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Lawrence D. Frenzel

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# FAIR CREDIT REPORTING ACT: THE CASE FOR REVISION

## I. INTRODUCTION

The enactment of the Fair Credit Reporting Act (FCRA)<sup>1</sup> in 1970 was a major first step in providing consumers with protections against the previously unregulated consumer information industry.<sup>2</sup> Although the FCRA is the only legislation that currently protects individual privacy in the consumer marketplace,<sup>3</sup> it is the result of a compromise<sup>4</sup> which renders it inadequate in today's society.<sup>5</sup> This Comment initially traces the background of the FCRA. It then examines the protection of consumer privacy and consumer remedies against abuses by the consumer information industry, in light of recent legislative and judicial developments. A case is also made for strengthening the FCRA in two areas: consumer privacy and consumer protection. Finally, proposals for amending the Act are offered.

## II. THE FCRA—IN PERSPECTIVE

### A. Regulation of the Information Merchants

The consumer information industry, consisting of credit bureaus and investigative reporting agencies,<sup>6</sup> collects and disseminates information upon which decisions are based which control nearly every aspect of

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1. 15 U.S.C. §§ 1681a-t (1970). The Fair Credit Reporting Act, enacted October 26, 1970, became effective April 25, 1971.

2. Comment, *The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act*, 26 HASTINGS L.J. 1219, 1223 (1975) [hereinafter cited as *Calif. CRAA*].

3. Statement by Senator William Proxmire Before the Privacy Protection Study Commission, at 1 (August 3, 1976) [hereinafter cited as *Proxmire Privacy Statement*].

4. The consumer credit industry—both credit grantors and credit bureaus—opposed Senator Proxmire's first bill to establish a Fair Credit Reporting Act. The resultant legislation was the product of bargaining between Senator Proxmire and his staff and the consumer information industry. The industry cooperated in the enactment of the FCRA once they felt that it was reasonable and commercially feasible to do so. *Hearings on S. 1840 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 741 (1975) (statement of the International Consumer Credit Association) [hereinafter cited as *S. 1840 Hearings*]; *Calif. CRAA*, *supra* note 2, at 1223.

5. *Proxmire Privacy Statement*, *supra* note 3, at 1.

6. There are two basic categories of "credit reports." The file or ledger report contains only objective factual information that is easily verifiable, such as a person's

a person's economic activity, including the granting of credit,<sup>7</sup> insurance underwriting,<sup>8</sup> employment,<sup>9</sup> and licensing.<sup>10</sup> The importance of the services provided by the personal information merchants in today's complex, highly mobile society is unquestioned. Credit grantors, insurers, employers and landlords are unlikely to know much—if anything—about the people with whom they do business.<sup>11</sup> The needs of the users of credit and investigative reports are commensurate with the ever-increasing demands of consumers for goods and services. This symbiotic relationship breeds deleterious side-effects: impositions and limitations on the consumer's right of privacy through a lack of control over the information that is collected and disseminated about his personal life.<sup>12</sup> Thus the consumer's desire for benefits and

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financial and public record data. The investigative report contains objective data and subjective data concerning a person's general reputation, mode of living, and character. This latter information is obtained from a person's business associates, friends, neighbors, or anyone who may have information concerning him. This highly subjective information, based on value judgments and interpretations of both the interviewees and interviewers is used chiefly by insurance companies, employers and landlords, who desire as much personal information as possible on which to base their business decisions. Comment, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, 2 HASTINGS CONST. L.Q. 773, 776 (1975) [hereinafter cited as *Little Brother Is Watching*].

For a thorough profile of the types and functions of credit reporting and investigative agencies in the consumer information industry, see Foer, *The Personal Information Market: An Examination of the Scope and Impact of the Fair Credit Reporting Act*, 2 LOY. L. STUDENTS CONSUMER J. 37, 41-53 (1974) [hereinafter cited as Foer].

7. *Ackerley v. Credit Bureau, Inc.*, 385 F. Supp. 658 (D. Wyo. 1974) (credit refused on basis of inaccurate file information).

8. *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976) (insurance coverage revoked on basis of inaccurate investigative report).

9. *Retail Credit Co. v. Russell*, 218 S.E.2d 54 (Ga. 1975) (investigative agency published libelous report to employer).

10. *Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976) (medical license refused on basis of inaccurate investigative report).

11. See Calif. CRAA, *supra* note 2, at 1221; Comment, *The Fair Credit Reporting Act—From the Regulators Vantage Point*, 14 SANTA CLARA L. REV. 459, 461 (1974) [hereinafter cited as *FCRA—Regulators Vantage Point*]; Note, *Protecting Privacy in Credit Reporting*, 24 STAN. L. REV. 550, 556 (1972) [hereinafter cited as *Protecting Privacy*]. Cf. *Joint Hearings Before the Ad Hoc Subcomm. on Privacy and Information Systems of the Comm. on Gov't Operations and the Subcomm. on Const. Rights of the Senate Judiciary Comm.*, 93d Cong., 2d Sess. 150-51 (1974) (statement of Vincent P. Barabba, Director, Bureau of the Census) [hereinafter cited as *Privacy Hearings*]; Butterfield, *Data Banks and Privacy Discussed by Data-Keepers*, PSYCHIATRIC NEWS May 7, 1975, reprinted in *S. 1840 Hearings*, *supra* note 5, at 711.

12. Credit bureau and investigative agency files often contain material which is irrelevant to the business purposes for which such reports are used, even though it may be factually correct. Even material which is relevant may be of a highly personal nature, yet the subject of the file has little control over who may learn his personal

privileges, obtainable only from sources which require personal information about him, clashes with his desire for privacy.<sup>13</sup>

Unfortunately, the vast majority of consumers are unaware that their privacy is being infringed upon by the operations of the information merchants.<sup>14</sup> Unless consumers personally experience the denial of benefits based upon an erroneous report by a credit reporting or investigative agency, they are disinterested in potential abuses which impinge upon their privacy rights.<sup>15</sup> Yet these potential abuses—in the form of erroneously reported facts<sup>16</sup>—can leave the consumer without credit, insurance, or employment. Moreover, the consumer can be forced to accept less satisfactory insurance at higher rates, or even a lower-paying job.<sup>17</sup> In light of such potentially deleterious consequences, Congress found legitimate need for regulating those who provide personal information for the use of others.<sup>18</sup> Enactment of the FCRA was a significant step toward protecting the right of the consumer's personal privacy.<sup>19</sup> However, it is only a beginning, for it does not properly balance the individual's expectation of privacy against business' need to receive certain information relating to the consumer's credit reliability.

The basic purpose of the FCRA is to insure that the various types of consumer reporting agencies exercise their important responsibilities with fairness, impartiality, and with respect for the consumer's right to privacy.<sup>20</sup> The intent of the Act was not to make the acquisition of

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history. This can lead to embarrassment, especially when one tries to overcome the stigma of past indiscretions. An individual's chances of obtaining credit, employment, or insurance may be jeopardized by a single adverse incident in his record, even though that incident may be insignificant in predicting his present character. An even greater hazard facing consumers is the possibility that their file may contain erroneous or incomplete material which they are unaware of, and thus cannot correct. *Protecting Privacy*, *supra* note 11, at 550.

13. A 1973 report of the Department of Health, Education and Welfare noted that "[t]here is a widespread belief that personal privacy is essential to our well-being—physically, psychologically, socially, and morally." *Calif. CRAA*, *supra* note 2, at 1221.

14. *FCRA—Regulators Vantage Point*, *supra* note 11, at 461.

15. *Id.* at 462.

16. See notes 7-10 *supra*.

17. *Little Brother Is Watching*, *supra* note 6, at 801.

An individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports.

*Retail Credit Co. v. Russell*, 218 S.E.2d 54, 58 (Ga. 1975).

18. *Privacy Hearings*, *supra* note 11, at 151.

19. *Id.* at 37 (statement of Elliot L. Richardson).

20. 15 U.S.C. § 1681(a)(4) (1970).

private information impossible; rather it was to regulate abusive practices on the part of information merchants.<sup>21</sup> Implementation of the objectives of the Act is achieved by the creation of certain rights in the consumer: (1) the right to be notified whenever any adverse action is taken on the basis of a consumer report, including the name and address of the supplier and the nature of the adverse information;<sup>22</sup> (2) the right to learn the nature and substance of one's file from the consumer reporting agency, with the exception of medical information and sources of investigative information;<sup>23</sup> (3) the right to be told the non-investigative sources in one's file, and the names of individuals who have received reports;<sup>24</sup> (4) the right to have a consumer report disclosed only for legitimate business purposes (*e.g.*, credit, insurance, employment), or in connection with governmental licensing or benefits which require it;<sup>25</sup> (5) the right to dispute and/or have corrected inaccurate or unverifiable information;<sup>26</sup> (6) the right to know that an investigative report may be, or is being made and the opportunity to request disclosure of the nature and scope of the investigation,<sup>27</sup> with the right to have any adverse investigative information re-verified before it can be included in any report made more than three months after receipt of such adverse information;<sup>28</sup> (7) the right to have certain obsolete data removed from the consumer report;<sup>29</sup> and (8) the right to bring a civil suit for willful<sup>30</sup> and negligent<sup>31</sup> noncompliance with provisions of the Act.<sup>32</sup> There is strong

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21. Foer, *On the Consumption of Consumer Reports: A Guide to the Investigating Lawyer* 14, cited in *S. 1840 Hearings*, *supra* note 4, at 67. These merchants consist of essentially 2500 credit bureaus and a small number of investigative reporting companies, *Privacy Hearings*, *supra* note 11, at 464, which collectively maintain files on over 100 million consumers. See *S. 1840 Hearings*, *supra* note 4, at 20.

22. 15 U.S.C. § 1681m (1970).

23. *Id.* § 1681g. However, the consumer does not have the right to be given physical access to, or copies of, his reports. *Privacy Hearings*, *supra* note 11, at 464.

24. 15 U.S.C. § 1681g (1970). This information is restricted to the previous six months for credit or insurance purposes, and to the preceding two years for employment purposes. *Id.*

25. *Id.* § 1681b. The consumer has the right not to have anything more than identifying information disclosed to governmental agencies, unless by court order. *Id.* § 1681f.

26. *Id.* § 1681i.

27. *Id.* § 1681d. The consumer does not have the right to know if an investigative report is being made for employment purposes. *Id.*

28. *Id.* § 1681l.

29. *Id.* § 1681c.

30. *Id.* § 1681n.

31. *Id.* § 1681o.

32. See generally FEDERAL TRADE COMMISSION BUREAU OF CONSUMER PROTECTION,

evidence, however, that despite the conferral of these rights upon the consumer, abusive practices persist.<sup>33</sup> It is primarily in the area of investigative reports that the more serious problems exist.<sup>34</sup>

Senator William Proxmire, chief advocate for strengthening FCRA consumer protections, has long recognized the deficiencies in the original Act, but has been unsuccessful in his efforts to amend it.<sup>35</sup> The debate over whether or not to expand the consumer's protection against the consumer information industry has raged between such groups as the Federal Trade Commission, civil libertarians, and consumer advo-

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COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT (2d ed. May 7, 1973) (discussion of provisions and requirements of the FCRA designed to assist the business community in understanding the Federal Trade Commission's interpretation of the Act).

33. Inaccurate information continues to appear in consumer reporting files, primarily because of human fallibility compounded by lax hiring practices, policies emphasizing production quantity over quality, and encouragement of the development of adverse information. *Little Brother Is Watching*, *supra* note 6, at 777-82.

34. R. ROHNER, MEMORANDUM ON FCRA AMENDMENTS, COMM. PRINT NO. 2 OF S. 1840, at 2 (April 26, 1976) [hereinafter cited as COMM. PRINT NO. 2].

Investigative reports, by definition, are those in which information about an individual's character, morals or life-style is collected by personal contact with neighbors, friends and other associates. The information is subjective, and the method of collection can create invasion of privacy problems.

*Id.*

35. Senator Proxmire introduced S. 2360, a bill designed to strengthen the FCRA, in 1973 and conducted hearings in 1973 on the issue of balancing the interests of consumer privacy rights with the interests of creditors, insurers, and employers to have sufficient information to pass on consumer applications. However, S. 2360 was tabled. Additional hearings were conducted in 1974 which focused on procedures used by consumer reporting agencies to gather information for consumer reports. In mid-1975, Senator Proxmire introduced S. 1840. Thereafter, hearings took place on the issue of increasing consumer protections under the Act. S. 1840 was then redrafted to deal exclusively with investigative consumer reports. In this form, it will be introduced in the 95th Congress. COMM. PRINT NO. 2, *supra* note 34, at 1; Proxmire Privacy Statement, *supra* note 3, at 11; Telephone interview with Joseph Fish, Senator Alan Cranston's Legislative Assistant, Los Angeles Office, August 6, 1976. See generally *S. 1840 Hearings*, *supra* note 4; *Hearings on Amending the Fair Credit Reporting Act Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 2d Sess. (1974); *Hearings on S. 2360 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *S. 2360 Hearings*].

Senator Proxmire summarized some basic deficiencies in the present FCRA before the Privacy Protection Study Commission:

Under the present law, consumers get no prior notification that reports will be prepared about them. Only in the case of investigative reports . . . is the consumer even told afterwards that a report has been or may be prepared. Of all the information that might be collected, medical information is certainly the most sensitive and personal. Yet to this day consumers who sign medical authorization forms have no clear indication of the virtually indiscriminate uses that may be made of that data in the future.

The present law requires that when a consumer is denied credit, insurance or employment on the basis of a report, he be advised of the identity of the reporting

cates on one side, and consumer reporting agencies, insurance underwriters, and creditors on the other side.<sup>36</sup>

This debate has focused upon the competing interests of the individual's right of privacy and business' need to know, the cost of collecting information and the need for accuracy, and finally, the minimum versus the maximum allowable rights of each individual consumer.<sup>37</sup>

The consumer reporting agencies have consistently, adamantly, and unanimously maintained that the FCRA is overwhelmingly successful in fulfilling Congress' express intent.<sup>38</sup> Armed with statistics revealing extremely small numbers of consumer complaints—compared to the millions of consumer reports issued—the reporting agencies contend that the casualties of consumer reporting abuses are negligible.<sup>39</sup> They have even rationalized the reported consumer complaints (except those apparent few caused by mere clerical errors) by contending that the complainants had no legitimate grievances against the reporting agencies, but rather were disgruntled over being denied benefits by the

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agency which supplied the report. But denials of benefits, or increases in the charges for those benefits, are not the only adverse actions that a consumer report may precipitate, and the Act leaves those other possibilities untouched. I understand, also, that earlier testimony before this Commission revealed that many life insurance companies make their decisions on the basis of reports supplied by the Medical Information Bureau, even though that Bureau's own bylaws prohibit such reliance. Here is one clear case where consumers are being affected by reports they may never know have been made.

The most common complaint I have heard from consumers about the Fair Credit Reporting Act is that they cannot get full access to their own files when they go to the reporting agency for that purpose. All the present law requires is that the agency disclose to the consumer the 'nature and substance' of the information. This means that reporting agency employees can excerpt the file contents orally to the consumer and satisfy their legal obligation, without allowing the consumer to actually see or handle the file itself. Further, if the consumer wishes to challenge the information in the file, he may do so, but there is no requirement in the law that the reporting agency tell him of this right, or of his right to file a written statement which must be included in subsequent reports.

Proxmire Privacy Statement, *supra* note 3, at 5-6.

36. See COMM. PRINT No. 2, *supra* note 34, at 2.

37. *Calif. CRAA*, *supra* note 2, at 1222.

38. Many statements made by credit reporting agencies, investigative reporting agencies, credit grantors, and insurance underwriters in the *S. 1840 Hearings* contained conclusions indicating that the FCRA is working well and fulfilling its Congressional objectives. See, e.g., *S. 1840 Hearings*, *supra* note 4, at 549, 567, 617, 663, 687.

39. The FTC claimed that it had received some 20,000 complaints during the four years subsequent to the effective date of the FCRA, but Associated Credit Bureaus, Inc. (a trade association representing approximately 1,800 credit bureaus which produce an estimated 100 million credit reports annually) analyzed the FTC complaints pursuant to a freedom of information request and discovered only 682 bona fide complaints out of approximately 600 million issued consumer reports. *S. 1840 Hearings*, *supra* note 4, at 20, 122.

The following remarks of W. Lee Burge, President of Retail Credit Co. (subsequently renamed EQUIFAX, Inc.), the largest investigative reporting agency in the country,

users of the reports.<sup>40</sup> These arguments tend to exculpate the consumer reporters from responsibility for consumer complaints, and place the blame on the consumers themselves.

In addition to their statistical "front-line" justification for retaining the present FCRA intact, the information merchants have offered a "second-line" justification, characterized as a self-regulation theory. This position favors the *status quo* on the basis that certain consumer reporting agencies currently follow self-prescribed codes or principles of conduct which are in complete harmony with the FCRA.<sup>41</sup> The principles of conduct espoused by the agencies allegedly protect consumers, as does the FCRA, yet they do not hamper the interchange of information needed for consumers to do business in the financial community.<sup>42</sup> In recent hearings on amending the FCRA, one representative of the credit reporting industry pointed out that FCRA regulations prescribing file disclosure for credit bureaus were similar to procedures undertaken prior to the Act, when disclosure was *voluntary*.<sup>43</sup> Thus, the credit reporting groups argue that they are a self-regulating

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typify the industry's rather casual attitude toward consumer reporting abuses:

It is true that mistakes are occasionally made in our industry. There are cases of mistaken identity which occur. A father's record may be confused with that of his son. A wrong address. Arguments about credit with a retail store or financial institution. A payment which may have been made by someone and not yet recorded in the maze of an accounting system—computerized or otherwise.

We diligently keep close records on the number of errors in Retail Credit Company reports, and of the millions of consumer reports we make each year, the number of errors is minute.

Nevertheless, we continue to strive to reduce errors to the irreducible minimum. Certainly we fully realize our solemn responsibility to see that no harm comes to any individual through our errors. It is in our own enlightened self-interest to do so. If it is true—and it is true—that a customer will not buy information for which he has no use, then it is even more true that he will not pay for information that is inaccurate. My company simply could not have grown, expanded, and been successful in serving business for the last 70 years if it did not keep errors to a *reasonable minimum*.

*Privacy Hearings, supra* note 11, at 652-53 (emphasis added). *See S. 1840 Hearings, supra* note 4, at 734-37.

40. *See S. 1840 Hearings, supra* note 4, at 125-26; *Privacy Hearings, supra* note 11, at 651-52.

41. For example, TRW Credit Data, the largest automated computerized credit agency in the country (maintaining credit reports on over 50,000,000 consumers) had a code of ethics which preceded the FCRA. TRW CREDIT DATA, CODE OF ETHICS (1972).

42. In order for the business community to do business and extend credit it must evaluate each risk and base its decisions on factual data. It is the information merchants' business to provide information to the decision makers, so that the consumer and the businessman will have an opportunity to make credit decisions. *See Privacy Hearings, supra* note 11, at 650. Reporting agencies attempt to maintain the most accurate and current information in a consumer's file to prevent any impairment of business transactions. *S. 1840 Hearings, supra* note 4, at 644.

43. Problems can arise when a consumer seeking a benefit is turned down. Frequent-



industry,<sup>44</sup> and that in spite of the FCRA, they have successfully protected consumer rights while serving the needs of business.<sup>45</sup>

Under close analysis, the arguments supplied by the information merchants are illusory; they are merely a clever alchemization of quantitative data into qualitative conclusions. First, industry self-regulation is simply not adequate to protect crucial consumer privacy considerations, as industry goodwill is not an effective policing medium.<sup>46</sup> Second, the seemingly low statistical measure of consumer reporting abuse belies assertions that the FCRA is functioning smoothly, for it ignores a basic premise on which the Act was founded: respect for the consumer's right to privacy.<sup>47</sup>

### B. *The Basis for the Consumer's Right to Privacy*

The Supreme Court has recognized a "right to privacy," under the United States Constitution.<sup>48</sup> This guarantee protects against inter-

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ly the reporting bureau's interviewer is unable to tell the consumer why he was denied credit when disclosing the nature and substance of the report.

Sometimes in these situations, the consumer is convinced that all of the information in his file has not been disclosed. Supposedly, these dissatisfied persons want to be able to handle their files or to be able to obtain hard copies of report information. But logic should make it clear that such suspicious persons would believe that a second file or report was being withheld, even if they would be permitted to read the actual file or to obtain a hard copy of the report. And it is important to note that these situations did not arise when credit bureau file disclosure was voluntary before the advent of the Fair Credit Reporting Act.

S. 1840 Hearings, *supra* note 4, at 739 (statement of the International Consumer Credit Assoc.).

44. See notes 41-43 *supra* and accompanying text.

45. See notes 39-40 *supra* and accompanying text.

46. Proxmire Privacy Statement, *supra* note 3, at 12, 13. This is evidenced by recent litigation where goodwill was so evidently lacking. See, e.g., *Ackerley v. Credit Bureau Inc.*, 385 F. Supp. 658 (D. Wyo. 1974); *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976); *Nitti v. Credit Bureau, Inc.*, 375 N.Y.S.2d 817 (1975). For further in-depth analysis of recent litigation, see notes 113-83 *infra* and accompanying text.

47. 15 U.S.C. § 1681(a)(4) (1970).

48. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Seven justices concurred in the opinion, holding that privacy is protected within the "penumbras" of the Constitution and is enforceable against adverse state action through the due process clause of the fourteenth amendment. The Court, however, disagreed on the theory used to reach that conclusion. Justice Douglas found the right of privacy to be implicit in the Bill of Rights, protected by the first, third, fourth, fifth and ninth amendments. Justices Goldberg, Warren and Brennan determined that the right of privacy is one of the additional fundamental rights protected by the ninth amendment. And Justices Harlan and White relied on the due process clause of the fourteenth amendment to protect the citizen's privacy.

The following excerpt from the testimony of Virginia H. Knauer, Special Assistant to the President for Consumer Affairs, before the Senate Subcommittee during the S. 1840

ference with an individual's right to have personal activities and information kept within the parameters of the individual's control.<sup>49</sup> The remedies for invasions of this right have been previously limited to situations in which abuses have amounted to the abridgment of fundamental constitutional guarantees.<sup>50</sup> The range of these fundamental guarantees has been slow to expand, occurring only in response to what the courts have deemed "extraordinary circumstances."<sup>51</sup>

The Constitution's "penumbra" of privacy does not yet extend its protection as far as does the common law,<sup>52</sup> which protects privacy through four main torts:

To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by a 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.' . . .<sup>53</sup>

Given these two potential sources of privacy protection, it would appear that potential consumer-plaintiffs would have a cause of action when information merchants gather and disseminate personal infor-

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Hearings further supports the citizen's right to privacy in both the governmental and private sectors:

Consumers have a vital interest in the collection, storage, and dissemination of information regarding their credit-worthiness, insurability, and employability. The manner and methods of handling this information impact on the consumer not only with regard to his ability to receive certain benefits in the marketplace, but also with regard to his ability to insure personal privacy.

This interest was recognized by the Privacy Act of 1974, which found that the right to privacy is a personal and fundamental right protected by the Constitution and that an individual's privacy is directly affected by the collection, maintenance, use, and dissemination of personal information.

*S. 1840 Hearings*, *supra* note 4, at 623. *But see Little Brother Is Watching*, *supra* note 6, at 796: "Individual privacy has not been protected by the courts when it was found to be outweighed by the public interest;" *see S. 1840 Hearings*, *supra* note 4, at 741-42 (statement of the International Consumer Credit Association).

49. *See Roe v. Wade*, 410 U.S. 113, 152-53 (1971) (a woman has a right to privacy concerning the determination of whether or not to have an abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) (the right of privacy includes the right of an individual to be free of governmental intrusion into matters affecting the personal judgment of whether to have a child). *Cf. Loving v. Virginia*, 388 U.S. 1, 12 (1966).

50. *York v. Story*, 324 F.2d 450, 454-55 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); *Morris v. Danna*, 411 F. Supp. 1300, 1303 (D. Minn. 1976), *citing* *Griswold v. Connecticut*, 381 U.S. 479 (1964). *See Runyon v. McCrary*, 96 S. Ct. 2586, 2597-98 (1976), *citing* *Roe v. Wade*, 410 U.S. 113, 152-53; *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971); *Stanley v. Georgia*, 399 U.S. 557, 564-65 (1969). *See also* *Loving v. Virginia*, 388 U.S. 1, 12 (1966); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941).

51. *Morris v. Danna*, 411 F. Supp. 1300, 1304 (D. Minn. 1976).

52. *Id.*

53. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 804 (4th ed. 1971). For an in-

mation about their activities and their financial status. Despite these sources of protection, however, the consumer has difficulty seeking redress, due to the qualified privileges accorded to reporting agencies by the FCRA.<sup>54</sup> Consequently, the FCRA allows violations of the protected right of privacy; and the true indicia of the FCRA's ineffectiveness are the abuses themselves which have occurred—and are occurring—as the result of this lack of protection in the Act.<sup>55</sup>

These deficiencies have been systematically exposed<sup>56</sup> through testimony focusing upon three areas in which the FCRA needs strengthening: coverage, clarity and liability.<sup>57</sup> The major issues involve the need for stronger protections for consumer privacy, more viable remedies to deter violations of the Act, and adequate compensation for those who are wronged by violations.

The Federal Trade Commission, which has responsibility for administering the FCRA,<sup>58</sup> has noted that consumers often fail to understand why they have no right to control the commercial dissemination of personal information. This stems from the fact that the Act's basic purpose is remedial rather than preventive; it provides consumers with the right to correct erroneous information which only comes to their attention after denial of credit.<sup>59</sup> Thus, under the current law,

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depth discussion of the four torts, *see id.* at 804-12.

54. See notes 123-29 *infra* and accompanying text.

55. See generally *Little Brother Is Watching*, *supra* note 6, at 778-82, which examines basic abuses of investigative reporting permitted by the FCRA, *i.e.*, unrealistic production goals forcing "short-cut" reporting; quotas on adverse information superseding accurate information gathering; failure to verify inaccurate public record information; outright evasion of the FCRA's minimal consumer protections. See *S. 1840 Hearings*, *supra* note 4, at 89-104 (statement of Robert Ellis Smith, Publisher, *Privacy Journal*), for several factual situations where different types of consumer reporting abuses occurred (*e.g.*, deceptions in gathering information by investigators, inaccuracy in reporting, prejudicial reporting, unfair information practices). *Privacy Hearings*, *supra* note 11, at 467. See also Fialka, *The Information Seekers: Your Privacy Is Their Concern*, Washington Star-News, May 25, 1974 reprinted in *Privacy Hearings*, *supra* note 11, at 2025-29; *cf. S. 1840 Hearings*, *supra* note 4, at 679 (testimony regarding improper use of credit reports, for example, prostitution ring running credit checks on its customers). See generally 15 U.S.C. § 1681(a)(4), (b) (1970); notes 20 & 21 *supra* and accompanying text.

56. See *S. 1840 Hearings*, *supra* note 4, at 16, 622; *Calif. CRAA*, *supra* note 2, at 1230; *FCRA—Regulators Vantage Point*, *supra* note 11, at 480-81; *Protecting Privacy*, *supra* note 11, at 560-61.

57. *Privacy Hearings*, *supra* note 11, at 467. The basic approach of the FCRA is sound, but in order for it to be effective, it must be improved, particularly in the areas of access to the consumer's file, the nature of the notice furnished to the consumer by the report user, the civil liability provisions, and coverage relating to governmental entities involved in consumer reporting activities. *Id.* at 465.

58. 15 U.S.C. § 1681s (1970).

59. *S. 1840 Hearings*, *supra* note 4, at 11.

consumers are not conscious participants in the vast information industry which collects and distributes data.<sup>60</sup> It is essential that the burden of correcting abuses be shifted from the consumer to the information merchants so that the individual will cease to be an uninformed victim, and will instead become the master of his own information.<sup>61</sup>

### III. CONSUMER PRIVACY

#### A. *Striking a Balance*

The right to privacy has been defined in a variety of ways.<sup>62</sup> The most important definition embraces the concept of intelligent control over the collection and dissemination of information concerning one's personal affairs.<sup>63</sup> The consumer must know what type of information

60. *Id.* at 10.

61. *Id.*; *Privacy Hearings*, *supra* note 11, at 154.

Lack of consumer education is a major problem which must be considered in making the consumer an active participant in the collection and distribution of his personal data. Unless the consumer is made aware of his rights, the law will be of little value to him. This problem is demonstrated by the following observations of a recent commentator who took an informal survey of consumers who were notified of an adverse credit report in compliance with 15 U.S.C. § 1681m(a) (1970):

[L]ess than twenty-five per cent of those persons notified of an adverse credit report went to the credit bureau identified, but the reasons given ran the gamut from distrust of the bureau, misunderstanding of their right to challenge information, to the inconvenience of making the visit in light of the benefit (another new credit account) being sought. Some consumers stated that they just thought it would not do any good to visit the bureau.

*FCRA—Regulators Vantage Point*, *supra* note 11, at 472. *But see S. 1840 Hearings*, *supra* note 4, at 134 (statement of Donald W. Ogden, President, Credit Bureau of Monroe, Inc.), indicating that the reporting industry has been active, from a publicity standpoint since passage of the FCRA, in explaining its operations and consumer rights relative to those operations.

62. Courts have defined the right of privacy as a purely personal right to be let alone, or to live a life of seclusion, or to be free from unwarranted publicity, or to live without unwarranted interference by the public into matters about which the public is not generally concerned.

Comment, *Fair Credit Reporting Act: Constitutional Defects of the Limitation of Liability Clause*, 11 Hous. L. REV. 424, 426 (1974) [hereinafter cited as *FCRA: Constitutional Defects*].

63. *S. 1840 Hearings*, *supra* note 4, at 11; *Little Brother Is Watching*, *supra* note 6, at 775.

IBM developed four basic principles of privacy in recognition of the country's concern with preserving the individual's right to privacy in the face of expanding information needs by both government and the private sector. The following principles first appeared in an advertisement in *TIME*, *NEWSWEEK*, and *U.S. NEWS & WORLD REPORT*, July 8, 1974:

1. Individuals should have access to information about themselves in record-keeping systems. And there should be some procedure for individuals to find out how this information is being used.

is being sought, as well as the manner in which that information will be collected, in order to make an informed decision about whether to permit the collection and dissemination of such data.<sup>64</sup>

The pressing problem with the current FCRA is that an imbalance exists which weighs heavily in favor of the reporting industry; consumers do not have adequate control over their commercially maintained personal information.<sup>65</sup> As a result, invasions of consumer privacy<sup>66</sup> can occur in varying degrees, which may result in injuries ranging from embarrassment to defamation.<sup>67</sup>

It is even possible for a consumer's privacy to be invaded without his knowledge.<sup>68</sup> In *Kelley v. Rinkle*,<sup>69</sup> a recent Texas Supreme Court case, this issue was raised in relation to a statute of limitations problem. The plaintiff brought a libel action after being reported to a credit agency's subscriber as owing money on a past-due account. The court held that the statute of limitations for a libel action for publication of a defamatory report to a credit agency begins to run when the person defamed learns or should have learned of the existence of the report.<sup>70</sup> It also recognized that in many cases a consumer may not learn of the existence of a libelous credit report until several months after its publication to the credit agency.<sup>71</sup> The Texas court further acknowledged

2. There should be some way for an individual to correct or amend an inaccurate record.

3. An individual should be able to prevent information from being improperly disclosed or used for other than authorized purposes without his or her consent, unless required by law.

4. The custodian of data files containing sensitive information should take reasonable precautions to be sure that the data are reliable and not misused.

*Privacy Hearings*, *supra* note 11, at 669.

64. *S. 1840 Hearings*, *supra* note 4, at 11.

65. For example, in the area of investigative reports, the FCRA does not restrict the reporting of such highly personal information as a person's sex habits or political affiliations. *FCRA: Constitutional Defects*, *supra* note 62, at 430.

66. The courts consider the following factors in determining whether or not an individual's privacy has been unconstitutionally invaded: "(1) invasion of personal privacy or privacy of the home; (2) actual harm; (3) balancing of other interests; and (4) existence of less restrictive alternatives." *Little Brother Is Watching*, *supra* note 6, at 791.

67. *See id.* at 803-04; *Protecting Privacy*, *supra* note 11, at 554.

"A reputation is a fragile thing—there is no such thing as complete vindication when false rumors are circulated." Comment, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Fair Credit Reporting Act*, 47 S. CAL. L. REV. 1070, 1074 (1974) [hereinafter cited as *FCRA Negligent Noncompliance*].

68. *See Calif. C.R.A.A.*, *supra* note 2, at 1233, where it is noted that medical information will often be released without the consumer's consent or awareness.

69. 532 S.W.2d 947 (Tex. 1976).

70. *Id.* at 949.

71. *Id.*

significant potential for abuse by those who would use credit information systems to wrongfully injure the consumer's credit reputation.<sup>72</sup> A consumer with no control over the sale of personal information will have no reason to suspect that his report might contain erroneous or defamatory information until it is too late; until the report has already been furnished to a reporting agency or user.<sup>73</sup>

The foundational right of individuals to retain a "vital, real and proprietary interest"<sup>74</sup> in personal information that is obtained and stored by others was recognized by Congress when it enacted the Privacy Act of 1974.<sup>75</sup> Although the purpose of the Privacy Act is to protect the privacy of individuals identified in information systems maintained solely by federal agencies,<sup>76</sup> the fundamental principles of privacy which govern the agencies are applicable to the FCRA as well. The two legislative schemes are in fact analogous in the areas of information disclosure,<sup>77</sup> access to records,<sup>78</sup> notations of dispute,<sup>79</sup> and civil remedies,<sup>80</sup> but the Privacy Act affords greater protection to the individual's right of privacy. This additional protection is particularly apparent in the critical areas relating to access and relevancy of information.<sup>81</sup> Access by consumers to their files can be considered one of the best guarantees of the right to privacy.<sup>82</sup> Moreover, a guarantee that file information which is dispensed to

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72. *Id.*

73. *Id.* The FTC noted, for example, a justification for the individual's right to control his own information in reports prepared for employment purposes, where an applicant could lose a job or advancement opportunity as a result of an inaccurate or defamatory report:

[A]n employment applicant has a special need to be alerted to possible inaccuracies in information supplied to a potential employer before the employer sees that information. The applicant may or may not be able to offer proof of inaccuracy to the employer, but at least will be able to present a claim of inaccuracy.

S. 1840 Hearings, *supra* note 4, at 28. Cf. *Protecting Privacy*, *supra* note 11, at 560.

74. Proxmire Privacy Statement, *supra* note 3, at 2.

75. 5 U.S.C. § 552a (Supp. V, 1975).

76. *Id.* § 552a(5).

77. Compare 5 U.S.C. § 552a(b), (c) (Supp. V, 1975) with 15 U.S.C. §§ 1681d, 1681f, 1681g, 1681h (1970).

78. Compare 5 U.S.C. § 552a(d) (Supp. V, 1975) with 15 U.S.C. § 1681j (1970).

79. Compare 5 U.S.C. § 552a(d)(4) (Supp. V, 1975) with 15 U.S.C. § 1681i (1970).

80. Compare 5 U.S.C. § 552a(g) (Supp. V, 1975) with 15 U.S.C. § 1681n (1970).

81. The Privacy Act provides for access to records, permitting visual inspection and the right to copy, for which the FCRA does not provide. 5 U.S.C. § 552a(d) (Supp. V, 1975). The Privacy Act also contains a relevancy provision which restricts the information an agency can maintain on an individual to that which is relevant and necessary for that agency's particular purposes. *Id.* § 552a(e).

82. S. 1840 Hearings, *supra* note 4, at 3 (statement of Senator Proxmire). The Federal Trade Commission fully supports the individual's right to have full access to personal information held in the files of government and private organizations. *Privacy*

report users is correct, complete, and relevant is necessary to insure that the consumer's privacy will not be impinged upon any more than is absolutely necessary.<sup>83</sup> Affording the individual protections in the private sector that are already guaranteed by the federal government would be the first step in striking a fair balance between the consumer's limited privacy and the reporting industry's need to utilize information for legitimate business purposes.<sup>84</sup>

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*Hearings, supra* note 11, at 460. See *S. 1840 Hearings, supra* note 4, at 624-25 for further governmental support of legislation which would allow consumer access to files.

83. *Id.* at 3.

What kinds of information are really necessary for purposes of insurance, employment, and creditworthiness beyond known performance standards?

Does it really make a difference in the cancellation of automobile insurance to know that a female policy holder has a "hippie-type" son? This critical question of relevancy must ultimately be resolved by the consumer reporting industry. It is indeed difficult to legislate relevancy effectively—the market-place is in the better position to deal directly with this problem through adequate disclosure.

*Id.* at 626 (statement of Virginia Knauer, Special Assistant to the President for Consumer Affairs).

Information is said to be irrelevant for its intended use when the data in no way relates to the purpose or decision for which the report was compiled. Although irrelevant information is not necessarily harmful, often this type of information covers highly personal matters generally considered within an individual's protected area of privacy.

*FCRA: Constitutional Defects, supra* note 62, at 430. See *Protecting Privacy, supra* note 11, at 555 (irrelevant data enables report users to make ostensible business decisions on the basis of personal bias).

*Contra, S. 1840 Hearings, supra* note 4, at 610 (statement of the Consumer Bankers Association).

[The] search for information is not a vicarious trip into the customer's private life. The customer expects to be investigated and he very, very rarely even suffers from the procedure. The question of relevant information gathering by the loan officers is difficult to address because of the variety of circumstances presented by loan applicants. What may be relevant in one loan situation may not be relevant in another.

*Id. Cf. Privacy Hearings, supra* note 11, at 471 (the FTC is convinced that limiting the collection of "relevant" information is not feasible).

A relevancy issue was decided in a recent case against a defendant reporting agency which provided subscribing merchants with names and check cashing histories of thousands of individuals with whom they would never do business. Preliminary injunctive relief was granted to a plaintiff class consisting of all persons whose names had been passed or presently appeared on various lists collected and disseminated. The court noted that since information on a particular consumer may only be provided to a report user who requires it for a specific transaction with that particular consumer, the defendant's practices clearly failed to comply with the FCRA. *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092, 1096 (D. Ariz. 1974). *But cf. Herring v. Retail Credit Co.*, 224 S.E.2d 663 (S.C. 1976) (the inclusion and reporting of public record information did not violate the FCRA or invade the consumer's privacy).

84. Senator Proxmire, in his testimony before the Privacy Protection Study Commission, divided privacy protection into three critical ingredients which are needed to properly balance consumer and reporting needs:

The first and most important is that consumers give their informed consent to the collection and distribution of information about themselves. This means that an individual is entitled to know the purpose for which information is collected, the

### B. Bifurcation of the FCRA

A further modification necessary to effectuate the balancing of consumer and consumer reporting interests is the bifurcation of the FCRA into two distinct acts: one dealing with credit reports; the other dealing with investigative reports.<sup>85</sup> Nearly all consumer reporting abuses exposed in recent hearings on proposed amendments to the Act concerned investigative reporting.<sup>86</sup> This is an area where the greatest potential for invasion of privacy exists. This does not necessarily mean, however, that the FCRA is adequate with respect to credit bureaus that merely collect and distribute ledger information.<sup>87</sup> There is no question that factual errors do occur which can injure the consumer.<sup>88</sup> However, erroneous data contained in credit reports are generally more accessible and easier to correct than information found in investigative reports.<sup>89</sup> The key to improving consumer protection

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kinds of information sought and the kinds of sources to be contacted, and where and how that information will be stored, and how it will be used.

It may be fair to say that consumers impliedly consent to reports about them when those reports are nothing more than routine collections of their credit histories gathered in connection with a credit application. But the consumer's consent to a broad-ranging investigation of his or her character, morals and life-style is not so easily implied from a simple application for insurance or employment.

Secondly, the individual must be able to know when that information has been used against him, and by whom. Otherwise we give approval to secret decisionmaking processes which the consumer is powerless to confront or challenge.

Lastly, the consumer is entitled to an assurance that information about him that is collected and distributed by consumer reporting agencies is accurate, complete and relevant to the purposes for which it is used. This is nothing more than fundamental fairness. The credit or insurance or employment applicant ought not be the subject of slipshod investigative techniques, or haphazard data collection, or of distorted recording, reporting or evaluation methods. A heavy burden ought to rest on the reporting agencies to assure that their procedures and their reports are as accurate and thorough as possible. And the insurance actuaries ought to be made to justify their claimed "need" for subjective and personal information. Even more importantly, consumers must have a chance to see for themselves exactly what is in their files, and must have an effective opportunity to challenge inaccurate information.

Proxmire Privacy Statement, *supra* note 3, at 3-4. See also S. 3349, 94th Cong., 2d Sess. (1976). This bill, known as the "Bill of Rights Procedures Act of 1976," was introduced to protect citizens' privacy rights with regard to bank records, credit records, telephone records; mail covers, service monitoring; and nonverbal communications. While primarily intended to prevent any sort of governmental access to, *inter alia*, an individual's credit records without the individual's authorization, it supports the basic premise that the individual is entitled to control over private record information. It also recognizes the need to strengthen consumer privacy protection.

85. S. 1840 was amended to deal exclusively with stronger regulation of investigative reporting agencies. Proxmire Privacy Statement, *supra* note 3, at 11.

86. S. 1840 Hearings, *supra* note 4, at 144.

87. Proxmire Privacy Statement, *supra* note 3, at 12.

88. See note 156 *infra* and accompanying text.

89. See, e.g., Federal Trade Commission, Know Your Rights Under the Fair Credit Reporting Act, A Checklist for Consumers (1972); Associated Credit Bureaus, Inc., Credit Bureaus and the Fair Credit Reporting Act (1971).



is through better notification procedures,<sup>90</sup> and stronger remedial measures for FCRA violations.<sup>91</sup> Credit bureaus adamantly support bifurcation of the FCRA because they do not want to be associated with investigative agencies which have been responsible for nearly all derogatory publicity associated with the consumer reporting industry.<sup>92</sup> The International Consumer Credit Association has gone so far as to say that combining the regulation of credit and investigative reports into one law has irreparably damaged the reputations of ethical, bona fide credit bureaus.<sup>93</sup>

While the underlying premise is that investigative reports inherently contradict the constitutional right of privacy,<sup>94</sup> these reports serve the legitimate needs of insurers and employers who must protect themselves against unreasonable risks.<sup>95</sup> Despite this purported legitimate need for highly subjective information, the insurance companies' claims that they require such information are unsubstantiated.<sup>96</sup> Yet

90. See notes 69-81 *supra* and accompanying text.

91. See generally notes 131-86 *infra* and accompanying text.

92. See *S. 1840 Hearings*, *supra* note 4, at 136, 739-40. Associated Credit Bureaus, Inc. has set forth the following list of misconceptions about credit bureaus which they feel result in unfair publicity:

1) Credit bureau files are *not* secret and anyone is entitled to know what is in the file about him, including the names of sources.

2) Any individual may challenge any information about him in a credit bureau file, correct it if it is in error or have his side of the dispute reported whenever the information is disseminated.

3) Credit bureaus do not gather information about personal habits, morals, characteristics, etc., and do not employ outside investigators to interview neighbors or friends. Such reports are known as 'investigative reports' and are compiled for insurance companies by *other* consumer reporting organizations—*not* by credit bureaus.

4) Only persons with a permissible purpose may have access to a credit report, and those purposes are spelled out in the Federal Fair Credit Reporting Act.

*Privacy Hearings*, *supra* note 11, at 520.

93. See *S. 1840 Hearings*, *supra* note 4, at 739.

94. *Little Brother Is Watching*, *supra* note 6, at 802.

95. *Id.*

In the credit industry alone hundreds of millions of dollars rest upon decisions regarding the extension of credit to individuals. The decisionmakers must be informed about a person's solvency and reliability. Automobile insurers need to know a person's driving record and other pertinent facts before taking the risk of insuring that person. Life insurance companies should know the medical history and the physical condition of the applicant, as well as the hobbies and interests of the applicant if they involve special dangers such as skydiving or mountain-climbing. An employer should know the experience and abilities of a prospective employee and the educational background of the applicant and his characteristics which might determine suitability for a particular assignment. The filing of such information holds certain cost-saving efficiencies which are helpful in the business world. The information thus gathered allows for "statistical stereotyping" as a means of making a large number of decisions in the shortest amount of time.

*Id.*

96. *Id.* at 804. No actuarial tables exist concerning the additional risks involved in insuring, for example, unmarried couples who live together.

this personal information, which is irrelevant and often based upon the opinions of third persons, is routinely gathered and filed by investigative reporters, thereby violating the consumer's personal privacy.<sup>97</sup>

Employers utilize the same kind of personal information in evaluating prospective or advancing employees.<sup>98</sup> One justification for this practice was advanced by the National Association of Manufacturers:

It is naive to anticipate that persons, whose names are supplied as references by the applicant or employee, will supply the same quality of information as would be contained in the investigative consumer report.<sup>99</sup>

Possibilities for error and invasions of privacy are much greater with investigative reports than with credit reports.<sup>100</sup> Consequently, different controls are needed to protect consumers from the inherently different kinds of consumer reports. The answer lies in bifurcation of the Act.

The first method of control is to give consumers the opportunity to consent to the collection and use of any personal information.<sup>101</sup> Pragmatically, it is doubtful that anyone would decline to authorize a required investigative report when applying for credit.<sup>102</sup> Providing the consumer with the option to do so, however, would allow informed consent to the compilation of personal information.<sup>103</sup> If he did not

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97. See *id.* at 797. But see *S. 1840 Hearings, supra* note 4, at 597 (in underwriting insurance policies, investigative reports are usually only ordered when doubts have arisen over the acceptability of a risk or its premium determination. Without them, it would be simple for underwriters to reject outright any risk). See also *id.* at 605-07, and 592-95 (for analysis of the insurance underwriting process and the use of investigative reports).

98. See *S. 1840 Hearings, supra* note 4, at 715-31 (comments of Thomas W. Norton, President of Fidelifacts/Metropolitan New York, Inc., which specializes in obtaining information for use by prospective employers in making hiring decisions; by corporate executives to check on merger and acquisition prospects; by security executives to uncover fraud, theft, and other criminal activities; and by the legal profession in civil and criminal pre-trial matters).

99. *Id.* at 749.

100. *Calif. CRAA, supra* note 2, at 1245.

101. [T]o mandate prior consent in this particular field is critical to insure the individual's rights. It places the consumer in the position of being able to make an intelligent, knowing choice in that he can choose to sacrifice some of his privacy in exchange for a benefit such as credit, insurance, or employment. It is essential, first, that the individual be aware that he is making a trade-off and second, that he be allowed to make his decision in an informed manner.

*S. 1840 Hearings, supra* note 4, at 625.

102. See *Calif. CRAA, supra* note 2, at 1245.

103. See *FCRA—Regulators Vantage Point, supra* note 11, at 459. For the position of the American Life Insurance Association, disfavoring authorization for investigative reports, see *S. 1840 Hearings, supra* note 4, at 586.

wish to be investigated, the benefit could be sacrificed in order to preserve his right to privacy.<sup>104</sup> At the very least, this is the consumer's choice; he thereby assumes an active rather than a passive role in the reporting process.

This active consumer role is particularly important when medical information is gathered. Under current law, a consumer who signs a standardized authorization form to release medical information to an insurance company is unaware that his personal medical data may be used by the company for non-insurance purposes. Examples include: (1) compilation of medical information for employment purposes; (2) use of case histories by training physicians; or (3) unauthorized incorporation of data in official reports on the consumer's physical condition to supervisory agencies.<sup>105</sup> If consumers are provided with the right to prior authorization of such reporting, they will be capable of effectively determining the use to which their personal medical information is put.<sup>106</sup>

The second method of control necessary to protect consumers from investigative reporting abuses is disclosure of sources.<sup>107</sup> Under present law, investigative agencies only have to reveal the "nature and substance"<sup>108</sup> of the information in the consumer's file; sources must

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104. See note 102 *supra* and accompanying text. The National Association of Independent Insurers feels that it is unlikely that a good insurance risk would refuse to give authorization for an investigative report. It suggests that declining such authorization would reflect the consumer's reluctance to have certain information, which probably would have an important bearing on the risk to be assumed, disclosed. The Association foresees "countless applicants for insurance being turned away because of the suspicions which are aroused," and insurance binders being given only "under the most crystal clear of situations." All this would result in a tighter market for insurance. *S. 1840 Hearings, supra* note 4, at 598.

105. Proxmire Privacy Statement, *supra* note 3, at 10, 11.

106. For insight into the operation of the Medical Information Bureau, a nonprofit trade association owned and controlled by some 700 member life insurance companies, see *S. 1840 Hearings, supra* note 4, at 629-40.

107. A consumer who finds himself the subject of a credit, insurance or employment investigative report cannot reasonably be expected to protect himself from potentially harmful or inaccurate opinions or data supplied by anonymous sources, unless he has the right to disclosure of those anonymous sources. *FCRA—Regulators Vantage Point, supra* note 11, at 474-76. According to the Federal Trade Commission, there is no justification for anonymity of sources, except for national security and law enforcement investigations. The Commission has indicated that a prior disclosure that the identity of information sources is available may decrease potential embarrassment and increase investigative reporting accuracy. "A source that is aware that he may have to justify his facts or opinions may be more circumspect in his statements." *Privacy Hearings, supra* note 11, at 62.

108. 15 U.S.C. § 1681g(1) (1970).

be revealed only if the investigative agency is sued for violating the Act.<sup>109</sup> During the Senate (S. 1840) Hearings, the disclosure issue was hotly contested by the investigative agencies, which felt that giving consumers the right to know who provided investigative information would simply eliminate those sources in the future.<sup>110</sup> The fear of the investigative reporting interests is legitimate, for without the protection of anonymity, certain sources of information, for example, landlords or neighbors, might simply refuse to provide adverse information so as not to breed either ill will or litigation. Alternatively, without adequate disclosure provisions, the consumer is faced with a privacy violation in the form of an inability to control, or even to learn of the existence of, information concerning him which is being disseminated.<sup>111</sup>

Having established the consumer's right to privacy in the context of consumer reporting—both credit and investigative—and the various means necessary to protect that privacy, it now becomes necessary to examine the means of enforcing those protections. The following section investigates recent litigation in the consumer reporting field, and analyzes the remedy provisions of the FCRA.<sup>112</sup> The section concludes with a proposal on how to strengthen the remedial provisions of the Act.

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109. *Id.* § 1681g(a)(2).

110. In discussing the S. 1840 amendment requiring disclosure of investigative sources to consumers, investigative reporting interests set forth the following fears and arguments: (1) that disclosure requirements would dry up information sources since individuals would refuse to cooperate if they knew they might be identified or subjected to legal action; (2) that the investigative reporting system would be damaged, thereby resulting in higher insurance costs to the consumer. *S. 1840 Hearings, supra* note 4, at 591, 681-86, 964. Cf. Comment, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 512 n.27 (1969) (complications of disclosure would slow down the business information process). An answer to the investigative reporting interests was offered by Jeremiah S. Gutman, Chairman, American Civil Liberties Union Privacy Committee, during the S. 1840 Hearings:

As long as we have a system which is so heavily dependent upon the use of consumer reports, the people who are the potential victims of improper consumer reporting are entitled to confrontation with those persons who have anything adverse to say about them, and if that good weighed on the scale on one side is balanced against the harm which may possibly occur by a dry-up of some information on the other hand, I would come down heavily on the side of the protection of due process and confrontation.

*S. 1840 Hearings, supra* note 4, at 536.

111. See note 60 *supra* and accompanying text. Senator Proxmire achieved a viable compromise of the disclosure issue in his latest FCRA amendments. COMM. PRINT NO. 2, *supra* note 34, at 3. The proposed "Fair Investigative Reporting Act" provides that consumers will be given the opportunity to learn the sources of adverse information which is not expunged after a dispute and reinvestigation. *Id.*

112. 15 U.S.C. §§ 1681n, 1681o (1970).

## IV. CONSUMER REMEDIES

A. *Litigation of Reporting Abuses*

Prior to the passage of the FCRA, incorrect or misleading credit reports were the source of most litigation by consumers against credit reporting agencies.<sup>113</sup> Much of this litigation centered on claims of defamation.<sup>114</sup> Practically, the remedies available to the consumer were largely ineffective; first, because the consumer reporting agencies were afforded an absolute defense of truth,<sup>115</sup> and second, because even where the consumer was able to show that the report was prima facie defamatory, the reporting agency could escape liability by demonstrating that the reports were issued in good faith and in furtherance of legitimate business objectives.<sup>116</sup>

Subsequent to the passage of the FCRA, suits against mercantile agencies for common law defamation or negligent credit reporting were not permissible.<sup>117</sup> Instead, the Act provides the consumer with a number of safeguards against defamatory credit reporting.<sup>118</sup> This statutory prohibition against the traditional common law claims is of little significance, however, in light of the ineffectiveness of the non-statutory remedies.<sup>119</sup>

One commentator found general agreement that the civil liability provisions of the Act offer the wronged consumer a greater opportunity for a compensatory recovery than he had in most jurisdictions prior to the FCRA.<sup>120</sup> There are, however, factual situations to which the FCRA civil liability provisions are inapplicable.<sup>121</sup> In these instances, the courts have held that state common law remedies will again apply.

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113. *FCRA: Constitutional Defects*, *supra* note 62, at 427.

114. *Id.*

115. Truth is also an absolute defense in defamation actions, *see* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 776 (4th ed. 1971), but it was not at issue in most cases, since the credit reports were clearly erroneous.

116. *See generally FCRA: Constitutional Defects*, *supra* note 62, at 427.

117. 15 U.S.C. § 1681h(e) (1970).

118. *Id.* § 1681 *et seq.* Actions may be brought for willful or negligent noncompliance with provisions of the Act. Examples include: (1) failure to disclose to the consumer the existence of a report, *id.* § 1681d; (2) using a report for impermissible purposes or using obsolete information, *id.* § 1681c; (3) failure to disclose on demand by the consumer, *id.* § 1681g; (4) erroneously reporting information on the public record, *id.* § 1681k; and (5) inaccurate reporting, *id.* § 1681i.

119. *FCRA: Constitutional Defects*, *supra* note 62, at 429.

120. *FCRA—Regulators Vantage Point*, *supra* note 11, at 482.

121. *See* 15 U.S.C. §§ 1681n, 1681o (1970); *Retail Credit Co. v. Russell*, 218 S.E.2d 54 (Ga. 1975).

For example, in *Retail Credit Co. v. Russell*,<sup>122</sup> the defendant credit company released a libelous report to the plaintiff Russell's employer.<sup>123</sup> The plaintiff was not hampered by common law defense privileges<sup>124</sup> in establishing his claim, for under Georgia law<sup>125</sup>—unlike the majority of jurisdictions—malice need not be proven, absent first amendment considerations.<sup>126</sup> The plaintiff was, therefore, successful in recovering \$15,000 in damages against the defendant company.

In finding liability on the part of the credit company, the Georgia Supreme Court recognized the plight of the individual consumer,<sup>127</sup> and at the same time dispelled all fears on the part of credit agencies that the lack of a privilege will subject them to large damage awards, thereby rendering them insolvent.<sup>128</sup> Although the plaintiff in *Russell* was afforded relief, the case illustrates that if the situation were to arise in another jurisdiction, the consumer might be left without an effective remedy.<sup>129</sup>

### B. Litigation of Abuses Under the FCRA

Even where the FCRA does apply to a particular factual situation, it does not always serve as a viable remedy.<sup>130</sup> Civil actions brought pursuant to the Act tend to result in nominal—if any—damages to the

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122. 218 S.E.2d 54 (Ga. 1975).

123. The information reported by Retail Credit to Russell's employer contained, *inter alia*, statements that Russell was "dismissed for dishonesty [from his prior job] and would not be eligible for rehire" and that he "admitted taking money over a period of time" from his former employer.

124. See notes 115-16 *supra* and accompanying text.

125. GA. CODE ANN. § 105-709 (1968).

126. All of the states, excluding Georgia and Idaho, recognize the conditional privilege which requires the consumer to prove malice. Thus, where the defamation action is not within the scope of the FCRA—where the consumer's discovery of the defamatory report is not through the provisions of the FCRA (e.g., the consumer learns of the report from his employer, a subscriber to the credit reporting agency)—the consumer is in no more advantageous position than he was prior to the passage of the FCRA. *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 57 (Ga. 1975).

127. 218 S.E.2d at 58.

128. *Id.* at 59. One of the largest credit reporting and investigative reporting agencies in the country, Retail Credit Co. (name changed to EQUIFAX, Inc. January 1, 1976), is headquartered and doing business in Georgia. *S. 1840 Hearings, supra* note 4, at 160.

129. See note 123 *supra* and accompanying text.

130. It is difficult to get a proper perspective on legal activities involving the Act, however, because there are relatively few reported cases. Cases involving jury verdicts are without written opinions. Further, many cases involving serious abuses of the FCRA are settled out of court without an easily available public record. *S. 1840 Hearings, supra* note 4, at 33. Part of the reason for the paucity of litigation is that the FCRA is directed toward giving the consumer his rights, yet does not give him the incentive to exploit the honest mistakes of credit reporting agencies. *S. 2360 Hearings, supra* note 35, at 34.

consumer-plaintiff.<sup>131</sup> Therefore, there is little incentive on the part of the consumer to bring an action under the statute,<sup>132</sup> and as a result, reporting agencies feel no real compulsion to comply with the protective mechanisms of the Act.<sup>133</sup>

The leading case brought pursuant to the FCRA, *Millstone v. O'Hanlon Reports, Inc.*<sup>134</sup> illustrates the extent to which reporting agencies still persist in willful noncompliance<sup>135</sup> with the accuracy and disclosure provisions of the Act.<sup>136</sup> James Millstone, a reputable journalist, was provided auto insurance coverage by the Fireman's Fund Insurance Company. The insurer ordered an investigative report on Millstone from O'Hanlon Reports. The report furnished contained a number of highly derogatory accusations.<sup>137</sup> Due to the report, Fireman's Fund directed its agent to cancel Millstone's policy. The agent, however, advised Fireman's of Millstone's respectability and the fact that he often covered the White House while at the Post-Dispatch's Washington office. The insurance company withdrew its cancellation order after learning these facts, but Millstone was disturbed by the report and demanded a copy from O'Hanlon.<sup>138</sup> O'Hanlon refused, although it orally disclosed a synopsis of the report to Millstone.

Upon Millstone's denial of the report's allegations, O'Hanlon reinvestigated and found them to be untrue.<sup>139</sup> However, O'Hanlon per-

131. *S. 1840 Hearings*, *supra* note 4. In a statement by Albert Foer, it was noted that plaintiffs have been unable to secure satisfactory monetary relief because of inherent deficiencies in the civil damage provisions of the FCRA.

You can prove that the credit bureau didn't follow the law, but you may not be able to recover anything for your efforts. The lack of minimum statutory damages undoubtedly discourages consumers from going into court, and thereby deprives the public of the private remedy as a means of enforcing the FCRA.

*Id.* at 41. (statement of Albert Foer).

See also 15 U.S.C. §§ 1681n, 1681o (1970), which outline the provisions for civil damages for willful and negligent noncompliance with the Act. Nowhere is there a *minimum* level for compensation.

132. FCRA—*Regulators Vantage Point*, *supra* note 11, at 484.

133. *Id.*

134. 383 F. Supp. 269 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976).

135. See 15 U.S.C. § 1681n (1970).

136. *Id.* §§ 1681e(b), 1681g. See also *Collins v. Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich. 1976).

137. 528 F.2d 829, 831 (8th Cir. 1976).

138. For example, it was reported that he was strongly suspected of being a drug user, and was disliked by his neighbors. *Id.*

139. O'Hanlon's agent devoted at most 30 minutes in preparing his report. His report was rife with innuendo, misstatement, and slander. Indeed, the recheck of his investigation shows that he depended solely on one biased informant; made no verification of the same despite O'Hanlon's requirement that there must be verification; and, finally, it took three days to recheck the original investigation, and every alle-

sistently refused to furnish Millstone with a copy of the report, and actually failed to disclose all the contents of the report which eventually came to light during discovery procedures.<sup>140</sup>

The district court found that Millstone was entitled to \$2,500 actual damages,<sup>141</sup> and further assessed the credit agency \$25,000 punitive damages for its willful noncompliance with the FCRA.<sup>142</sup> Attorney's fees of \$12,500 were also awarded.<sup>143</sup> In affirming the district court's judgment, the Court of Appeals for the Eighth Circuit concluded that O'Hanlon violated both the spirit and the letter of the FCRA by recklessly disregarding Millstone's rights under the Act.<sup>144</sup>

The *Millstone* appellate court helped to resolve two major issues confronted by enforcement of the FCRA, as well as to demonstrate the problems which could be avoided if the Act were strengthened in the areas of consumer authorization and access to files. First, the case involved the issue of whether consumer reports were "commercial speech," which is not protected by the first amendment.<sup>145</sup> Neither the district court nor the court of appeals found first amendment protection.<sup>146</sup> The latter followed the test of constitutionality for

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gation therein was found untrue . . . .

Not until Millstone brought pressure to bear, through the Federal Trade Commission and, ultimately, through this lawsuit, did O'Hanlon make the disclosure required by section 1681g.

*Id.* at 834.

140. *Id.* at 831.

141. 383 F. Supp. 269, 276 (E.D. Mo. 1974).

142. *Id.* Punitive damages are permitted under 15 U.S.C. § 1681n(2) (1970).

143. 383 F. Supp. 269, 276 (E.D. Mo. 1974).

144. 528 F.2d 829, 835 (8th Cir. 1976).

145. U.S. CONST. amend. I.

The commercial speech doctrine was first enunciated in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), but has not been a settled area of constitutional law. *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 832 (8th Cir. 1976), *aff'g* 383 F. Supp. 269 (E.D. Mo. 1974). For a very recent development concerning the first amendment commercial speech doctrine, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 96 S. Ct. 817 (1976) (first amendment protections may not be denied to commercial speech merely because of the economic element).

146. The district court noted that four circuit courts of appeals have uniformly held that the activities and publication of retail credit reports are not speech which should be protected under the first amendment, adding, "[a]ny prospective chilling of First Amendment freedoms should be looked at quite carefully by any court." *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269, 274 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976). The court concluded that because the reports "were distributed for commercial purposes and clearly without regard to social concerns or grievances," they were "commercial speech" and thus fell outside the protective boundaries of the first amendment. 383 F. Supp. at 274.

The court of appeals agreed with the district court, but further bolstered their holding by examining the FCRA in light of the test set forth in *Bigelow v. Virginia*, 421 U.S. 809 (1975). See note 147 *infra* and accompanying text.



determining whether commercial speech is to be protected as was outlined in *Bigelow v. Virginia*.<sup>147</sup> The court concluded that Congress possessed authority to require both that O'Hanlon follow reasonable procedures to assure maximum accuracy of its reports, and that it accurately disclose its file information to the consumer.<sup>148</sup>

Second, the court of appeals held that actual damages could be determined for mental pain and anxiety under the FCRA.<sup>149</sup> Prior to this holding, it was generally feared that unless damages were allowed for mental anguish, or unless presumptive general damages were allowed, a consumer would have no practical ability to prove his case, and thus would have no effective remedy against reporting abuses.<sup>160</sup> This possibility is most prevalent in the case of actions for negligent noncompliance in which punitive damages are not permitted.<sup>161</sup>

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147. 421 U.S. 809 (1975). *Bigelow* involved the conviction of a newspaper editor who printed an advertisement for a New York abortion referral service. The Supreme Court reversed the conviction, thereby striking down the Virginia statute at issue. The Court announced the following standard of review:

Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. . . . To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged.

*Id.* at 826.

148. *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976), *aff'd* 383 F. Supp. 269 (E.D. Mo. 1974).

149. *Id.* at 834. The district court found that although Millstone did not lose wages or incur medical expenses, he repeatedly had to contact O'Hanlon, and as a result he suffered sleeplessness, nervousness and mental anguish. Thus, the court awarded Millstone \$2500.00 actual damages. *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269, 276 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976).

O'Hanlon claimed that its misconduct did not damage Millstone to the extent that he recovered. In addition to belittling the injuries suffered by Millstone, O'Hanlon noted that the incorrect investigative report was made for a mere sixty-eight dollar insurance policy, that Millstone himself caused further publication of the incorrect report in news stories about his problem with them, and that the insurance company did not believe the report when confronted with the truth by Millstone's insurance agent. 528 F.2d at 834.

The Court of Appeals for the Eighth Circuit rejected O'Hanlon's arguments, and found no abuse of discretion in the district court's award to Millstone. *Id.* at 835.

150. *FCRA Negligent Noncompliance*, *supra* note 67, at 1112. Civil suits are not often a viable course of conduct for consumers to undertake under the FCRA because of the necessity of proving actual damages. In most cases it will be difficult, if not impossible, to prove actual damages due to a denial of credit or insurance benefits. In at least one case the court dismissed a complaint with prejudice because the consumer could not show actual damages from having been denied a credit card, even though the reporting agency was proven negligent (*Miller v. Credit Bureau* [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,173, at 89,067 (D.C. Super. Ct. 1972)). *Calif. CRAA*, *supra* note 2, at 1238 n.119.

See *Privacy Hearings*, *supra* note 11, at 470; *FCRA—Regulators Vantage Point*, *supra* note 11, at 484. Cf. *Ackerley v. Credit Bureau, Inc.*, 385 F. Supp. 658, 661 (D. Wyo. 1974).

151. 15 U.S.C. § 1681o (1970).

The appellate court's decision suggests that—at least in the Eighth Circuit—consumers now have a better opportunity to recover under the Act. However, the consumer's burden of proof problem in establishing actual damages not resulting from physical manifestations of mental anguish remain.<sup>152</sup> How, for example, can a plaintiff-consumer prove that he was damaged from having been denied a credit card due to the negligence of a reporting agency?<sup>153</sup> The court fails to resolve the question; nor is the answer found in the FCRA.

Although Mr. Millstone managed to recover under the FCRA, the case does underscore the deficiencies in the Act. The FCRA needs two "preventive cures" to obviate the potential for abuses such as those which occurred in *Millstone*. First, prior notification of the existence of the investigative report would give the consumer the opportunity to challenge and correct any misinformation *before* it was distributed to a third party; before any damage could be done.<sup>154</sup> Second, providing the consumer with the right to obtain a copy of his file would insure that any misinformation would be properly deleted or corrected.<sup>155</sup> Without physical access, the consumer is constantly threatened by the situation that arose in *Millstone*: incomplete disclosure of potentially damaging information.

*Nitti v. Credit Bureau Inc.*<sup>156</sup> serves as an example of similar abuses of FCRA provisions by credit bureaus who provide ledger data on consumers. The defendant in *Nitti* was charged with repeatedly dispensing an incorrect, obsolete credit report to local credit institutions despite plaintiff's frequent attempts to correct the report.<sup>157</sup> In assessing the credit bureau \$10,000 in punitive damages, the trial court emphasized the deterrent effect of its judgment on the defendant and on others who may perpetrate similar acts against consumers.<sup>158</sup> It

152. See note 149 *supra*, and accompanying text.

153. See *Calif. CRAA*, *supra* note 2, at 1238.

154. See *S. 1840 Hearings*, *supra* note 4, at 546-47, 625-26.

155. *Id.*; *FCRA Negligent Noncompliance*, *supra* note 67, at 1093.

Because consumer reports commonly contain records of lawsuits filed by or against the subject of the report, a consumer may find himself with a "black mark" in his file if he brings suit against a reporting agency. Strengthening the FCRA with a source disclosure provision which does not require filing an action to learn the source of adverse information will remove this potential bar to remedial action faced by consumers. *FCRA Negligent Noncompliance*, *supra* note 67, at 1094 n.153.

156. 375 N.Y.S.2d 817 (1975).

157. *Id.* at 822. "Like a character in Kafka, he was totally powerless to move or penetrate the implacable presence brooding, like some stone Moloch, within the Castle." *Id.*

158. The *Nitti* court explained that the purpose of punitive damages is not only to punish the wrongdoer and deter him from further wrongdoing, but also to deter others, to protect the public. *Id.* at 820-21.

appears that adding a "preventive cure" of insuring file accuracy through minimum damage provisions might deter the kind of activity which created problems for the plaintiff in *Nitti*.<sup>159</sup> Such provisions would essentially impose strict liability on credit bureaus for reporting errors.

Since one out of every twenty reports may contain material errors,<sup>160</sup> strict liability provisions would effectively force information merchants to reduce their margin of error and insure accurate reporting. This is especially necessary for violations associated with *negligent* reporting,<sup>161</sup> since under the current FCRA negligence provision,<sup>162</sup> punitive damages are not available.<sup>163</sup>

A decision from the court of civil appeals of Texas, *Chilton Corp. v. Moore*,<sup>164</sup> reinforces the need for strict liability provisions in the Act, for it illustrates the hazards of placing the burden of proving abuses on the party with the least awareness of—and access to—significant evidence. Plaintiff-appellee sued defendant-appellant credit bureau for negligently furnishing bad credit reports to several institutions.<sup>165</sup> The trial court found that Chilton Corporation failed to "follow reasonable procedures to assure maximum accuracy of the information concerning the individual about whom the report relates."<sup>166</sup>

On appeal, the trial court's determination that plaintiff had met his burden of proof was upheld.<sup>167</sup> Although Moore prevailed, the burden of proof question in actions brought pursuant to the FCRA remains

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159. While the awarding of liquidated damages in civil suits seeking redress for violations of consumer protection statutes is considered harsh by some, when such damages are available the resultant degree of compliance is measurably enhanced. The obvious example is the Truth in Lending Act, where the minimum \$100 civil liability for non-compliance has resulted in a high degree of compliance (see FTC National Survey of Truth in Lending Compliance) and a substantial amount of private civil activity. . . . Therefore, a similar approach is deemed essential to insure a correspondingly high degree of compliance with the FCRA.

*Privacy Hearings*, *supra* note 11, at 471 (statement of the Federal Trade Commission).

160. *Ackerley v. Credit Bureau Inc.*, 385 F. Supp. 658, 659 (D. Wyo. 1974). *Cf. FCRA Negligent Noncompliance*, *supra* note 67, at 1129.

161. *See* note 153 *supra* and accompanying text.

162. 15 U.S.C. § 1681o (1970).

163. *Id.* § 1681n(2).

164. 508 S.W.2d 679 (Tex. Civ. App. 1974).

165. *Id.* at 681.

166. *Id.* at 680, *quoting* 15 U.S.C. § 1681e(b) (1970).

167. The court of appeals held that Moore did meet his burden of proof in showing that: (1) the defendant gave him a very bad credit rating, and (2) the defendant took no steps to assure the accuracy of bad credit information they had received from one of Moore's creditors. 508 S.W.2d at 681-82.

a significant problem.<sup>168</sup> More often than not, it is the defendant credit bureau which is in the better position to prove whether procedures inside the company were reasonable to insure reporting accuracy.<sup>169</sup> A shift in the burden of proof, similar to *res ipsa loquitur* in negligence cases, would provide a greater "incentive" for credit agencies to maintain accurate reporting standards.<sup>170</sup>

An ancillary issue raised in *Chilton* was whether a source who supplies erroneous information to the consumer reporting agency should be held liable under the FCRA. In *Chilton*, it was Sears Roebuck that initially provided erroneous information to the defendant credit bureau.<sup>171</sup> The FCRA, however, does not create any alternative liability for the sources of erroneous information provided to the reporting agencies.<sup>172</sup> The FCRA immunity provision<sup>173</sup> will even bar the use of common law remedies in such cases.<sup>174</sup> It appears that exposing the *source* of information to liability would assure accuracy in the furnishing of information. This exposure would help take the onus off consumer reporting agencies who are provided with erroneous information.

### C. Regulating the Gathering of Irrelevant Personal Information

There is nothing in the FCRA which restricts the type of information consumer reporting agencies can obtain and sell.<sup>175</sup> As a result, information that does not reasonably relate to the business purposes for which the report was compiled finds its way into investigative reports.<sup>176</sup> This irrelevant information is generally of a highly personal

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168. The plaintiff had to use circumstantial evidence in order to substantiate his claim, while the defendant credit manager had access to a wealth of information relating to the accuracy of defendant's past investigation and reporting techniques. *Id.* at 682. See also *FCRA—Regulators Vantage Point*, *supra* note 11, at 483.

169. 508 S.W.2d at 683. See also *S. 1840 Hearings*, *supra* note 4, at 545.

170. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 382 (4th ed. 1971).

171. 508 S.W.2d at 681. While the issue of whether an information supplier should be liable for erroneous reporting emerges from the facts of the case, the court did not address it in the opinion.

172. *Retail Credit Co. v. Dade County*, 393 F. Supp. 577, 583 (S.D. Fla. 1975); *Bain v. May Dept. Stores Co.*, 5 CCH CONSUMER CREDIT GUIDE ¶ 98,649, at 88,203 (Cal. Ct. App. 1974) (retail store not held liable under either state or federal laws for making a statement to a credit reporting agency which was used by a third party as the basis for denying consumer credit).

See *Calif. CRAA*, *supra* note 2, at 1241-42.

173. 15 U.S.C. § 1681h(e) (1970).

174. *But cf. S. 1840 Hearings*, *supra* note 4, at 645-46.

175. See generally 15 U.S.C. § 1681 *et seq.* (1970).

176. This problem results in an imbalance between the needs of the information merchants and the legitimate privacy concerns of the individual consumer.

nature, and enables prospective creditors, insurers, or employers to make business decisions, in part, on the basis of personal bias.<sup>177</sup>

The case of Galen Cranz serves as an example.<sup>178</sup> Ms. Cranz had her automobile insurance cancelled on the basis of a report revealing that she lived with a member of the opposite sex "without the benefit of marriage."<sup>179</sup> This cancellation occurred despite the fact she had a very good driving record, a respectable job and a dependable income.<sup>180</sup> Considering her marital status irrelevant, she attempted, unsuccessfully, to have it deleted from her file. Ms. Cranz finally filed suit to have the information deleted. After a three year span and an out-of-court settlement, both the reporting agency and the insurance company agreed to delete the information on the ground of irrelevancy.<sup>181</sup>

The experience of Ms. Cranz is not uncommon.<sup>182</sup> Yet it would be difficult to legislate standards of relevancy that would apply, for example, to both automobile insurers and employers. To avoid this problem, the FCRA should be amended to prohibit the reporting of certain highly personal information, regardless of relevancy.<sup>183</sup>

The civil remedy provisions of the FCRA do not serve any deterrent purpose, they only provide for liability after the fact. Each consumer is responsible for policing the industry to uncover abuses relating to his own personal file.<sup>184</sup>

The weaknesses in the Act, as exemplified in the preceding cases, encourage the kind of investigatory practices that lead to invasions of

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177. *S. 1840 Hearings, supra* note 4, at 512.

178. The Cranz case was discussed before the Senate Subcommittee on Consumer Affairs during the *S. 1840 Hearings, supra* note 4, at 511-19 (statement of Galen Cranz).

179. *Id.* at 513.

180. *Id.* at 514.

181. *Id.* at 513.

182. When asked whether or not she had any indication that her situation was commonplace, Ms. Cranz replied that her attorney had been contacted by seven other attorneys who reported having similar cases. She personally received thirty letters from citizens in her situation. *Id.* at 518.

183. Ms. Cranz's attorney recommended prohibiting the inclusion in consumer reports of certain kinds of information, whether relevant or not, for example, information about certain life styles. *Id.* at 518.

184. [The FCRA], like the Clayton Act and the Truth-in-Lending Act (15 U.S.C. §§1601 *et seq.* (1970)) among others, was enacted to enable private litigants to assist in the enforcement of the Congressional purposes and, at the same time, recover such damages as may have been inflicted upon them. The federal purpose is to "create a species of 'private attorney general' to participate prominently in enforcement."

*Nitti v. Credit Bureau, Inc.*, 375 N.Y.S.2d 817, 824 (1975) (citations omitted). *Cf. S. 1840 Hearings, supra* note 4, at 645.

privacy,<sup>185</sup> and fail to give the consumer an incentive to sue when an invasion occurs.<sup>186</sup>

#### D. State Legislation to Curb Invasions of Consumer Privacy

Many states have enacted consumer credit and investigative reporting legislation which provides greater protection to individuals<sup>187</sup> through stronger access, disclosure and relevancy measures.<sup>188</sup> However, a significant preemption problem may exist. For example, in *Retail Credit Co. v. Dade County*,<sup>189</sup> the Southern District of Florida held that a local ordinance which gave consumers greater protection than the FCRA was inconsistent with the Act.<sup>190</sup> The district court determined that the ordinance's requirements for disclosure of investigative sources, disclosure of medical information, and its removal of the qualified immunity privilege were unenforceable. The court based its reasoning on the legislative history of the FCRA.<sup>191</sup> At least one commentator has viewed the decision as incorrect, but noted that if it is followed elsewhere, more protective state regulations may be struck down.<sup>192</sup>

Whether or not other federal courts will follow *Retail Credit* is an open question; but the option could be eliminated by amending the FCRA preemption provision<sup>193</sup> to prevent a finding by any court that a state law which affords greater protection to the consumer would be inconsistent with the FCRA.<sup>194</sup>

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185. See notes 48-52 *supra* and accompanying text.

186. For example, a person seeking a loan or a job may be faced with the problem of getting quick action to change an erroneous consumer report that the immediate transaction depends on. If he must litigate to change the report, the loan or job opportunity may be lost. Thus, in order to effectively aid the consumer faced with the immediacy of adverse action to obtain relief, the FCRA should provide the consumer with a priority action to prevent him from being damaged by the erroneous report.

187. 1 CCH CONSUMER CREDIT GUIDE ¶ 680, at 2901-2917 (1976). For an analysis of the various state consumer credit laws, see generally *Little Brother Is Watching*, *supra* note 6, at 821-23.

188. See generally *Little Brother Is Watching*, *supra* note 6, at 821-23. Cf. *Privacy Hearings*, *supra* note 11, at 275.

189. 393 F. Supp. 577 (S.D. Fla. 1975).

190. *Id.* at 582-84.

191. *Id.* See note 4 *supra* and accompanying text.

192. *S. 1840 Hearings*, *supra* note 4, at 79 (reply by Albert Foer to question directed by Senator Proxmire).

193. 15 U.S.C. § 1681t (1970).

194. *S. 1840 Hearings*, *supra* note 4, at 80. *But cf. id.* at 677.

The latest proposed FCRA amendments, consisting of Senator Proxmire's "Fair Investigative Reporting Act,"<sup>195</sup> arose in response to suggestions and criticisms made during the S. 1840 Hearings.<sup>196</sup> The latter sought to strengthen present FCRA provisions relating to both credit reports and investigative reports, but the Committee Print deals only with investigative reports, thereby bifurcating the Act into two titles.<sup>197</sup> The proposed Fair Investigative Reporting Act alleviates the privacy protection problems examined in this Comment,<sup>198</sup> however, it still lacks a comprehensive preemption requirement.<sup>199</sup> Further, bifurcation of the present FCRA will not be completely effective unless the new Fair Credit Reporting Act provides consumers with remedial safeguards comparable to those in the proposed Fair Investigative Reporting Act.<sup>200</sup> Specifically, amendments are needed to provide minimum damages for willful or negligent noncompliance with the FCRA by the distributors, users, and sources of credit information. The deterrent effect of such a provision will help insure the accuracy in reporting which is vital to the preservation of privacy.<sup>201</sup>

195. COMM. PRINT NO. 2, *supra* note 34.

196. *Id.* at 2.

197. *Id.*

198. The following excerpt from Committee Print No. 2 summarizes the proposed privacy protection measures of the Fair Investigative Reporting Act:

1. Where the present law only requires that consumers be notified of an investigative report *after* it has been ordered, the Committee print would require that consumers be told in advance and that consumers affirmatively authorize any such reports; except fraud or claims reports.

2. Before any medical information is obtained (usually by an insurance company) the consumer must be told whether such information will be relayed on to a consumer reporting agency for storage, there to be available to other insurance companies. The medical authorization form must identify any such reporting agencies.

3. Consumer reporting agencies will be required to adopt reasonable procedures to assure the relevancy, as well as the accuracy, of information collected. Unreasonable "quota" systems and deceptive practices are specifically prohibited.

4. Consumers will be entit [sic] to physically inspect their files, or to get disclosure of file contents by mail as well as by phone or personal visit. Consumers will also be able to get copies of file material, and to learn the sources of information which is [sic] not expunged after a reinvestigation.

5. Under the present law, consumers must be notified only when credit or insurance is denied or the cost is increased as a result of a consumer report. The Committee Print expands this so that "any adverse action" based on a report will obligate the user to tell the consumer his rights and identify the reporting agency.

6. The present law does not call for regulations to be issued. The Print directs the Federal Trade Commission to promulgate regulations.

7. In the Committee Print the civil liability provisions are modified to set minimum recoveries for willful or negligent violations, and a limited immunity from defamation or negligence suits is provided for consumer reporting agencies or report users who act in compliance with the new title.

*Id.* at 3.

199. See note 194 *supra* and accompanying text.

200. See COMM. PRINT NO. 2, *supra* note 34, at 3.

201. See note 172 *supra* and accompanying text.

The new California Consumer Credit Reporting Agencies Act<sup>202</sup> and Investigative Consumer Reporting Agencies Act<sup>203</sup> may provide the best models on which to base new federal legislation. They insure adequate consumer privacy protections in both credit reporting and investigative reporting areas.<sup>204</sup>

## V. CONCLUSION

Recent litigation and legislative hearings have pointed out the need for amending the Fair Credit Reporting Act. Striking an optimum balance between the privacy interests of the consumer and the legitimate needs of the merchants is a difficult task. Perhaps the greatest obstacle facing the improvement of consumer protections is the cost factor: increased consumer protection will mean increased operating costs for the information merchants, and ultimately, increased costs for the consumer seeking benefits.<sup>205</sup> Yet in light of the reporting industry abuses outlined in this Comment, it is apparent that the Act must be strengthened.

Bifurcation of the FCRA will undoubtedly render it more efficient. The characteristic differences between investigative and credit reporting necessitate different regulatory measures. Amendments providing for greater notification, greater access to information, and restrictions on the type of information permitted in consumer reports, will afford the consumer the control necessary to assure the accuracy of his file information. Fortifying the liability sections of the Act with minimum damages provisions will deter violations of consumer privacy, promote accurate reporting, and insure adequate redress to consumers whose rights are violated by the information merchants. With these statutory tools at his disposal, the consumer will be better able to educate himself concerning any personal information on file. Moreover, he will be better equipped to enforce his fundamental right of privacy.

*Lawrence D. Frenzel*

202. CAL. CIV. CODE § 1785.1 *et seq.* (West Supp. 1976).

203. CAL. CIV. CODE § 1786 *et seq.* (West Supp. 1976).

204. See also PAC. L.J. REVIEW OF SELECTED 1975 CALIF. LEGISLATION 347, 348 (1975).

205. The argument is continually made by those who would diligently and efficiently accomplish results, that costs will go up and that things will be so efficient—well, that's one of the consequences of operating under the constitutional system and what we are here doing is attempting through legislation such as is now before the committee to impose upon a certain sector of our economy principles of due process which we have imposed upon other sectors.

S. 1840 Hearings, *supra* note 4, at 536-37 (statement of Jeremiah S. Gutman, Chairman, American Civil Liberties Union Privacy Committee). See *id.* at 11, 81, 624. For the information merchants' attitude on increased consumer protection costing the consumer more, see generally *id.* at 576, 742.