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Tenant Reports as an Invasion of Privacy: A Legislative Proposal

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TENANT REPORTS AS AN INVASION OF PRIVACY: A LEGISLATIVE PROPOSAL

by Robert W. Benson* & Raymond A. Biering**

This is to advise that we now subscribe to a service that records all filings on Unlawful Detainer actions. As this service is used by landlords, it will be impossible, in the future, to rent an apartment if you have been served a legal action. We are advising you of this, as the failure to pay your rent on time, will result in your name being placed in the file, and you will be unable to secure any apartment in the future.1

I. INTRODUCTION

Over ten million persons currently live in rental housing in California.2 While rent control, housing discrimination, and other major legal concerns of these renters have received a great deal of public discussion and analysis, a new issue has surfaced virtually unnoticed: the problem of “tenant reports.”

Tenant reports are reports about individual renters compiled by commercial enterprises and sold to landlords.3 The reports contain essentially three types of information: (1) information obtained from public records, such as records of unlawful detainer actions in the courts; (2) employment, financial, health, and similar information previously gathered for employment, credit, or insurance purposes; and (3) in-depth information concerning a renter’s background and personal habits, typically obtained through contacts with the renter’s acquaint-

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** A.B., 1974 (University of California, Berkeley); Loyola Law School, Class of '79. The authors are indebted to Gary E. Knell, A.B. 1975 (University of California, Los Angeles); J.D., 1978 (Loyola Law School, Los Angeles); Assistant Counsel, United States Senate Committee on Governmental Affairs. This article builds upon an earlier article by Biering & Knell, Protecting the California Tenant's Right to Privacy: A Legislative Solution, Los Angeles Daily Journal Report, July 7, 1978, at 11.

1. Letter from Preferred Property Management, Los Angeles, to a tenant who is a client of the Legal Aid Foundation of Los Angeles; enclosed in correspondence from Foundation attorney Robert M. Myers to Professor Benson, dated September 25, 1978.

2. Extrapolated from data in California Department of Housing and Community Development, California Statewide Housing Plan (1977), Tables 2-2, 2-8, 3-1, and C-14.

3. The term “tenant report” is not a legal term but is used by the authors for purposes of discussing commercial reports on renters.
Tales, neighbors, and past landlords. Once compiled, many of these reports are stored in computer banks for sale to future clients.4

Tenant reporting companies are a part of the overall consumer reporting industry which has long supplied the business sector with credit reports, insurance investigations, employment histories, and other detailed information concerning individual consumers.5 The idea of a tenant report, however, is a relatively new response to demands by wary landlords for information about prospective tenants. Some tenant reporting companies have been created solely to meet this demand;6 others are long-established consumer reporting companies which have simply adapted their systems to handle this additional market.7 Some of the companies are strictly local in operation;8 others operate in interstate commerce, with branch offices in many major cities.9

To the extent that tenant reports actually aid landlords in determining which prospective tenants present financial risks, the reports serve a legitimate economic function. In this respect, landlords are not unlike creditors, employers, and insurers; they have a legitimate interest in guarding against unjust losses resulting from dealings with individuals who present financial risks.

On the other hand, there is a rapidly growing consensus in both California and the nation that some aspects of an individual's life should not be disclosed to others, even to those with some legitimate need to know.10 Personal (especially sexual) relationships, emotions, opinions,
conduct performed with the reasonable expectation that one is alone, and certain legal and financial affairs are among the areas beyond the pale, except when compelling circumstances exist. The key questions in this struggle between the needs of business and the needs of individual privacy are these: What circumstances truly compel incursions into the zone of privacy? When incursions are justified, what safeguards should be erected to prevent abuses?

Answers to these questions have been tentatively worked out with respect to credit, employment, and insurance reports. The answers take the form of an uneasy compromise between competing interests, a compromise which is embodied in both federal and California statutes. But a gap exists in California law. The state credit, employment, and insurance reporting statutes simply fail to extend their coverage to tenant reports. Consequently, California tenant reporting companies, though subject to the federal legislation in this area, may operate free of the state safeguards which regulate credit, employment, and insurance reports. And while the language of the federal statute appears broad enough to bring tenant reports within its purview, the safeguards provided by the federal statute alone are ineffective to deal with the special abuses inherent in tenant reports.

The letter quoted at the outset of this article, threatening that the tenant's "name will be placed in the file, and [the tenant] will be unable to secure any apartment in the future," permits no doubt that unless safeguards are applied to tenant reports, California tenants face a loss


13. See note 12 supra. Critics of the federal Act (upon which the California Act is patterned) have pointed out the partial and tentative nature of the solutions reached in that statute. See text accompanying notes 103-09 infra, as well as the following academic criticisms: Note, The Fair Credit Reporting Act, 23 ME. L. REV. 253 (1971); Note, The Fair Credit Reporting Act, 56 MINN. L. REV. 819 (1972); Note, Consumer Protection: Regulation and Liability of the Credit Reporting Industry, 47 NOTRE DAME LAW. 1291 (1972); Note, Protecting Privacy in Credit Reporting, 24 STAN. L. REV. 550 (1972); Note, Protecting the Subjects of Credit Reports, 80 YALE L.J. 1035 (1971).
14. See text accompanying notes 139-58 infra.
15. See text accompanying notes 113-20 infra.
16. See notes 123-24 infra and accompanying text.
of privacy with cruel consequences. This article describes the tenant reporting industry and the specific problems it poses for individual privacy, analyzes existing law applicable to the consumer reporting industry, and proposes some statutory amendments designed to close the present gap in California law and provide federal protection.

II. THE TENANT REPORTING INDUSTRY

A. The Services Provided

Today, landlords are faced with an increasingly mobile tenant population. It is unlikely that a prospective tenant will be personally known to a landlord; therefore, some form of background investigation is useful to minimize the risks in entrusting valuable rental property to a stranger. Traditionally, landlords have depended on their own formal or informal procedures to investigate applicants. But with the advent of the computerized consumer reporting industry, it has become possible to purchase a great deal of tenant information that would otherwise be too expensive or impractical to obtain. Although it is difficult to ascertain the current scope of the business or to determine precisely how many companies presently serve the market, it is clear that a broad spectrum of companies disseminates tenant information. The following descriptions of several companies operating in the Los Angeles area illustrate the nature of the services provided by the tenant reporting industry.

Unlawful Detainers Registry (U.D. Registry) is an example of a relatively local tenant reporting company. According to a company brochure, “U.D. Registry provides accurate, authoritative unlawful detainer data on over 150,000 defendant tenants compiled directly from public court records. . . . U.D. Registry informs its members if a potential tenant has had any unlawful detainer history . . . .” The

17. See section II infra.
18. See section III infra.
19. See section IV infra.
20. Arguably, minimizations of these risks benefit both landlords and responsible tenants by keeping the costs of rental property down. The same assertion has been made with respect to consumer reports generally. Note, The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act, 26 HASTINGS L.J. 1218, 1221 (1975).
21. Unlawful Detainers Registry is a California corporation with offices in Encino, California.
22. The (undated) U.D. Registry brochure was obtained in January 1978, and is on file in Loyola Law School Library. The brochure states in pertinent part:
   On May 9, 1977, the Municipal Court of the Los Angeles Judicial District released their documented report on Unlawful Detainers. This statistical report found that un-
company stresses that "this is not credit information nor is this information available on a credit report." Moreover, "[t]he information is current and updated daily by personnel checking court records throughout the County. Soon, information from state-wide sources will be fed into the data bank and will be available to members."

U.D. Registry's scope of operations is fairly limited. The company makes available the names of defendants in unlawful detainer actions filed in the Los Angeles County Municipal and Superior Courts. Records of unlawful detainer actions are public records that a landlord could obtain without the assistance of a reporting company. However, U.D. Registry's market exists because landlords find it impractical to search court records for every prospective tenant. The magic of the modern computer allows U.D. Registry to search records easily, main-

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lawful detainer actions now exceed 25,000 a year—more than that of the total civil filings in their central office.

The increase in contested filings has risen over 100% from 1976 to 1977.

If you ever rented to an unlawful detainer (or perhaps you just did) you are part of these statistics.

But, you don't have to be... and that's what The U.D. Registry, Inc. is all about...

TIME IS MONEY...

We've all heard this old saying, and yes, nowhere is it more evident than in the rental of property.

When your rentals are occupied by a delinquent tenant, it does cost you time and money which result in a substantial loss of income.

Although the unlawful detainer action is supposed to provide a special remedy for the landlord, today's increasing legal complexities and high attorneys' fees make the unlawful detainer more and more costly and impractical.

YOU CAN PREVENT THIS...

Yes, you can prevent this loss to your profits. You can assure yourself that you are not renting to a prior Unlawful Detainer.

THE U.D. REGISTRY, INC.

The U.D. Registry, Inc. is an information service available to persons in the rental industry concerned about the landlord/tenant history of tenant applicants.

U.D. Registry provides accurate, authoritative unlawful detainer data on over 150,000 defendant tenants compiled directly from public court records—this information is not available through any other service.

U.D. Registry informs its members if a potential tenant has had any unlawful detainer history before renting to this individual—all as a result of one simple, toll-free telephone call to the U.D. Registry.

U.D. Registry, Inc. Membership Application (1978) [hereinafter cited as Membership Application].

23. Id.


25. See note 22 supra.


27. See Membership Application, supra note 22.
tain and update files, and release specific information upon request.\textsuperscript{28} The apparent rationale behind dissemination of such information is that the mere knowledge of whether a prospective tenant was previously a defendant in an unlawful detainer action will somehow assist a landlord to determine whether the prospective tenant is a good rental risk. The soundness of the rationale is examined later in this article.\textsuperscript{29}

Renters Reference of America (RRA) is an example of a larger and more diversified tenant reporting company.\textsuperscript{30} RRA has a staff of full-time investigators who gather information on the histories of rental applicants, including habits, patterns of behavior, employment history, and bank references.\textsuperscript{31} The scope of its inquiries includes verification of information the applicant has entered on the rental application, as well as investigation of whether the applicant has ever damaged apartments or has been a noisy tenant.\textsuperscript{32} The information obtained through investigations is placed in a data bank for easy retrieval.\textsuperscript{33} At present, the company appears to be providing these reports exclusively to large management firms which operate at least 300 units in a metropolitan area.\textsuperscript{34}

According to an RRA representative, its files are open to tenants under certain circumstances.\textsuperscript{35} Once a landlord has rejected a rental applicant on the basis of information supplied by RRA, the applicant may then contact the company and will be informed of the probable reasons for rejection.\textsuperscript{36} If the applicant feels the reason is unwarranted due to inaccurate records, RRA states it will conduct a further investigation and, if convinced of the inaccuracy, will immediately change the records.\textsuperscript{37}

U.D. Registry and RRA are limited purpose operations, specializing in tenant information. However, some national credit reporting services have begun to move into the tenant reporting business. One of the
largest of the national reporting companies is Equifax, Inc.\textsuperscript{38} Although Equifax began as an Atlanta, Georgia credit bureau in 1901, it later diversified to include other types of consumer reporting.\textsuperscript{39} Equifax has developed a "tenant report" for its investigators to use while serving the rental industry.\textsuperscript{40} The report includes comments on a prospective tenant's business connections, stability, family size, reputation, prospects for continued employment, and prior rental history.\textsuperscript{41} The report is intended to be used in conjunction with the company's existing credit reports, giving a landlord a fairly comprehensive history of a prospective tenant.\textsuperscript{42}

Still another national data bank service is TRW.\textsuperscript{43} TRW is a limited purpose reporting company, specializing in objective data on financial transactions.\textsuperscript{44} Although it is not certain that the company has, at present, developed a specialized tenant reporting system, it is clear that landlords can obtain TRW credit reports on prospective tenants.\textsuperscript{45}

\section*{B. The Potential Abuses}

The types of information tenant reporting companies include in their reports are inherently threatening to privacy and other legal rights of tenants. One type of information often included is records of legal actions, particularly unlawful detainer suits.\textsuperscript{46} Proponents of the use of such records argue that unlawful detainer actions are matters of public record, that the fact of a tenant's previous involvement in an unlawful

\begin{thebibliography}{99}
\bibitem{38} Equifax, Inc. is a corporation based in Atlanta, Georgia, with branch offices in over 220 cities and sub-offices in 1,000 other cities throughout North America. The company was formerly known as Retail Credit Company. Letter, Brochure, and Sample Reports from Howard W. Snow, Equifax, Inc., to Raymond A. Biering (Feb. 8, 1978) [hereinafter cited as Letter from Snow] (on file in Loyola Law School library).
\bibitem{39} Foer, \textit{supra} note 5, at 43 n.27.
\bibitem{40} Letter from Snow, \textit{supra} note 38.
\bibitem{41} \textit{Id.}
\bibitem{42} \textit{Id.}
\bibitem{43} TRW is a computerized consumer credit reporting agency which acts as an automated central clearing house for the storage and reporting of factual credit information on an estimated 35 million individuals. The company serves more than seven thousand credit grantors in approximately 26 thousand locations throughout the United States. From centralized, on-line computer facilities located in Anaheim, California, TRW currently provides its services in 11 major cities and metropolitan areas. \textit{Hearings on S. 2360 Before the Subcomm. on Consumer Credit of the Comm. on Banking, Housing and Urban Affairs, 93rd Cong., 1st Sess. 128 (1973)} (statement of Donald L. Badders) [hereinafter cited as \textit{Hearings on S.2360}].
\bibitem{44} \textit{Id.}
\bibitem{45} Telephone Interview by Professor Benson with Barbara Butler, TRW Staff, in Los Angeles (Mar. 8, 1979).
\end{thebibliography}
detainer action may suggest he or she is a bad rental risk, and that landlords realize such information is not necessarily derogatory and therefore no harm should result to an innocent tenant. These arguments, however, are not altogether tenable when examined against the realities of the judicial system and the rental housing market.

Unlawful detainer records, like most court records, are public documents. However, they are public not to provide landlords with a device to measure potential rental risks but to assure the integrity of the judicial system. In fact, the records are quite inadequate to measure rental risks. Landlords who rely on a commercial reporting service are likely automatically to disqualify any prospective tenant whose name has ever appeared in an unlawful detainer suit. Thus, court records become a commercial blacklist, a consequence never intended by the common law rule making court records public. In a period of housing shortages, with extremely low rental vacancy rates, such a blacklist could permanently prevent a tenant from securing housing in a given region altogether.

Even if a tenant had once been the wrongdoer in an unlawful detainer case, it would be brutal to exclude him permanently from the housing market for that reason alone. In analogous situations, statutory law allows wrongdoers to rid themselves of their taints after passage of a reasonable period of time; taints of old bankruptcies, judgments, tax liens, accounts placed for collection, and even criminal convictions simply may not be reported under existing law by consumer reporting agencies. The courts also have long recognized that a legitimate public interest is served by preventing the unbridled dissemination of facts gleaned from public records. The California Supreme Court has stated:

It would be a crass legal fiction to assert that a matter once public never becomes private again. Human forgetfulness over time puts today’s “hot”

49. Id. at 2, col. 2.
50. See notes 60-61 infra.
52. See note 51 supra.
53. See, e.g., Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 539-40, 483 P.2d 34, 41, 93 Cal. Rptr. 866, 873 (1971) (footnote omitted). The case pitted a rehabilitated felon's right to anonymity against a magazine's right to identify him.
news in tomorrow's dusty archives. In a nation of 200 million people there is ample opportunity for all but the most infamous to begin a new life.  

In short, while court records are and should remain public, at some point the law traditionally has curbed the use of those records for private, undesirable ends. The authors believe the exploitation of public unlawful detainer records should be similarly circumscribed.

Moreover, the mere fact that a prospective tenant’s name appears on a list of unlawful detainer actions is not a reliable indication that he or she is a poor rental risk. There is a great danger of simple identification errors in transcribing tenants’ names from court records to computer data banks. There is also great opportunity for misinterpretation of court records. The fact that an unlawful detainer suit was filed does not mean the suit was valid. Furthermore, in California, the tenant is always named as defendant in unlawful detainer actions; many of these actions, however, are in effect initiated by the tenant who refuses to pay rent after continual attempts to force the landlord to comply with legal obligations. Thus, although a tenant might be the aggrieved party, he or she may be perceived as the wrongdoer by prospective landlords. Moreover, the prospective landlord may not care who the wrongdoer in the action was; the appearance of the tenant’s name in an unlawful detainer listing will signal that the tenant is a person willing to litigate his or her rights, and that alone might be sufficient to cause many landlords to reject the applicant.

54. Id.
55. Cf. note 77 infra and accompany text.
57. Even Howard Jarvis, co-author of California’s Proposition 13 in the election of June 1978, and activist in apartment owners’ organizations, has stated: “I think it’s very misrepresented to publish lists of cases that were simply filed. Either side could be right.” Lindorff, Tenants Blacklisted?, Valley News, Nov. 4, 1977, at 1, col. 4 [hereinafter cited as Lindorff].
60. Cary Lowe, staff attorney for California Housing Action and Information Network (CHAIN, a tenants’ organization), has remarked: As a result of one run-in with a landlord, which may well have been the landlord’s fault, a tenant could be branded as an undesirable everywhere. . . . [L]andlords unfamiliar with the law could assume that all tenants who had unlawful detainer cases filed against them were “deadbeats.” . . . [E]ven those who knew the law might consider tenants who were on the list for “exercising their rights” to be undesirable troublemakers.
61. Id. Radio station KFWB in Los Angeles broadcasted an editorial opposing the blacklisting of tenants through tenant reports. Radio Broadcast by KFWB, Los Angeles (Nov.
To prevent this misuse of public records by landlords, it seems desirable to limit the reported information to those unlawful detainer cases in which the landlord was adjudged the prevailing party and to those cases which actually reflect that the tenant is a poor rental risk. These cases generally involve some wrongful act on the part of the tenant other than mere holdover, such as default in rent, failure to perform conditions or covenants of the lease, or subletting, waste, nuisance, and unlawful use of the property. Other unlawful detainer actions, essentially those in which the landlord simply wants the tenant to move out for no stated reason, are much less likely to reflect financial risk and much more likely to reflect mere differences of opinion between landlord and tenant. Even if the landlord wins such cases, the cases

10-11, 16-17, 1977). After these stories appeared, Los Angeles City Councilman Joel Wachs introduced a motion in the Los Angeles City Council calling for state regulation of “persons and companies which accumulate and release information on unlawful detainer actions,” to require any such company to identify its sources of information, and to allow any person who has been denied housing “the right to challenge and amend any inaccurate information regarding the person which has been gathered from unlawful detainer actions.” Motion No. 77-4720 S-9 (Dec. 2, 1977).

In Schweig. v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970), the California Supreme Court addressed the issue of a landlord’s ability to either terminate the tenancy or increase the rent of a tenant in retaliation for the tenant’s assertion of his statutorily protected rights. The court stated:

Clearly, sections 1941 and 1942 [of the Civil Code] express the policy of this state that landlords in the interest of public health and safety have the duty to maintain leased premises in habitable condition and that tenants have the right, after notice to the landlord, to repair dilapidations and deduct the cost of the repairs from the rent. The policy expressed in these sections cannot be effectuated if landlords may evict tenants who invoke the provisions of the statute. Courts would be withholding with one hand what the Legislature has granted with the other if they order evictions instituted in retaliation against the exercise of statutory rights.

Id. at 516, 476 P.2d at 102, 90 Cal. Rptr. at 734. In his dissent, Chief Justice Wright called for legislative action to remedy this gap in tenant protection. Id. at 518, 476 P.2d at 104, 90 Cal. Rptr. at 736.

The California Legislature responded in 1970 with CAL. CIV. CODE § 1942.5 (West Supp. 1978) which proscribes the retaliatory eviction of a tenant within 60 days of the assertion of the tenant’s rights.

This has given rise to an inconsistency in California’s tenant protection scheme. The law prevents the chilling of a tenant’s statutory rights by defeating a retaliatory unlawful detainer action while it permits the virtual freezing of those rights by allowing the tenant to be blacklisted in the housing market by the mere appearance of an unlawful detainer filing in a tenant report. This result is clearly inconsistent with the policy articulated by both the California Supreme Court and the California Legislature.

62. The fact that a tenant has received a notice to quit bears neither positive nor negative connotations.

63. CAL. CIV. PROC. CODE § 1161(2) (West Supp. 1978).

64. Id. § 1161(3).

65. Id. § 1161(4).

66. Id. §§ 1161(1), (5).
should be excluded from tenant reports because of the chilling effect their inclusion could have on tenants who speak out for their legal rights.\textsuperscript{67}

Another type of information often contained in tenant reports is credit data.\textsuperscript{68} Credit reports are usually limited to financial information, \textit{e.g.}, bill-paying habits, charge accounts, creditors, amounts and locations of bank accounts, marital status, occupation, and income.\textsuperscript{69} Although landlords are not necessarily "creditors," as that term is commonly used,\textsuperscript{70} it can be argued that credit data is relevant in a tenant report because it reflects a prospective tenant's ability to make timely rental payments over the period of the lease.\textsuperscript{71}

Still another type of information which may appear in tenant reports is in-depth investigative data.\textsuperscript{72} Although there are some companies which compile investigative information specifically for tenant reports,\textsuperscript{73} this information usually will have been compiled for credit, insurance, or employment reports.\textsuperscript{74} Investigative reporting companies generally obtain their information from newspapers, court records, and interviews with a consumer's friends, employers, and neighbors.\textsuperscript{75} The information sought typically includes income, drinking and drug habits, domestic relations, political and social affiliations, living conditions, and general reputation.\textsuperscript{76}

The unregulated use of credit and investigative information in tenant reports raises a number of serious dangers. The information may be inaccurate, misleading, or biased. Simple but grave mistakes may be made, such as inaccurate transcriptions by computer operators when tenants' names are similar.\textsuperscript{77} Investigators may misinterpret information received or may fail to update it.\textsuperscript{78} Legitimate complaints by a consumer against a creditor may appear as adverse information on a

\textsuperscript{67} See note 61 \textit{supra} and accompanying text.
\textsuperscript{68} See notes 38-45 \textit{supra} and accompanying text.
\textsuperscript{69} See 15A AM. JUR. 2d \textit{Collection and Credit Agencies} § 19, at 213-14 (1976).
\textsuperscript{70} See \textit{BLACK'S LAW DICTIONARY} 441 (rev. 4th ed. 1968).
\textsuperscript{71} Cf. note 142-43 infra and accompanying text.
\textsuperscript{72} See notes 30-45 \textit{supra} and accompanying text.
\textsuperscript{73} See notes 21-37 \textit{supra} and accompanying text.
\textsuperscript{74} See notes 38-45 \textit{supra} and accompanying text.
\textsuperscript{75} See generally, \textit{e.g.}, Letter from Snow, \textit{supra} note 38.
\textsuperscript{76} See sample credit reporting forms in \textit{Hearings on S. 2360, supra} note 43, at 839-79.
\textsuperscript{78} See generally Nader, \textit{supra} note 56, at 19.
tenant report. Moreover, the report may be based on malicious gossip whispered to an investigator by a person who bears a grudge against the consumer. Some companies even place a premium on derogatory information and reward their investigators for it. And all of these dangers are merely ancillary to the ultimate issue: investigations of an individual's personal habits and political views are a gross intrusion into the intimate zone of privacy.

In sum, while it may be theoretically true that the tenant reporting system helps keep the cost of rental property down by allowing landlords to minimize rental risks, as a practical matter the system imposes unacceptable social costs. Tenant reports are too easily turned into instruments of abuse. Innocent tenants may be blacklisted from the rental market, be victimized by clerical errors or retaliation by landlords, or have their private lives exposed and misinterpreted. Furthermore, they may never be aware that they have been subjected to such treatment. Protection against these abuses would best be achieved by a total proscription of the use of tenant reports. That course, however, may be politically infeasible. At very least, adequate safeguards must be placed on the use of tenant reports.

III. INADEQUACY OF EXISTING LAW

A. Common Law

The common law actions of defamation and invasion of privacy are available to the victim of an erroneous or unreasonably intrusive consumer investigation. However, both of these theories have done little to restrict the consumer reporting industry because the courts have imposed increasingly difficult burdens of proof on injured plaintiffs.

In defamation actions, the majority of jurisdictions has held that society's interest in the free flow of information generally outweighs the individual's privacy interest. This judicial attitude has brought about

79. Id.
80. Id. See also Hearings on S. 823, supra note 77, at 398-401 (testimony of Michael E. Tanner).
81. Nader, supra note 56, at 19.
82. See notes 10-11 supra and accompanying text.
84. See generally id § 117.
85. See generally id. §§ 111-117; Prosser, Privacy, 48 CALIF. L. REV. 383 (1960) [hereinafter cited as Privacy]. In addition, the California legislation discussed in section III C infra places new restrictions on the common-law remedies. See CAL. CIV. CODE § 1785.32 (West Supp. 1978).
86. See, e.g., Ormsby v. Douglass, 37 N.Y. 477 (1868). For a general discussion of the
the doctrine of conditional privilege,\textsuperscript{87} which has served as a defense in defamation actions by both tenants and debtors.\textsuperscript{88} Once the privilege is invoked by the defendant, the plaintiff must show a lack of good faith on the part of the defendant in order to defeat the privilege.\textsuperscript{89} The absence of good faith is generally established by proving malice, judicially defined as "hatred or ill will"\textsuperscript{90} or a knowledge of the falsity of the communication.\textsuperscript{91} A consumer will rarely be able to show malice when opposing a reporting company because of the lack of access to facts sufficient to prove that a company acted with hatred, ill will, or a knowledge of the inaccuracy of the report. As a result, the conditional privilege doctrine has afforded virtual immunity in defamation actions to publishers of credit information.\textsuperscript{92}

The plaintiff is in no better position in invasion of privacy actions. He faces a number of onerous burdens. First, the conditional privilege defense might arise when a plaintiff is alleging defamation-related injuries to reputation.\textsuperscript{93} Second, "the disclosure of the private facts must be a public disclosure, and not a private one: there must be, in other words, publicity."\textsuperscript{94} At least one California court has held that "the tort must be accompanied by publicity in the sense of communication to the public in general or to a large number of persons as distinguished from an individual or a few."\textsuperscript{95} Therefore, a consumer might be hard pressed to show that the dissemination of a tenant report constituted a legally sufficient publication. Third, a plaintiff may be denied recovery on a privacy theory if the intrusion is within "the realm of legitimate public concern"\textsuperscript{96} or the disclosure or publication concerns non-private

\textsuperscript{87} W. Prosser, \textit{supra} note 85, § 115.
\textsuperscript{88} Id. § 115, at 788. The doctrine of conditional privilege has been adopted in California through both judicial decision, \textit{see}, e.g., Everett v. California Teachers Ass'n, 208 Cal. App. 2d 291, 294, 25 Cal. Rptr. 120, 122 (1962), and legislative action, \textit{see}, e.g., \textit{CAL. CIV. CODE} § 47(3) (West 1954).
\textsuperscript{89} W. Prosser, \textit{supra} note 85, § 115, at 790.
\textsuperscript{92} \textit{See} W. Prosser, \textit{supra} note 85, § 117, at 788.
\textsuperscript{93} Id. § 117, at 818; \textit{Privacy}, \textit{supra} note 85, at 421.
\textsuperscript{94} W. Prosser, \textit{supra} note 85, § 117, at 810 (footnote omitted).
\textsuperscript{95} Porten v. University of San Francisco, 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839, 841 (1976).
\textsuperscript{96} Id.
information.  

Perhaps the greatest shortcoming of the common-law remedies is that an injured tenant is generally in no position to consider a defamation or invasion of privacy action. A prospective tenant who has been denied housing may not even be aware of the information upon which the denial was based. Moreover, it is charitable to assume that the average tenant is in a financial position to sue when denied a rental opportunity. The high costs of litigation render a lawsuit an impractical means of asserting one’s legal right to an apartment—or even to a good reputation.

B. Federal Law

In 1970, the Ninety-first Congress enacted the Fair Credit Reporting Act (FCRA). The FCRA was largely in response to the judiciary’s failure to shape viable common-law remedies for the increasing intrusions of the consumer reporting industry. Congressional interest in this area was originally aroused by a 1965 proposal to centralize the extensive United States Government files in a single federal data bank. The Fair Credit Reporting bill was introduced by Senator William Proxmire (D-Wisconsin) on January 31, 1969. After hearings, debates, and a number of House and Senate amendments, the FCRA was finally passed and later signed into law by the President on October 26, 1970.

From the beginning, the FCRA was the product of bargain and compromise between Congress and the consumer reporting industry. The consumer reporting industry recognized that some sort of governmental regulation in the field was inevitable and that cooperation, rather than resistance, was more conducive to friendly legislation. The FCRA was an important first step in the area of consumer reports,

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97. There is a great deal of information which is technically public because it is on file and open for public inspection, e.g., unlawful detainer records. Although information of this nature may be extremely damaging to an individual’s reputation when used out of context, it is difficult to show a tortious invasion of privacy because the information is already “public.”


100. Id. at 72-73.


104. Id.
but it was not regarded as a total solution to the problem.\textsuperscript{105} On August 3, 1973, Senator Proxmire introduced amendments to the FCRA\textsuperscript{106} which the Federal Trade Commission itself supported.\textsuperscript{107} However, after five days of hearings on the proposed amendments, the Senate Consumer Credit Subcommittee voted to table further consideration.\textsuperscript{108} As a result, the FCRA stands today as it was originally enacted in 1970.

The FCRA imposes restrictions on the contents and dissemination of consumer credit and investigative reports.\textsuperscript{109} It requires that the consumer be given access to, and opportunity to correct or dispute, the information on file.\textsuperscript{110} The Federal Trade Commission is principally charged with administrative enforcement,\textsuperscript{111} and civil penalties are provided for non-compliance.\textsuperscript{112}

At first glance, one might assume that tenant reports are beyond the purview of the FCRA. The very title of the Act implies its limitation to credit reports. However, the use of the word "credit" was more the result of inattentive drafting than deliberate design.\textsuperscript{113} That Congress intended to regulate more than credit reports is clear from the Act's express "findings and intent":

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(6) It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such in-

\textsuperscript{105} See articles cited in note 13 supra.
\textsuperscript{106} S. 2360, 119 CONG. REC. 15604-06 (daily ed. Aug. 3, 1973); Hearings on S. 2360, supra note 43.
\textsuperscript{107} Hearings on S. 2360, supra note 43 (statement of Lewis A. Engman, Federal Trade Commission).
\textsuperscript{110} Id. § 1681i.
\textsuperscript{111} Id. § 1681s.
\textsuperscript{112} Id. §§ 1681n-o.
\textsuperscript{113} Id. § 1681(a)(2)-(4), (b).
formation in accordance with the requirements of this subchapter.\(^\text{114}\)  
The regulation of "consumer credit" is referred to as one of the "needs of commerce," along with "personnel, insurance and other information." Thus, the scope of the language is broad and refers to information that might be used for any number of commercial purposes.

By definition, the types of reports regulated by the FCRA are "consumer reports" and "investigative consumer reports."\(^\text{115}\)  

The FCRA defines "consumer report" as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance . . . , or, (2) employment purposes, or (3) other purposes authorized under section 1681b . . . .\(^\text{116}\)

The FCRA authorizes the use of reports for purposes other than mere credit investigation.\(^\text{117}\)  

It permits a consumer report to be given to any person who the agency has reason to believe "has a legitimate business need for the information in connection with a business transaction involving the consumer."\(^\text{118}\)  

Clearly, the rental of property is such a business transaction.

The FCRA defines "investigative consumer report" as:

a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information . . . .\(^\text{119}\)

Tenant reports often include precisely this type of information.\(^\text{120}\)  

Therefore, the Act applies to tenant reports either because they are "consumer reports" or because they are "investigative consumer reports."

The FCRA applies only to reporting agencies which use a "means or facility of interstate commerce,"\(^\text{121}\) but this criterion is read broadly by

\(^{\text{114}}\) Id. (emphasis added).  
\(^{\text{115}}\) Id. \S 1681a(d), (e).  
\(^{\text{116}}\) Id. \S 1681a(d).  
\(^{\text{117}}\) Id. \S 1681b(3)(E).  
\(^{\text{120}}\) See notes 30-45 supra and accompanying text.  
the Federal Trade Commission staff to include any agency which uses a telephone or the U.S. mail. Therefore, even intrastate California reporting agencies are probably covered by the FCRA. However, the FCRA is ineffective to protect California tenants because it fails to address the unique problem of unlawful detainer listings; its only restriction on use of these records is a general prohibition against the reporting of lawsuits over seven years old. Fortunately, the Act does invite supplementary state legislation by specifically providing that state legislation is not affected unless it is inconsistent with the FCRA.

C. California Consumer Reporting Legislation

To strengthen the safeguards of the federal Fair Credit Reporting Act, the California Legislature passed assembly bills 600 and 601 in 1975. These were added to the California Civil Code as the "Consumer Credit Reporting Agencies Act" and the "Investigative Consumer Reporting Agencies Act," respectively. In the words of their sponsor, Assemblyman Jerry Lewis (R-Redlands), the California acts were intended to provide "greater safeguards in protecting the good name of the consumer." Unfortunately, they failed to safeguard the "good name" of a consumer-tenant seeking to rent housing.

Consultant to FTC Los Angeles Regional Office, in Los Angeles (Feb. 20, 1979). Such a broad reading of the similar jurisdictional requirement which appears in the Securities Exchange Act of 1934 has been upheld by the courts. See, e.g., Spilker v. Shayne Laboratories, 520 F.2d 523 (9th Cir. 1975), where sellers of stock had made two intrastate telephone calls in connection with a sale. The court held the use of the telephone satisfied the Act's jurisdictional provision which requires "the use of any means or instrumentality of interstate commerce." Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j (1976).

122. See notes 48-67 supra and accompanying text.
125. 1975 Cal. Stats. ch. 1271.
126. Id. ch. 1272.
127. Id. chs. 1271-1272.
130. Id. §§ 1758-.56. The most significant effects of these added safeguards were: (1) They gave consumers the right to visually inspect their files and receive copies rather than merely be apprised of the substance. Compare CAL. CIV. CODE §§ 1785.10, .15, 1786.10, .22 (West Supp. 1978) with 15 U.S.C. § 1681g (1976). (2) They gave consumers the right to place a one hundred word statement of dispute in their files whether or not the reporting agency believes the dispute is frivolous or irrelevant; the federal statute allows agencies to refuse such statements on the ground that they are frivolous or irrelevant. Compare CAL. CIV. CODE § 1785.16, 1786.24 (West Supp. 1978) with 15 U.S.C. § 1681i (1976). See also Note, The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act, 26 Hastings L.J. 1218 (1975).
The Consumer Credit Reporting Agencies Act (CCRAA) was adopted with the express finding that, "There is a need to insure that consumer credit reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy . . . ." Furthermore, the purpose of this Act was to require "that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . ."

The CCRAA requires consumer credit reporting agencies to allow the consumer, upon request, to visually inspect all files regarding that consumer, resolve disputes over the files' contents, and disclose the names of the recipients of any report sent out. Anyone using the reports to deny credit or insurance must notify the consumer as to which agency supplied the report. When the report is not received from an "agency," as defined in the Act, the recipient must, upon request, disclose the nature and substance of the report to the consumer. To enforce the Act, the consumer is provided an action for damages, including attorney's fees and, in the proper case, punitive damages.

The types of agencies covered by the CCRAA are those engaging "in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties . . . ." A "consumer credit report" is defined as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used . . . for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized in Section 1785.11.

"[O]ther purposes authorized in Section 1785.11" include a "legitimate
business need for the information in connection with a business trans-
action involving the consumer.” Rental decisions no doubt constit-
tute a “legitimate business need.” A report concerning a prospective
tenant that contains information “bearing on credit worthiness, credit
standing, or credit capacity” would therefore be a “consumer credit re-
port” subject to the statute.

But what about reports on tenants which convey information about
character, reputation, mode of living, or personal relationships? It is at
least debatable whether a report indicating that Jane Doe plays loud
music at midnight, or is a lesbian, is a report bearing on Jane Doe’s
“credit.” Moreover, the Act’s definition of “consumer credit re-
port” goes on to specifically exclude,

any report containing information solely on a consumer’s character, gen-
eral reputation, personal characteristics, or mode of living which is ob-
tained through personal interviews with neighbors, friends, or associates
of the consumer reported on, or others with whom he is acquainted or
who may have knowledge concerning any such items of information.

The purpose of this exclusionary language is apparently to distinguish
consumer credit reports from investigative consumer reports, which are
separately covered in the Investigative Consumer Reporting Agencies
Act. Its effect, however, is to create a good deal of confusion, as well
as another loophole. The existence of the word “solely” suggests
that a “consumer credit report” may contain some investigative infor-
mation, but that reports limited solely to investigative information,
even if made for credit purposes, are probably not covered by the
CCRAA.

Moreover, companies supplying only information of unlawful de-
tainer listings compiled from public records may argue quite plausi-
bly that the listings merely report a tenant’s rental history rather than
information “bearing on a consumer’s credit worthiness, credit stand-

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141. Id. § 1785.11.
142. In one case, two businesswomen were denied life insurance on the basis of an inves-
tigative report which stated that,

neighbors have been led to strong suspicions “of Lesbian action between those women”
and said that “[i]nformants will not come out and state that they think the applicant
[Wetherby] is ‘Lesbian’ but hint and hedge around and do everything but state it, saying
that they definitely do not act like the feminine sex if they are.”

143. See note 140 supra and accompanying text.
144. Id.
145. CAL. CIV. CODE § 1785.3(c)(4) (West Supp. 1978) (emphasis added).
146. See notes 152-58 infra and accompanying text.
147. See note 145 supra and accompanying text.
148. See notes 21-29 supra and accompanying text.
Thus, reports of unlawful detainers appear not to be subject to the CCRAA either.

Even if tenant reports containing investigative or unlawful detainer information were held to be subject to the CCRAA, landlords using those reports to deny rentals would not have to inform the applicant of that use. The Act only imposes that duty upon recipients who use the reports to deny credit, insurance, or employment.\[150\]

These loopholes should be closed by amending the CCRAA to make it apply expressly to any reports on prospective tenants. At the same time, new safeguards should be placed on the reporting of unlawful detainer listings to prevent their misleading use generally and to prevent their exploitation when they are too dated or otherwise not fairly relevant to a tenant’s present suitability as a rental customer.\[151\]

In contrast to the CCRAA, the Investigative Consumer Reporting Agencies Act (ICRAA)\[152\] covers "investigative consumer reports," which are defined as,

consumer report[s] in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he is acquainted or who may have knowledge concerning any such items of information . . . .\[153\]

The Act provides safeguards similar, though not identical, to those established by the CCRAA.\[154\]

The application of the Act is narrowly limited to reports made concerning persons applying for employment or insurance.\[155\] The term "consumer" is limited to "a natural individual who has made application to a person for employment purposes or insurance for personal, family, or household purposes."\[156\] The definition of "investigative consumer reporting agency" is similarly confined.\[157\] These definitions control the Act’s application. As a result, a person who applies for anything other than employment or insurance, e.g., an apartment, is not a

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149. See note 140 supra and accompanying text.
150. CAL. CIV. CODE § 1785.20(a)-(b) (West Supp. 1978). While the Act applies to reports bearing on credit, the provision concerning use of those reports only demands that users notify consumers specifically when credit, insurance, or employment are denied or increased in cost.
151. See text accompanying notes 46-67 supra and section IVB infra.
152. CAL. CIV. CODE §§ 1786-.56 (WEST SUPP. 1978).
153. Id. § 1786.2(c).
154. See notes 135-38 supra and accompanying text.
155. Id. § 1786.2(b).
156. Id.
157. Id. § 1786.2(d).
“consumer” within the meaning of the ICRAA. Thus, there presently appears to be no applicable legislation in California controlling investigative reports concerning tenants.  

The shortcomings of the CCRAA and the ICRAA can be summarized as follows: First, only tenant reports containing information “bearing on a consumer’s credit worthiness, credit standing, or credit capacity” are covered by the provisions of the CCRAA. This probably exempts reports on personal characteristics and unlawful detainer history. Even if reports containing such information were covered by the acts, landlords using the reports would have no duty to inform the tenant of that use. Second, reports limited solely to investigative information are expressly excluded from the CCRAA. Third, no tenant reports, regardless of the type of information they contain, are regulated by the ICRAA because it applies only to employment and insurance applicants. Thus, there is a clear need for new legislation to protect California tenants from the abuses they may encounter in their search for rental housing.

IV. A LEGISLATIVE SOLUTION: SB 411

The authors have drafted a bill designed to remedy the defects in current law discussed in this article. State Senator David A. Roberti (D-23rd District) has introduced the bill as SB 411 in the 1979-80 regular session of the California Legislature. A section-by-section analysis follows the text of the bill.

A. The Bill

An act to amend Sections 1785.1, 1785.3, 1785.11, 1785.13, 1785.20,
1785.35, 1786, 1786.2, 1786.12, 1786.18, 1786.40 and 1786.54 of the Civil Code, relating to credit.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1785.1 of the Civil Code is amended to read:

1785.1. The Legislature finds and declares as follows:

(a) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, and general reputation of consumers.

(b) Consumer credit reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(c) There is a need to insure that consumer credit reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(d) It is the purpose of this title to require that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, property rental or leasing and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

(e) The Legislature hereby intends to regulate consumer credit reporting agencies pursuant to this title in a manner which will best protect the interests of the people of the State of California.

(f) The extension of credit is a privilege and not a right. Nothing in this title shall preclude a creditor from denying credit to any applicant providing such denial is based on factors not inconsistent with present law.

(g) Any clauses in contracts existing between creditors and credit reporters which prohibit any action by either the reporter or the creditor required by this title are not in the public interest and shall be considered unenforceable. This shall not invalidate the other terms of such a contract.

SEC. 2. Section 1785.3 of the Civil Code is amended to read:

1785.3. The following terms as used in this title have the meaning expressed in this section:

(a) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(b) The term "consumer" means a natural individual.

(c) The term "consumer credit report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to
be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) property rental or leasing purposes or (4) other purposes authorized in Section 1785.11.

The term does not include: (1) any report containing information solely as to transactions or experiences between the consumer and the person making the report, or (2) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device, or (3) any report by a person conveying a decision whether to make a specific extension of credit directly or indirectly to a consumer in response to a request by a third party, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under Section 1785.20, or (4) any report containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living which is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he is acquainted or who may have knowledge concerning any such items of information.

(d) The term "consumer credit reporting agency" means any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes.

(e) The term "file" when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer credit reporting agency regardless of how the information is stored.

(f) The term "employment purposes", when used in connection with a consumer credit report, means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee.

(g) "Item of information" means any of one or more informative entries in a credit report which causes a creditor to deny credit to an applicant or increase the cost of credit to an applicant.

SEC. 3. Section 1785.11 of the Civil Code is amended to read:

1785.11. A consumer credit reporting agency shall only furnish a consumer credit report under the following circumstances:

(a) In response to the order of a court having jurisdiction to issue such an order.

(b) In compliance with a lawful subpoena issued by a court of competent jurisdiction.

(c) In accordance with the written instructions of the consumer to whom it relates.
(d) To a person which it has reason to believe:

(1) Intends to use the information in connection with a credit transaction, or entering or enforcing an order of a court of competent jurisdiction for support, involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(2) Intends to use the information for employment purposes; or

(3) Intends to use the information in connection with the underwriting of insurance involving the consumer, the rate for such insurance, or for insurance claims settlements; or

(4) Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant's financial responsibility or status; or

(5) Intends to use the information in connection with the rental or leasing of any property; or

(6) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

SEC. 4. Section 1785.13 of the Civil Code is amended to read:

1785.13. (a) Except as authorized under subdivision (b) no consumer credit reporting agency shall make any consumer credit report containing any of the following items of information:

(1) Bankruptcies which, from the date of adjudication, antedate the report by more than 14 years.

(2) Suits from the date of filing and paid judgments which from the date of entry antedate the report by more than seven years.

(3) Unpaid judgments which, from the date of entry, antedate the report by more than 10 years.

(4) Paid tax liens which, from the date of payment, antedate the report by more than seven years.

(5) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(6) Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime which, from the date of disposition, release, or parole, antedate the report by more than seven years. Such items of information shall no longer be reported if at any time it is learned that in the case of a conviction a full pardon has been granted, or in the case of an arrest, indictment, information, or misdemeanor complaint a conviction did not result.

(7) Records of unlawful detainer actions in which (i) the date of final adjudication antedates the report by more than two years; or (ii) the person bringing the action was not adjudged the prevailing party; or (iii) the action was brought under subdivision 1 of Section 1161 of the Code of Civil Procedure
(relating to termination of term and expiration of tenancy); or (iv) the action was brought under subdivision 5 of Section 1161 of the Code of Civil Procedure (relating to delivery of possession).

(8) Any other adverse information which antedates the report by more than seven years.

(b) The provisions of subdivision (a) are not applicable in the case of any consumer credit report to be used in the following transactions:

(1) A credit transaction involving, or which may reasonably be expected to involve, a principal amount of fifty thousand dollars ($50,000) or more.

(2) The underwriting of life insurance, involving or which may reasonably be expected to involve, an amount of one hundred thousand dollars ($100,000) or more.

(3) The employment of any individual at an annual salary which equals, or may reasonably be expected to equal, thirty thousand dollars ($30,000) or more.

SEC. 5. Section 1785.20 of the Civil Code is amended to read:

1785.20. (a) Whenever credit or insurance for personal, family, or household purposes, or employment, or the rental or leasing of any property involving a consumer is denied or the charge for such credit or insurance, rental or lease is increased either wholly or partly because of information contained in a consumer credit report from a consumer credit reporting agency, the user of the consumer credit report shall so advise the consumer against whom such adverse action has been taken and supply the name and address or addresses of the consumer credit reporting agency making the report.

(b) Whenever credit or insurance for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or in part because of information obtained from a person other than a consumer credit reporting agency bearing upon consumer's credit worthiness or credit standing, the user of such information shall, within a reasonable period of time, and upon the consumer's written request for the reasons for such adverse action received within 60 days after learning of such adverse action, disclose the nature and substance of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subdivisions (a) and (b) of this section.

SEC. 6. Section 1785.35 of the Civil Code is amended to read:

1785.35. This title does not apply to any consumer credit report which by its terms is limited to disclosures from public records relating to land and land titles, with the exception of disclosures from public records relating to unlaw-
ful detainer actions, and does not apply to any person whose records and files are maintained for the primary purpose of reporting those portions of the public records which impart constructive notice under the law of matters relating to land and land titles, nor does it apply to transactions by mail where the credit grantor and its major credit application processing office are located outside the State of California.

SEC. 7. Section 1786 of the Civil Code is amended to read:

1786. The Legislature finds and declares as follows:

(a) Investigative consumer reporting agencies have assumed a vital role in assembling and evaluating information on consumers for employment, and insurance, and rental or leasing purposes.

(b) There is a need to insure that investigative consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(c) It is the purpose of this title to require that investigative consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for employment, and insurance, and property rental or leasing information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

(d) The Legislature hereby intends to regulate investigative consumer reporting agencies pursuant to this title in a manner which will best protect the interests of the people of the State of California.

SEC. 8. Section 1786.2 of the Civil Code is amended to read:

1786.2. The following terms as used in this title have the meaning expressed in this section:

(a) The term "person" means any individual, partnership, corporation, trust estate, cooperative, association, government or governmental subdivision or agency, or other entity. The term "person" as used in this title shall not be construed to require duplicative reporting by any individual, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity involved in the same transaction.

(b) The term "consumer" means a natural individual who has made application to a person for employment purposes, for insurance for personal, family, or household purposes, or for the rental or leasing of any property.

(c) The term "investigative consumer report" means a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained from any source, including through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he is acquainted or who may have knowledge concerning any such items of information. The term does not include a consumer report or other compilation of information which is limited to specific factual information relating to a consumer's credit record or manner
of obtaining credit obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a potential or existing creditor of the consumer or from the consumer.

(d) The term "investigative consumer reporting agency" means any person who, for monetary fees or dues, regularly engages in whole or in part in the practice of assembling or evaluating employment, or insurance information, or both, or any other information concerning consumers for personal, family, or household purposes, for the purposes of furnishing investigative consumer reports to third parties, to be used with respect to consumers for employment purposes or insurance primarily for personal, family, or household purposes, or for property rental or leasing, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes, or a private investigator licensed in this state or employees of such a private investigator and does not include any licensed insurance agent, insurance broker, or solicitor, insurer, or life insurance agent.

(c) The term "file" when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by an investigative consumer reporting agency regardless of how the information is stored.

(f) The term "employment purposes", when used in connection with an investigative consumer report, means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee.

(g) The term "medical information" means information on a person's medical history or condition obtained directly or indirectly from a licensed physician, medical practitioner, hospital, clinic, or other medical or medically related facility.

SEC. 9. Section 1786.12 of the Civil Code is amended to read:

1786.12. An investigative consumer reporting agency shall only furnish an investigative consumer report under the following circumstances:

(a) In response to the order of a court having jurisdiction to issue such an order.

(b) In compliance with a lawful subpoena issued by a court of competent jurisdiction.

(c) In accordance with the written instructions of the consumer to whom it relates.

(d) To a person which it has reason to believe:

(1) Intends to use the information for employment purposes; or

(2) Intends to use the information serving as a factor in determining a consumer's eligibility for insurance or the rate for such insurance; or

(3) Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant's financial responsibility or status; or
(4) Intends to use the information in connection with an order of a court of competent jurisdiction to provide support where the imposition or enforcement of the order involves the consumer; or

(5) Intends to use the information in connection with the consumer's application for the rental or lease of any property.

SEC. 10. Section 1786.16 of the Civil Code is amended to read:

1786.16. (a) Any person described in subdivision (d) of Section 1786.12 shall not procure or cause to be prepared an investigative consumer report unless the following applicable conditions are met:

(1) If an investigative consumer report may be sought in connection with the underwriting of insurance, it shall be clearly and accurately disclosed in writing at the time the application form, medical form, binder, or similar document is signed by the consumer that an investigative consumer report regarding the consumer's character, general reputation, personal characteristics, and mode of living may be made. If no signed application form, medical form, binder, or similar document is involved in the underwriting transaction, such disclosure shall be made to the consumer in a writing mailed or otherwise delivered to the consumer not later than three days after the report was first requested.

(2) If, at any time, an investigative consumer report is sought for employment purposes other than promotion or reassignment, the person procuring or causing the report to be made shall, not later than three days after the date on which the report was first requested, notify the consumer in writing that an investigative consumer report regarding the consumer's character, general reputation, personal characteristics, and mode of living will be made. This notification shall include the name of the consumer reporting agency conducting the investigation and a summary of the provisions of Section 1786.22.

(3) If an investigative consumer report may be sought in connection with the rental or lease of any property, the consumer upon whom the report is requested shall be notified that an investigative consumer report regarding the consumer's character, general reputation, personal characteristics, and mode of living may be made. Such notification shall be made to the consumer by the reporting agency in writing, mailed or otherwise delivered to the consumer not later than three days after the report was first requested.

(b) The provisions of subdivision (a) shall not apply to an investigative consumer report procured or caused to be prepared by an employer if the purpose of the employer is to:

(1) Determine whether or not an employee is to be retained; and

(2) To determine whether or not such employee is engaged in any criminal activity likely to result in a loss to the employer.

(c) Those persons described in subdivision (d) of Section 1786.12 of this
title shall constitute the sole and exclusive class of persons who may cause an investigative consumer report to be prepared.

SEC. 11. Section 1786.18 of the Civil Code is amended to read:

1786.18 (a) Except as authorized under subdivision (b) no investigative consumer reporting agency shall make any investigative consumer report containing any of the following items of information:

(1) Bankruptcies which, from the date of adjudication, antedate the report by more than 14 years.

(2) Suits from the date of filing and paid judgments which from the date of entry antedate the report by more than seven years.

(3) Unpaid judgments which, from the date of entry, antedate the report by more than 10 years.

(4) Paid tax liens which, from the date of payment, antedate the report by more than seven years.

(5) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(6) Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime which, from the date of disposition, release, or parole, antedate the report by more than seven years. Such items of information shall no longer be reported if at any time it is learned that in the case of a conviction a full pardon has been granted, or in the case of an arrest, indictment, information, or misdemeanor complaint a conviction did not result, except that records of arrest, indictment, and information misdemeanor complaints may be reported pending pronouncement of judgment on the particular matter subject to such records.

(7) Records of unlawful detainer actions in which (i) the date of final adjudication antedates the report by more than two years; or (ii) the person bringing the action was not adjudged the prevailing party; or (iii) the action was brought under subdivision 1 of Section 1161 of the Code of Civil Procedure (relating to termination of term and expiration of tenancy); or (iv) the action was brought under subdivision 5 of Section 1161 of the Code of Civil Procedure (relating to delivery of possession).

(8) Any other adverse information which antedates the report by more than seven years.

(b) The provisions of subdivision (a) are not applicable in the case of any consumer report to be used in the following transactions:

(1) The underwriting of life insurance, involving or which may reasonably be expected to involve, an amount of one hundred thousand dollars ($100,000) or more.

(2) The employment of any individual at an annual salary which equals, or may reasonably be expected to equal, thirty thousand dollars ($30,000) or more.

SEC. 12. Section 1786.40 of the Civil Code is amended to read:
1786.40. (a) Whenever insurance for personal, family, or household purposes, or employment, or the rental or leasing of any property involving a consumer is denied or the charge for such insurance, rental or lease is increased either wholly or partly because of information contained in an investigative consumer report from an investigative consumer reporting agency, the user of the investigative consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the investigative consumer reporting agency making the report.

(b) Whenever insurance for personal, family, or household purposes involving a consumer is denied or the charge for such insurance is increased either wholly or in part because of information obtained from a person other than an investigative consumer reporting agency, the consumer, or another person related to the consumer and acting on the consumer's behalf and bearing upon the consumer's general reputation, personal characteristics or mode of living, the user of such information shall, within a reasonable period of time, and upon the consumer's written request for the reasons for such adverse action received within 60 days after learning of such adverse action, disclose the nature and substance of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer. The user may withhold the substance of such medical information, as defined in subdivision (g) of Section 1786.2, but shall inform the consumer of the existence of any such medical information withheld. The consumer shall have a right to be informed in writing of the substance of such information upon written authorization from the consumer's attending physician providing the information. The user shall inform the consumer of the consumer's right to be informed in writing of the substance of such withheld information at the time of disclosure pursuant to this subdivision.

SEC. 13. Section 1786.54 of the Civil Code is amended to read:

1786.54. This title does not apply to any investigative consumer report which by its terms is limited to disclosures from public records relating to land and land titles, with the exception of disclosures from public records relating to unlawful detainer actions, or which is a report issued preliminary to the issuance of a policy of title insurance, and it does not apply to any person whose records are maintained for the primary purpose of reporting those portions of public records which impart constructive notice under the law of matters relating to land and land titles and which may be issued as the basis for the issuance of a policy of title insurance.

B. Section-by-Section Analysis of the Bill

The Consumer Credit Reporting Agencies Act (sections 1785.1-.35 of the Civil Code) is amended as follows:

Section 1785.1(d) currently provides that the purpose of the Act is to require that consumer credit reporting agencies adopt reasonable
procedures for meeting various needs of commerce. As amended, the Act will expressly include property rental or leasing decisions as "a need of commerce." (Although there is no legal distinction between "renting" or "leasing" of property, the two terms are used in the statute in recognition of common business usage.)

Section 1785.1(g) currently provides that clauses in contracts between creditors and credit reporters are unenforceable when they prohibit legal actions required by the Act. However, the existing language does not prohibit, for example, unfair adhesion or exculpatory agreements with the consumer. Such agreements are widely regarded by the courts as contrary to the public interest. As amended, the Act will render unenforceable all private contractual waivers of the requirements of the Act.

Section 1785.3(c) currently defines "consumer credit report." It is unclear whether reports on prospective tenants are within this definition. As amended, information bearing on a consumer's eligibility for property rental or leasing purposes is expressly included in the Act.

Section 1785.11 currently sets forth the circumstances in which a consumer credit report may be utilized. As amended, the Act provides that such reports can be released to a person who the reporting agency has reason to believe intends to use the information in connection with the rental or leasing of any property.

Section 1785.13 currently prohibits the use of certain types of information in consumer credit reports, e.g., bankruptcies older than 14 years, arrest records older than seven years, etc. As amended, the Act will also prohibit the use of unlawful detainer records which (i) are older than two years, (ii) are records of actions in which either the landlord was not adjudged the prevailing party or the case did not proceed to final judgment, or (iii) are records of actions which generally reflect disputes over matters other than money, lease violations, damage, and similar serious issues. As explained in the text, the rationale for this last exclusion is to avoid the use of unlawful detainer listings to harass tenants who speak up for and litigate perceived legal rights.

Section 1785.20 currently requires the user of a consumer credit report to advise the consumer of an adverse report which was used to deny or increase the charge for credit, insurance, or employment. As amended, the same obligations would be owed to the consumer when an adverse report is used to deny or increase the cost of rental or leased property.

161. See notes 62-67 supra and accompanying text.
SECTION 1785.35 currently exempts disclosures of public records relating to land or land titles from the requirements of the Act. To avoid the erroneous treatment of unlawful detainer listings as such records, unlawful detainer listings are expressly excluded from this exemption.

The Investigative Consumer Reporting Agencies Act (Sections 1786-.56) is amended as follows:

SECTION 1786 currently outlines the Legislature’s findings and purpose to the Act. As amended, language referring to property rental or leasing information is expressly included in the Act.

SECTION 1786.2 currently contains definitions, including “consumer,” “investigative consumer report,” and “investigative consumer reporting agency.” As amended, these terms would include express references to property rental or leasing.

SECTION 1786.12 only permits investigative consumer reports to be furnished in response to a lawful subpoena, in response to the written instructions of a consumer, or for the purpose of determining eligibility for employment, insurance, or a government license. As amended, reports used to determine a consumer’s eligibility for the rental or lease of any property are also included.

SECTION 1786.16 currently places conditions upon the procuring or preparing of any investigative consumer report. As amended, the Act extends these conditions to cover investigative reports made in connection with the rental or leasing of property. Specifically, the amended Act requires notification to the consumer by the reporting agency whenever such a report has been requested.

SECTION 1786.18 currently prohibits the use of certain types of information in consumer credit reports, e.g., bankruptcies older than 14 years, arrest records older than seven years, etc. As amended, the Act will also prohibit the use of unlawful detainer records which (i) are older than two years, (ii) are records of actions in which either the landlord was not adjudged the prevailing party or the case did not proceed to final judgment, or (iii) are records of actions which generally reflect disputes over matters other than money, lease violations, damage, and similar highly relevant issues. As explained in the text, the rationale for this last exclusion is to avoid the use of unlawful detainer listings to harass tenants who speak up for and litigate perceived legal rights.

SECTION 1786.40 currently requires the user of a consumer credit report to disclose to the consumer any adverse information which was used to deny or increase the charge for credit, insurance, or employ-
ment. As amended, the same obligations would be owed to the consumer whenever an adverse report is used to deny or increase the cost of rental or leased property.

Section 1786.54 currently exempts disclosures of public records relating to land or land titles from the requirements of the Act. To avoid the erroneous treatment of unlawful detainer listings as such records, unlawful detainer listings are expressly excluded from this exemption.

V. Conclusion

California tenants are presently exposed to unacceptable invasions of privacy by tenant reporting companies. Safeguards provided by federal law are ineffective to prevent unfair exploitation of unlawful detainer records. State law provides no safeguards at all. The proposed bill, SB 411, will bring tenant reports under the same safeguards now established by state law for consumer credit and investigative reports; in addition, the bill will significantly curb reports of unlawful detainer records.

These legislative solutions are partial and remedial, designed for immediate action. More fundamental protection of tenants' privacy must await the day when Congress and the California Legislature truly come to grips with the growing threats to the privacy of us all.