108 Cal. App. 2d 191 (1951) (Publicity of activities of serviceman during war is not an invasion of privacy); Kelly v. Johnson Pub. Co., 160 Cal. App. 2d 718 (1958) (An injury to reputation is not an invasion of privacy); James v. Screen Gems, 174 Cal. App. 2d 650 (1959) (Publicity of activities of decedent is not an invasion of privacy of decedent's spouse); Carlisle v. Fawcett Pub. Co., 201 Cal. App.

to detract from the importance of the existing remedies. The new statutory remedies will be examined in detail in the following section. Because the judicial remedies are still of major importance to consumers in California and elsewhere, however, their use and functionability as separate remedies should be reviewed.

The principal judicial remedies available to consumers are civil actions in negligence, defamation of character, and invasion of privacy.[80] In addition, there have been cases seeking injunctive relief as a primary remedy; however, the consistent result has been a denial of equity jurisdiction based upon the existence of an adequate remedy at law.[81]

There have been a number of actions brought against credit rating and mercantile agencies on the theory of negligence.[82] From holdings of these cases it is apparent the principal issue of contention is the extent of the duty to be imposed upon the agency. Generally, courts have held that a credit rating agency owes a duty to the consumer to act as a reasonable man under the circumstances. If the credit rating agency does not utilize its professional skills in a reasonable manner, *i.e.*, if the agency assimilates information without taking reasonable steps to insure authenticity, or if the agency disseminates the information without making a reasonable investigation to determine if the recipient has a legitimate business interest, the agency may have breached its duty of due care to the consumer. If duty and the other prima facie elements of the action can be satisfied, the agency will then be liable both for its own negligence and for the negligence of its agents and servants.[83] As a practical remedy to a consumer, however, it appears that this remedy may be inadequate because credit rating agencies are agents of the credit grantor;[84] they owe only a duty of due care in the preparation and

2d 733 (1962) (Privacy requires a weighing of public and private interests); York v. Story, 324 F.2d 450 (9th Cir. 1963) (Police officer who photographed assault victim in indecent positions and then circulated the pictures violated her right of privacy); Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968) (Publication of picture of person before he came to public attention was an invasion of privacy); Kapellas v. Kofman, 1 Cal. 3d 20 (1969) (Even public official may sue where newspaper story was so lacking in justification as to amount to an invasion of privacy).

80. 57 GEO. L.J. 509 (1969); 53 C.J.S. *Libel & Slander* § 52, at 100 (1948).

81. To obtain injunctive relief for invasion of privacy the court must find that the remedy at law is inadequate. 43 C.J.S. *Injunctions* § 132, at 678 (1945). This prerequisite has created great problems in the availability of this remedy, for the general rule is that actions at law for defamation provide adequate legal remedies. *See* Raymond v. Russell, 143 Mass. 295, 9 N.E. 544 (1887), which held the legal remedies of libel and slander were adequate and, therefore, there was no basis for the extension of equitable jurisdiction. For injunctive relief the court said there must be breach of trust or breach of contract.

82. *See* Dun v. City Nat. Bank of Birmingham, 58 F. 174 (2d Cir. 1893); Xiques v. Bradstreet Co., 70 Hun. 334, 24 N.Y.S. 48 (Sup. Ct. 1893); Crew v. Bradstreet, 134 Pa. 191, 19 A. 500 (1890).

83. Dun v. City Nat. Bank of Birmingham, 58 F. 174 (2d Cir. 1893).

84. *See generally* 15 AM. JUR. 2d *Collection and Credit Agencies* § 3, at 551 (1964).

dissemination of credit reports.[85] Thus, unless the credit agency has a contract which guarantees the accuracy of its reports, the consumer must prove a failure to make due and diligent inquiries or he is barred from recovery.

Defamation, principally libel,[86] has been the vanguard of remedies chosen by consumers over the years to redress injuries inflicted upon their credit reputations.[87] Its practicability is questionable, however, since under the general rule, credit rating organizations are given a qualified privilege[88] for dissemination of credit information.[89] If the consumer wishes to proceed on the theory of defamation, he must prove that the credit agency communication was made with malice,[90] or under such circumstances that reasonable men would not have acted in the same manner;[91] or that the information was communicated to a party who did not have a legitimate business interest in the information.[92] Though some states have unconditionally refused to extend the de-

85. Globe v. Perth, 116 N.J. Law 168, 182 A. 641 (1936).

86. Referring to the difficulty of defining libel, Prosser has said:

> The distinction itself between libel and slander is not free from difficulty and uncertainty. As it took form in the seventeenth century, it was one between written and oral words. But later on libel was extended to include pictures, signs, statutes, motion pictures, and even conduct carrying a defamatory imputation. . . . From this it has been concluded that libel is that which is communicated by the sense of sight, or perhaps also by touch or smell, while slander is that which is conveyed by the sense of hearing.

PROSSER, HANDBOOK OF THE LAW OF TORTS § 107, at 770 (3rd ed. 1964). [Hereinafter cited as PROSSER].

87. 57 GEO. L.J. 509, 513 (1969).

88. A qualified privilege is a privilege that may be lost if certain specific or implied limitations upon the privilege are not observed. N.Y. & Porto Rico S.S. Co. v. Garcia, 16 F.2d 734 (1st Cir. 1926); Johnson v. Finance Acceptance Co. of Ga., 118 Fla. 397, 159 So. 364 (1935); Bender v. Met. Life Ins. Co., 313 Mass. 337, 47 N.E.2d 595 (1943); Rodger v. Am. Kennel Club, 138 Misc. 310, 245 N.Y.S. 662 (Sup. Ct. 1930); Solow v. G.M. Truck Co., 64 F.2d 105 (1933); Richardson v. Gunby, 88 Kan. 47, 127 P. 533 (1912).

89. 53 C.J.S. *Libel & Slander* § 240, at 364 (1948); Erick Bowman Remedy Co. v. Jensen Salsbery, 17 F.2d 255, 260 (8th Cir. 1926); Mell v. Edge, 68 Ga. App. 314, 22 S.E.2d 738 (1942); Tower v. Crosby, 125 Misc. 403, 211 N.Y.S. 571 (Sup. Ct. 1925), *rev'd on other grounds*, 212 N.Y.S. 219, 214 N.Y. App. 392 (1925); M. Rosenberg & Sons v. Craft, 182 Va. 512, 29 S.E.2d 375 (1944). The rationale for the qualified privilege, obviously enough, is that the communication of credit information is a socially desirable goal, and that the protection of qualified privilege is necessary in order to effectuate this public policy.

90. Iden v. Evans Model Laundry, 121 Neb. 184, 236 N.W. 444 (1931); Stevens v. Morse, 185 Wis. 500, 201 N.W. 815 (1925).

91. *See generally* Hallen, *Excessive Publication in Defamation*, 16 MINN. L. REV. 160 (1932); Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865 (1931).

92. *See* Johns v. Associated Aviation Underwriters, 203 F.2d 208 (5th Cir. 1953) (insurers to insured); Cook v. Gust, 155 Wis. 594, 145 N.W. 225 (1914) (promoter to prospective investor); Hales v. Commercial Bank of Spanish Fork, 114 Utah 186, 197 P.2d 910 (1948) (bank to payee of forged check). Also of interest is New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In this case one of the three police commissioners of Montgomery, Alabama, sued the *New York Times* for publishing a partially false and derogatory advertisement that concerned the police of Montgomery, Alabama. The U.S. Supreme Court found that the *Times* did not have knowledge of the falsity when it published the advertisement, and said, at 279,

> The constitutional guarantees require . . . a federal rule that prohibits a *public*

fense of qualified privilege to credit rating organizations,[93] in most states the privilege does exist. Hence, as a remedy for consumers, defamation is only marginally effective.

The tort action for invasion of privacy is probably the most important judicial remedy available to a consumer because of its far reaching pos-

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official [emphasis added] from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The rationale for the holding was that if a publisher were made to guarantee the accuracy of his statements such a rule would force "self-censorship" and amount to a prior restraint on first amendment liberties. Thus a *public official* suing a private citizen must prove that the defamatory matter was communicated with actual malice or he is prohibited from recovering damages.

In Time v. Hill, 385 U.S. 374 (1967), the U.S. Supreme Court applied the Sullivan rule to actions involving invasions of privacy among private citizens. The court held that the plaintiff must prove ". . . the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (385 U.S. at 388). Inasmuch, therefore, as the Sullivan and Hill doctrines concerned the communication of information in the public domain, it does not appear likely that they will be made applicable to credit rating organizations. The information communicated by such organizations is generally of interest only to a limited part of the public. If such information were held to be in the public domain and thus subject to the Sullivan and Hill holdings, however, the effect would be detrimental to consumers. This conclusion follows, for the inclusion of derogatory information in a credit rating file is said to be permissible for public policy reasons (*see* collected cases at note 89, *supra*). And credit rating agencies generally make good faith efforts to authenticate derogatory information (*Hearings*, at 185). Thus, if the Sullivan and Hill doctrines were extended to include defamatory actions among private citizens it would appear that only the most blatant abuses of the privilege to communicate derogatory information for credit purposes would give the consumer a right of recovery.

93. *E.g.*, in Pacific Packing Company v. Bradstreet Co., 25 Idaho 696, 139 P. 1007, 1010 (1914), the Idaho Supreme Court said,

> The only safe and just rule either in law or morals is the one that exacts truthfulness in business as well as elsewhere and places a penalty upon falsehoods, making it dangerous for a mercantile, commercial, or any other agency to sell and traffic falsehood and misrepresentation about the standing and credit of men or corporations. The company that goes into the business of selling . . . reports about others should assume the responsibility for its acts, and must be sure that it is peddling the truth.

In California the decision is clouded. The provisions of the California statute read:

> A privileged publication . . . is one made . . . [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

CAL. CIV. CODE § 47.

The California Supreme Court had an opportunity to resolve the question in 1965, but it avoided the issue for a seemingly artificial reason. The case was Stationers Corp. v. Dun & Bredstreet, Inc., 62 Cal. 2d 412 (1965). Defendant, a mercantile agency, communicated a credit report concerning plaintiff's business to a third party. Plaintiff considered this report libelous and brought suit. Defendant invoked Civil Code § 47(3) as a defense. The court stated, at 420-421:

> It would be grossly unjust to permit a defendant, in the pursuit of his commercial interests, to rely upon the special privilege granted by section 47, subdivision 3, without requiring him to disclose information in his possession necessary to determine whether the statements were made without malice.

The ratio decidendi of this case was quite limited. The case did not decide whether the qualified privilege contained in Civil Code section 47(3) applied, or did not apply, to mercantile agencies. Rather, the case held that mercantile agencies could not use the privilege if they refused to disclose the source of their information to a plaintiff who was trying to prove knowledge of falsity and malice. The holding of this case, therefore, appears to be artificial because the statute itself speaks of no limitations such

sibilities. Invasion of privacy is actionable in all but four states.[94] As with the development of many other tort actions, the creation of the right of privacy was probably generated most by analogizing it to the law of property rights. Judge Cooley, in 1888, coined the phrase, "the right to be let alone."[95] This phrase could quite correctly be analogized to the property remedy of trespass. In property law, and later in the law of torts, one in lawful possession of property may obtain at least nominal damages and an injunction as a remedy against a party who had invaded his property interest without consent.[96] This is the property owner's remedy for invasions of his "right to be let alone." The concept advanced by Warren and Brandeis in 1890 was that human well-being is far more important than the well-being of property, and the remedies available for injuries to the person should be at least as extensive as those for injuries to property. The courts gradually acknowledged the merit of allowing an injured party to sue for the invasion of his own personal interests rather than fictionalizing to some invasion of property.[97] Since 1890, appellate level cases have dealt with an innumerable number of phases of the plaintiff's "right to be let alone." Referring to these phases, Dean Prosser says:

> The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.'[98]

It is often argued that conduct of credit rating agencies constitutes an invasion of one or another of the consumer's rights to be free from intru-

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as disclosure of sources. Rather, the true meaning of the case is probably a hint to the legislature that the California Supreme Court considers this an inequity in the statute law in need of modification.

The states that have given credit rating agencies a qualified privilege generally do not have statutes that are as broad and sweeping as the California statutory privilege. It would appear, therefore, that one of two conclusions can be drawn: (1) The California Supreme Court does not wish to give any privilege to credit rating organizations and will continue to create artificial barriers to the implementation of the statute; or (2) the California Supreme Court wants to give credit rating agencies a qualified privilege but is prevented from doing so by what it considers to be overbreadth in Civil Code section 47(3).

94. Brunson v. Ranks Army Stores, 161 Neb. 519, 73 N.W.2d 803 (1955); Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909); Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Texas 1952); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).

95. COOLEY, TORTS 29 (2d ed. 1888).

96. Brame v. Clark, 148 N.C. 364, 62 S.E. 418 (1908).

97. Although New York trial court cases accepted the concept of privacy as early as 1890, the Georgia Supreme Court was the first review court to embrace the views of Warren & Brandeis; the case was Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). With the introduction of the Restatement of Torts in the 1930's, which recognized a cause of action for "unreasonable and serious" interference with privacy, many other states leaped aboard the bandwagon. PROSSER, § 112, at 831.

98. PROSSER § 112, at 832.

sion of his privacy.[99] In the area of intrusion, the right to privacy is an interest protected from illegal wiretapping,[100] "peeping toms,"[101] nuisance telephone calls,[102] and unauthorized prying into bank accounts,[103] among others. Somewhat akin to the remedy of trespass, the cases dealing with the right of privacy show unmistakenly that there must be something in the nature of unauthorized prying or intrusion into the plaintiff's right to be let alone[104] in an area that was reasonably expected to be private, and would be offensive or objectionable to a reasonable man of ordinary sensibilities.[105] If the intrusion involves a matter of public knowlege, or a matter subject to public access, there is generally no interest protected by the right of privacy.[106]

Proponents for regulation of the credit rating industry usually point to insurance investigations by the industry as the type of conduct most likely to intrude upon the consumer's right of privacy.[107] A credit investigation for insurance usually results in the collection and recording of items relating to the consumer's marital problems, private morals, drinking habits and extramarital affairs.[108] Such matters are private, without relevance to granting credit and violate the consumer's right of privacy.

Unlike defamation, where credit rating agencies have, in most jurisdictions, the defense of qualified privilege, *consent* is the only defense to an action for invasion of privacy.[109] If the consumer can carry the burden of proving that an intrusion was made into a private aspect of his life objectionable to a reasonable man of ordinary sensibility, he may recover unless he has consented to the intrusion. For the defendant to be entitled to the defense of consent, however, statutes in all states that recognize the right of privacy require that consent

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99. Prosser lists the four types of possible invasions as intrusion, public disclosure of private facts, false light in the public eye, and appropriation. PROSSER § 112, at 833, 834, 837, and 839.

100. Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); La Crone v. Ohio Bell Tel. Co., 114 Ohio App. 299, 182 N.E.2d 15 (1961).

101. Moore v. N.Y. Elevated R. Co., 130 N.Y. 523, 29 N.E. 997 (1892); Pritchett v. Board of Com'rs of Knox County, 42 Ind. App. 3, 85 N.E. 32 (1908).

102. Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956); Harms v. Miami Daily News, Inc., 127 So. 2d 715 (Fla. 1961).

103. Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (1929); Zimmerman v. Wilson, 81 F.2d 847 (3d cir. 1936).

104. PROSSER § 112, at 833.

105. *Id.*

106. *Id.*

107. 57 GEO. L.J. 509, 525 (1969).

108. *See* text at note 18, *supra.*

109. There are privileges, e.g., privilege of giving further publicity to already public figures, Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942), that apply generally to the concept of privacy. However, consent is the only defense to invasions of privacy occasioned by intrusions. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

be given in writing.[110] And, "[t]he defendant's honest belief that he has the plaintiff's consent, when he has not, will go to mitigate punitive damages, but otherwise is not a defense."[111] It may seem at first glance that since the consumer must waive his right to privacy by written consent the credit rating industry would rarely have a defense to an action for invasion of privacy because consumers very rarely sign express consent forms to future investigations.[112] Yet the dearth of suits and judgments for consumers suggests that the industry has other means of avoiding liability for these intrusions.

One of the principal methods used by the agencies as a protection against the initiation of suits for invasion of privacy by consumers is simply maintaining their information files with the utmost secrecy to prevent any notice to the consumer.[113] Even though a consumer may be denied credit, insurance, or employment as a result of a credit investigation, without access to the investigation file he has no opportunity to procede with a legal action against the credit agency.

LEGISLATIVE REMEDIES

For sixty years Oklahoma was the only sovereign body in the United States with legislation regulating credit rating agencies.[114] In 1970 this situation has changed. California, after two years of legislative study,[115] has adopted the Consumer Credit Reporting Act.[116] During the two

110. PROSSER, § 112, at 851.
111. *Id.*
112. For example, an applicant for insurance signs an application form, but these forms generally do not contain any express statement that the applicant has consented to an investigation of his credit standing. And even if a consumer should sign such a consent statement, he might be able to have it stricken from the contract on the basis that the actual invasion went beyond the fair construction of the intended consent.
113. W. Lee Burge, president, Retail Credit Co., denies that this is presently the policy of his organization. His testimony on this point is quite interesting:
> Senator Proxmire. On page C-75 of Manager's Manual it says: 'Neither deny nor admit making a report. Decline to give a categorical yes or no to any demand by caller that you tell him whether you have reported on him.' Mr. Burge. Well, this is an old instruction. . . . It has been completely altered. Senator Proxmire. When was this revised? Mr. Burge. *Within the past year, Senator.* [emphasis added]. *Hearings*, at 184.

114. Credit Ratings, 24 OKLA. STAT. ANN. §§ 81-85 (1955) (enacted in 1910); 115 CONG. REC. S1163, 1166 (Jan. 31, 1969).
115. The original versions of the California legislation were initially introduced in the 1969 Regular Session. *See* note 1, *supra.*
116. A.B. 149, CAL. STATS. 1970, c. 1348.
> The Consumer Credit Reporting Act, CAL. STATS. 1970, Chapter 1348, and the Consumers Legal Remedies Act, CAL. STATS. 1970, Chapter 1550, were enacted during the 1970 Regular Session and both enact sections 1750, *et seq.*, of the Civil Code. The two Acts are not in substantive conflict, however, and both will be placed in the Civil Code, distinguished by their chapter numbers. An amendatory bill will undoubtedly be introduced during the 1971 Regular Session and the code section number of one of the two Acts changed.

years of study, this Act has been the subject of much compromise, and modification.[117] As a final product, it is a welcome boon to consumer's rights.

The Act was originally introduced in the 1969 Regular Session but failed to pass due to strong opposition from credit rating agencies, insurance companies, and financial instiutions.[118] As introduced during the 1969 session[119] the bill was considerably different than the Consumer Credit Reporting Act of 1970.[120] The 1969 version merely attempted to provide California consumers with certain rights regarding their credit files. Its original form may best be summarized as an attempt to establish that consumers should be afforded due process with regard to denial of credit and information pertaining to their credit file.

When reintroduced during the 1970 session the bill took the form identical to its predecessor of 1969.[121] By June 30, 1970, however, the bill had changed drastically.[122] The original version had been entirely replaced by the present Act,[123] which provided that consumers have the right to assure the correctness of credit information pertaining to them. It also enacted specific procedures for correcting that information when it is discovered to be incorrect.

The Consumer Credit Reporting Act is still designed to provide consumers with due process safeguards in the assimilation and dissemination of information pertaining to their credit standing. To implement these safeguards the designated procedures are directed first at the credit grantors. If a consumer is denied credit based upon an unfavorable credit report, the credit grantor must notify the concerned consumer of this fact.[124] If the consumer feels that such a denial is unjustified, the burden of taking further action is then upon him. He has sixty days in which to file a written request with the credit grantor requesting the identity of the credit rating agency that released the unfavorable report.[125] The consumer may then by mail,[126] telephone,[127] or in person,[128] demand disclosure by the credit agency of the "nature and substance of all information . . . on the applicant," the sources of the

117. Interview with Mr. Robert White, Administrative Assistant to Assemblyman Pete Wilson in Sacramento, California, July 8, 1970.
118. *Id.*
119. A.B. 985, 1969 Regular Session, as introduced, March 17, 1969.
120. A.B. 149, CAL. STATS. 1970, c. 1348.
121. A.B. 149, as introduced, January 12, 1970.
122. A.B. 149, as amended, June 30, 1970.
123. *Id.*
124. CAL. CIV. CODE § 1754, CAL. STATS. 1970, c. 1348.
125. *Id.*
126. CAL. CIV. CODE § 1753(b)(3), CAL. STATS. c. 1348.
127. CAL. CIV. CODE § 1753(b)(2), CAL. STATS. 1970, c. 1348.
128. CAL. CIV. CODE § 1753(b)(1), CAL. STATS. 1970, c. 1348.

information, and the identity of all recipients of the report during the preceding six-month period.[129]

If the completeness or accuracy of any item of information in the consumer's file is disputed, the credit rating agency is obligated to reinvestigate unless "it has reasonable grounds to believe that the dispute . . . is frivolous or irrelevant."[130] It should be emphasized this provision relates to frivolous or irrelevant *disputes*. If the information is incomplete or inaccurate, the credit rating agency must correct it or delete it even though the information may not have been used in any credit rating report within the preceding six-month period.

If the credit rating agency does reinvestigate the disputed information and still cannot reach an agreement with the consumer, the Act provides that the consumer may file a brief statement setting forth his version of the dispute.[131] If the consumer elects to file such a statement, the credit rating agency is then obligated to note that the item of information is the subject of a dispute between it and the consumer whenever it uses that information in subsequent reports.[132] In addition, the credit rating agency is obligated to inform the consumer that he has the privilege to have his statement sent to any specifically designated credit grantor who has, within the preceding six-month period, received the disputed information.[133]

Finally, the Act provides that when the credit report concerns only the consumer's ability to pay, his habit of payment, or his general credit standing, the civil and criminal remedies ordinarily available to consumers are limited to cases of willful misrepresentation.[134] If an incomplete or inaccurate credit report that does not fall within one of these three areas is communicated to a credit grantor, the ordinary civil remedies are obviously available; however, the practicability of this conclusion is insignificant when the phrase "general credit standing" is considered. It is difficult to conceive of any credit report that will not relate in some way to the consumer's "general credit standing." Hence the language in this section of the act seems to effectively bar most of the previously existent remedies.

The importance of this Act, in spite of its effect on judicial remedies, is beyond question. The Act provides the type of relief most frequently needed by consumers; a more immediate and expeditious

129. CAL. CIV. CODE § 1752(a), CAL. STATS. 1970, c. 1348.
130. CAL. CIV. CODE § 1755(a), CAL. STATS. 1970, c. 1348.
131. CAL. CIV. CODE § 1755(b), CAL. STATS. 1970, c. 1348.
132. CAL. CIV. CODE § 1755(c), CAL. STATS. 1970, c. 1348.
133. CAL. CIV. CODE § 1755(d), CAL. STATS. 1970, c. 1348.
134. CAL. CIV. CODE § 1756, CAL. STATS. 1970, c. 1348.

process that will allow the consumer to correct errors and obtain credit when he needs it rather than face a protracted litigation where an ultimate remedy may be very costly and uncertain. The Consumer Credit Reporting Act procedures, by providing the consumer with notice when a credit report is the basis for refusal of credit, and imposing a duty on the credit reporting agency to respond to the consumer's complaints is a major advance in that direction—but that is not to say that it is as clear or as complete as it should be. For example, one provision in the Act in need of clarification is the definition of "creditor."[135] The administrative assistant to the author of the Act explained in an interview that it was introduced in order to correct abuses occasioned by retail credit reports. The coverage of this proposal, as he understood it, was limited to retail credit rating reports alone.[136] The validity of his understanding is supported when considering the definition of "applicant", the individual to whom the Act was intended to benefit. Section 1751 of the Civil Code, added by the Act, defines applicant as a natural person who has made application to a creditor for extension of credit for personal, family or household purposes. The section also defines the term "Commercial Creditor" as a person or entity which extends credit for purposes other than personal, family or household purposes. Hence a Commercial Creditor is distinguished in order to limit the meaning of creditor under the Act. Commercial Creditor is nowhere else mentioned in the Act.

The application of this Act is of critical importance to the consumer, for today most credit files are generally all inclusive of any information obtained on a consumer.[137] The problem that is presented by this limited applicability goes to the very purpose for the introduction of the Act. The measure was introduced because the author's constituents were having problems getting their credit files corrected.[138] The types of credit files that are in existence creating problems for consumers throughout the nation today, however, are far from limited to applications for retail credit. Indeed, retail credit reports may be the most innocuous of the three principal categories. If a consumer has been denied retail credit because of an erroneous credit file he is inconven-

135. CAL. CIV. CODE § 1751(d), CAL. STATS. 1970, c. 1348, defines "creditor" as ". . . a person or entity which extends credit for personal, family or household purposes."

136. Interview with Mr. Robert White, Administrative Assistant to Assemblyman Pete Wilson in Sacramento, California, July 8, 1970.

137. Interview with Mr. Charles J. Benson, Vice-President, Credit Bureau Metro, Inc. of San Francisco, California, August 12, 1970. Typically a consumer's file is a "general inclusion" file. Such a file may be defined as a single file that contains information derived from investigations made for the extension of retail, personnel, and insurance credit.

138. Interview with Mr. Robert White, Administrative Assistant to Assemblyman Pete Wilson in Sacramento, California, July 8, 1970.

ienced and embarrassed. If a consumer is denied employment or insurance because of false information relating to a credit report he may suffer a measurable harm. Consequently, despite the fact that the Consumer Credit Reporting Act is an important innovation in the field of consumer protection it may be totally inadequate as a solution to credit reporting control in California.

The Consumer Credit Reporting Act was not the only credit rating legislation that was discussed during the 1970 session of the California Legislature. There were two other proposals which, had they passed, would have added significant dimensions to the consumer's arsenal of remedies.

One of the proposals was Assembly Bill 799.[139] The general purpose behind this bill was to provide express notice on all credit applications informing the applicant as to whether or not the information supplied would be made available to third parties.[140] The provisions of this bill would seem of little significance since they merely require notice of disclosure of the information to third parties. However, some lobbyists felt the ramifications of the bill were serious and managed to maneuver its death in less than four months time.

Assembly Bill 2367 was the third proposal introduced into the 1970 Regular Session of the California Legislature relating to the credit rating industry.[141] This proposal was very broad, including articles defining the rights of consumers, and creating a board to regulate all credit rating agencies in California.[142]

The purpose of Articles 1 and 2 of this measure was to establish statu-

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139. ASSEMBLY WEEKLY HISTORY, February 19, 1970, at 128. This bill was introduced in response to a request by the Teamsters Union, but unfortunately it failed to receive sufficient votes to pass out of committee. Interview with William Campbell, Assemblyman for the 50th Assembly District, in Sacramento, California, July 8, 1970.

140. The face of every application form used on or after the effective date of this section for consumer credit shall indicate in eight-point bold type whether or not information offered by the customer will be made available to any person other than the creditor.

A.B. 799, 1970 Regular Session, § 1921.

141. ASSEMBLY WEEKLY HISTORY, April 3, 1970, at 358. This bill was originally introduced into the 1969 Regular Session but strong opposition from the credit rating industry and insurance companies caused it to be defeated. Interview with Mr. James Reed, Senior Counsel to Assemblyman James A. Hayes in Sacramento, California, July 8, 1970. As introduced in 1969, and 1970, A.B. 2367 was to apply to agencies that reported insurance credit, personnel histories, and retail credit ratings. However, due to strong opposition the author found it necessary, as a matter of strategy, to delete insurance and personnel reporting from the scope of the bill. Interview with Mr. Lionel Wilson, Staff Assistant to the Judiciary Committee of the California State Assembly, in Sacramento, California, July 8, 1970.

142. A.B. 2367, Article 3 contains provisions for the creation of a regulatory board in the Department of Consumer Affairs. The strongest objections to enactment of this bill grew out of the author's refusal to delete Article 3. Interview with Mr. John Hapgood, Manager, Retailers Credit Association of Sacramento, California, August 10, 1970.

tory rights for consumers and to delineate procedures for the fulfillment of those rights. These procedures, encompassing the due process concepts of the Consumer Credit Reporting Act, went further by establishing time limitations for the use of certain kinds of information. Because of its unprecedented scope this proposal is important and its provisions warrant detailed analysis. One proposed section required a contract between the agency and the subscriber.[143] The importance of this requirement is that it would compel credit grantors to promise to use the privilege of credit information only for bona fide credit purposes.[144] If the credit grantor abuses this privilege the credit rating agency would be obligated to discontinue service.[145] The contract would also obligate the credit grantor to disclose to the consumer the identity of the credit rating agency that issued the report resulting in the denial of credit.[146] The consumer would then have the opportunity to require disclosure by the agency of its information and the agency would be required to cooperate in correcting errors or misinformation.

A second section of A.B. 2367, similar to the provisions of A.B. 149 would have obligated credit rating agencies to negotiate controversies with consumers.[147] The consumer would have had the burden of bringing the question to the attention of the credit rating agency. Once this was done, however, the agency would be required to reinvestigate any disputed items and update any necessary records at its own expense.[148] The burden of updating its own records is not an unreason-

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143. A.B. 2367, 1970 Regular Session, § 9883.2(a).

144. *Id.*

> Credit Reporting organizations shall require service contracts in which the regular subscriber or the occasional user must certify each of the following:
> (1) That inquiries will be made only for the purposes of credit granting or other bona fide business transactions.
> (2) That the consumer will be provided with the name and address of the credit reporting organization from which it obtained any report that lead to the refusal of credit.

145. A.B. 2367, 1970 Regular Session, § 9883.2(b), says:

> The credit reporting organization shall refuse service to any prospective subscriber or user who will not so certify, and shall discontinue service to any subscriber or user who fails to comply with the certification required by subdivision (a).

146. A.B. 2367, 1970 Regular Session, § 9883.2(a)(2). This provision purported to achieve the same result that was achieved by A.B. 149—namely to give the consumer notice of a possible reason for a denial of credit so that he could have an opportunity to correct any errors in his file if he wished to do so.

147. A.B. 2367, 1970 Regular Session, as amended June 24, 1970, § 9883.

148. A.B. 2367, 1970 Regular Session, § 9883(c), states:

> When the consumer has had an application for credit rejected in whole or in part, or when the charge for such credit is increased, because of a credit reporting organization report, the credit reporting organization shall make any necessary reinvestigation and perform any necessary updating of records, including public record, at no cost to the consumer for the interview or for the reinvestigation. In the case of a consumer who has not been refused credit, if a reinvestigation of certain items is requested, a modest fee not exceeding the cost of a revised report may be charged.

able duty to place upon the credit rating industry. In fact, most agencies now perform this task at no expense to consumers.[149] However, to force the credit rating industry to correct public records solely at their expense is unreasonable.

Another important provision of this legislative proposal is a clause which defines the relationship between credit rating agencies and governmental agencies.[150] Identifying information is made available to any type of governmental agency, and any or all of the information in the consumer's file may be supplied to such agencies; however, if the governmental agency is a non-credit grantor, it must resort to legal process in order to avail itself of anything more than identifying information. As previously mentioned, this is an important provision, because agencies such as the F.B.I. and the I.R.S. frequently use credit rating files.[151] Practices such as these raise strong questions relating to the consumer's right to privacy.[152] Therefore, it is important that this kind of regulation be added to the statutory scheme of consumer protection.

As mentioned above, this proposal also provided for time limitations on the use of items of public record.[153] The need for this type of limitation is important, for under present procedures judgments and tax liens that are not immediately satisfied are usually noted in the consumer's credit file. The situation then frequently arises where the consumer satisfies these legal responsibilities but finds the disposition of the matter was not included in his credit file. The result is that the consumer is plagued by the repercussions from this incomplete information for an indeterminable period of time.

A.B. 2367 also carried a specific provision to establish procedures for the consumer to follow if he was unable to correct errors with the cooperation of the credit rating agency. It would have obligated the agency to:

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149. Interview with Mr. Charles J. Benson, Vice President, Credit Bureau Metro, Inc., of San Francisco, California, on August 12, 1970.

150. A.B. 2367, 1970 Regular Session, § 9883.1, provided:

> (a) Identifying information, such as names, addresses, former addresses, and places of employment or former employment, in the file of a credit reporting organization may be supplied to any governmental agency under contract for purposes other than evaluation of credit.
>
> (b) Any other information in the file of the credit reporting organization shall be supplied to credit-granting governmental subscribers and occasional users while evaluating credit applications. Other governmental subscribers and occasional users may obtain such information only in response to legal process.

151. Snyder, *Do Credit Bureaus Know Too Much About You?* PARADE, November 3, 1968, at 11.

152. *See* text at note 73 *supra.* These practices certainly seem to be unjustifiable intrusions into the consumers "right to be let alone."

153. A.B. 2367, 1970 Regular Session, as amended June 24, 1970, § 9883.5.

> (a) Delete any inaccurate or unverifiable information.
> (b) Plainly mark the item as disputed . . .
> (c) Permit the consumer to file a statement containing his version of the dispute.
> (d) Send a copy of such statement to all previous recipients . . . identified by the consumer or by the records of the credit reporting organization.
> (e) Include such statement in all subsequent reports.[154]

There is evidence to indicate that the majority of the credit rating agencies are now utilizing most of these procedures in their dealings with consumers.[155] The only step that probably would be objectionable to a reasonable California credit rating agency is the provision that obligates the agency to send a ". . . copy of such statement to all previous recipients . . . identified by . . . the records of the credit reporting organization."[156] Literally interpreted, this clause would obligate the agency to send a copy of the consumer's statement to all previous recipients of the credit report even though many of the recipients would have no present interest in the revision. Though this provision is in some ways meritorious, it should be modified to require only that: (1) all recipients within the preceding twelve-month period, or (2) any creditor designated by the consumer who has, within the preceding twenty-four month period, received a credit rating on the consumer before it would warrant inclusion in the present law.[157] It is admitted that this proposal differs markedly from the statutory procedures announced in section 1755(d) of the Consumer Credit Reporting Act. However, it is felt that a limitation of only six-months is far too short a period to adequately guard consumer's rights.

CONCLUSION

In one form or another, all of the previously illustrated abuses occur in most, if not all, of the credit rating agencies throughout the United States. Such an indictment, on first impression, undoubtedly has the effect of creating the impression the credit rating industry has no regard for the rights of consumers. Such impressions should be avoided, how-

154. A.B. 2367, 1970 Regular Session, as amended June 24, 1970, § 9883.8.
155. Interview with Mr. Charles J. Benson, Vice-President, Credit Bureau Metro, Inc., of San Francisco, California, August 12, 1970.
156. A.B. 2367, 1970 Regular Session, as amended June 24, 1970, § 9883.8(d).
157. The time limit enunciated by the Consumer Credit Reporting Act and by most legislative proposals is six months. No justification for this specific limitation has been uncovered, however, and it can only be assumed that the persons drafting the legislative proposals arbitrarily decided that this period was a reasonable compromise. Such a short period of time does raise doubts, however, that it is adequate to correct the abused rights of innocent consumers. A period of twenty-four months appears to be a more reasonable limitation.

ever. In reality the evidence shows that the great majority of the abuses are not occasioned through the evil intent or intentional inadvertance of the industry. Rather, the great majority of the enumerated abuses are the type that arise simply from the normal operation of the present procedures. The apparent answer to this need appears to lie in the creation of acknowledged rights for consumers and delineated responsibilities for credit rating organizations. Toward this desired end, therefore, the following model statute is respectfully submitted as an amendment to the Consumer Credit Reporting Act:

1. (a) (Reporters) shall require service contracts in which the (creditor) must certify each of the following:
(1) That inquiries will be made only for the purposes of (granting) credit or other bona fide business transactions.
(2) That the (applicant) will be provided with the name and address of the (reporter) from which it obtained any report that lead to the refusal of credit.
(b) The (reporter) shall refuse service to any prospective (creditor) who will not so certify, and shall discontinue service to any (creditor) who fails to comply with the certification required by subdivision (a).
2. The face of every application form used . . . for consumer credit shall indicate in eight-point bold type whether or not information offered by the applicant will be made available to any person other than the creditor.
3. No (reporter) shall require a consumer to grant immunity from legal action to the (reporter) or its sources of information, as a condition for obtaining access to his own credit report.
4. (a) Identifying information, such as names, addresses, former addresses, and places of employment or former employment, in the file of a (reporter) may be supplied to any governmental agency under contract for purposes other than evaluation of credit.
(b) Any other information in the file of (a reporter) shall be supplied to credit granting governmental subscribers for purposes of . . . evaluating credit applications. Other governmental subscribers . . . may obtain such information only in response to legal process.
5. (a) A (reporter) shall report bankruptcies of all types for not longer than 10 years from the date of adjudication of the most recent bankruptcy.
(b) A (reporter) shall report records of accounts placed for collection and records of accounts charged to profit and loss for not longer than five years, or until the governing statute of limitations has expired, whichever is shorter.
(c) A (reporter) shall report suits and judgments for not longer

than five years from date of entry, or until the governing statute of limitations has expired, whichever is shorter.

A (reporter) shall report paid tax liens for not longer than five years.

(d) A (reporter) shall report records of arrest, indictment, or conviction of crimes for not longer than five years from the date of release or parole. Such items shall no longer be reported if at any time it is learned that in the case of a conviction a full pardon has been granted, or in the case of an arrest or indictment, a conviction did not result.

(e) A (reporter) may report any other adverse data not otherwise specified in this section for not longer than five years.

6. California Civil Code section 1755(d) is amended to read: Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the reporter shall, at the request of the applicant, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subdivision (b) or (c) to any creditor specifically designated by the applicant who has within *twenty-four* months prior thereto received a report for credit purposes which contained the deleted or disputed information. The reporter shall disclose to the applicant his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the applicant's statement regarding the disputed information is received.

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