

Protecting Consumers From Arbitrary, Erroneous, And Malicious Credit Information

I. THE COLLECTION, DISTRIBUTION, AND USE OF CREDIT INFORMATION: A SOURCE OF PROBLEMS

At 54, Sigmund Arywitz was the picture of a successful businessman. As executive secretary and treasurer of the Los Angeles County Federation of Labor, AFL-CIO, he was making \$30,000 a year and had just finished eight years of service in Sacramento as state labor commissioner. Suddenly, in the space of one year, Mr. Arywitz was refused charge accounts by five Los Angeles area department stores, and a major car-leasing company turned him down for credit.

Using his influence, Mr. Arywitz discovered that a certain Los Angeles credit bureau had reported that he had been involved in many lawsuits. Then it all fit together. During his eight years in Sacramento Mr. Arywitz had been "listed for the record as plaintiff or defendant in hundreds of lawsuits filed by or against the state labor department." Thus he discovered that his credit slur had resulted from the fact that agents of the credit bureau, in checking public records, had reported that Arywitz was involved in a multitude of "legal actions."¹

Despite the successful outcome, this example is no isolated episode of deficiencies in the credit-reporting process. In the past few years, articles in a number of national magazines, including *Reader's*

¹"The Assault on Privacy," *NEWSWEEK*, July 27, 1970, at 15.

Digest,² *Consumer's Reports*,³ and *Playboy*;⁴ newspapers such as the *Wall Street Journal*;⁵ and books such as "BUY NOW, PAY LATER"⁶ have reported incidents involving serious breaches of privacy and problems of access, accuracy, and confidentiality in the gathering and use of credit-related information.

There is no serious argument about the need for a credit reporting industry. The American economy is rapidly evolving from a monetary system based on cash and checks toward one based entirely on credit. Consumer credit has grown from \$5 billion outstanding at the end of World War II to over \$110 billion by the end of the 1960's.⁷ Furthermore, over sixty percent of the average individual's income now goes to pay off credit obligations.⁸

Without credit bureaus, America's rapidly growing consumer credit industry would not be able to function effectively, if at all. The creditor needs to know of the potential customer's bill-paying history in order to properly assess any risk which might be involved in extending credit. Credit reporting agencies have filled such a need. The consumer also benefits when he can secure credit promptly without undue red tape.

As the nation's economy has grown, there has been a corresponding growth in the need for credit information. This need has been reflected in the expansion of the credit reporting system. Members of the Associated Credit Bureaus of America issued over 97 million credit reports in 1967 and maintained files on 110 million Americans.⁹ And these figures will grow dramatically as the industry becomes computerized. The eventual result will be fully computerized credit bureau networks that would have the potential to maintain files on every economically viable American.¹⁰

Given the pervasive reach of the credit investigating and reporting industry, how it is operated becomes important. Credit bureau services are available to subscribers. Subscribers include commercial

²Morris, "What Credit Bureaus Know About You", *READER'S DIGEST*, Nov. 1967, at 85.

³"When Credit Is Flatly Refused", *CONSUMER REPORTS*, May 1967, at 244.

⁴Westin "The Career Killers," *PLAYBOY MAGAZINE*, June 1970 at 103.

⁵Sasser, "Prying For Pay: How Credit Bureaus Collect and Use Data on Millions of Persons," *The Wall Street Journal*, Feb. 5, 1968, at 16.

⁶H. BLACK, *BUY NOW, PAY LATER* (1961).

⁷*Hearings on S.823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess., ser. 1 (1960) [hereinafter cited as 1969 Fair Credit Reporting Hearings].*

⁸*NEW REPUBLIC* Oct. 5, 1968, at 5.

⁹1969 *Fair Credit Reporting Hearings*, at 427.

¹⁰Miller, "Detour to 1984," *THE NATION*, June 1, 1970, at 649.

creditors, landlords, insurance companies, and others. Subscribers pay an annual or monthly fee and an additional charge each time they obtain information, such as a report assessing the "credit worthiness" of an individual.¹¹

A particular subscriber, before deciding whether to extend credit, will request a report from a credit bureau. A typical credit report contains the applicant's name, address, marital status, bank references, and a summary of his bill paying habits. It may also contain information about his employment history, present salary, approximate bank balance, and a record of loans, mortgages, installment purchases, charge accounts, and legal involvements. Some reports may even comment on the individual's personal character.¹² A credit bureau does not normally rate a person's credit per se; they supply facts on which the creditor makes his own decision.

Sources of the information compiled in credit bureau files are many. Much of it comes from the individuals themselves.¹³ For instance, if a person applies for a charge account, the information he gives on the application is relayed to a local credit bureau. In addition, files may contain information not directly supplied by people applying for credit. Stores and banks not only buy credit reports but also send to credit bureaus the vital statistics and repayment records of consumers. Also, references listed on a credit application may be contacted or public records may be searched for information. Thus, many bureaus scan newspapers and other public records in search of data thought to be pertinent in deciding whether an individual ought to be extended credit.

From just a cursory glance at this information gathering and reporting process, one can note several problem areas. These consist of certain aspects of the credit reporting process that have increased the possibility of wrongfully harming the subjects of the credit reports.

A major problem is the possibility of inaccurate information being contained in a person's file. There have been many examples of errors of identification, incomplete information, and biased reporting.¹⁴ One bureau admitted that it combed through court records and noted when a person was sued or arrested, but did not follow up on the out-

¹¹"Credit Bureaus: What They Know About You," GOOD HOUSEKEEPING, Sept. 1969, at 184. [hereinafter cited as GOOD HOUSEKEEPING].

¹²1969 *Fair Credit Reporting Hearings*, at 510. The reason why is that many credit bureaus have branched out into related investigational work.

¹³GOOD HOUSEKEEPING, *supra* note 11, at 184.

¹⁴1969 *Fair Credit Reporting Hearings*, at 93.

come of the cases.¹⁵ Information contained in files may be misleading. A person might be labeled as a "slow payer" when the cause of any slow payments might be a legitimate dispute over the quality of the merchandise. But this fact rarely gets into the credit report, because the supplier of the information is the seller, who may be "getting even" with a recalcitrant buyer.

A further problem of accuracy involves field investigations. Although the Associated Credit Bureaus of America, the nation's largest organization of independent credit bureaus, claims that its "files contain only factual credit-related information reported from credit grantors,"¹⁶ some credit bureaus have grown into omnibus information gatherers that rely on other investigative techniques.¹⁷ These include field investigations to gather information and opinions as to an individual's status and reputation in the community. The people conducting such investigations are often inadequately paid and under time pressures. The result is often a loss of care and accuracy. Furthermore, such reports often contain unverified gossip and conclusions based on the mere opinions of neighbors and business associates of the person investigated.¹⁸ And such investigative information goes not only to the clients requesting it but also into credit bureau files for future reference.

The problem of inaccuracy is compounded by the fact that, until recently, a person being refused credit has usually not been given a reason for such refusal or even told that he was the subject of a report by a credit bureau. The typical contract between a bureau and a credit grantor stated that information from the reports and the identity of the agency could not be revealed to the person reported on.¹⁹ Thus, once an error or a misleading entry found its way into a file, it has been almost impossible for the individual to have it corrected, because, until recently, it has been the practice of most bureaus not to allow a person to see his own file.²⁰

A central issue concerning invasion of privacy and credit bureaus is the release of credit information to persons other than creditors.

¹⁵"Credit Bureaus Near a Day of Judgment," *BUSINESS WEEK*, Aug. 17, 1968 at 46.

¹⁶*Id.*

¹⁷1969 *Fair Credit Reporting Hearings*, at 94. For example Retail Credit Co. only performs credit checking as a subsidiary operation. The vast bulk of its business comes from investigations of people who apply for insurance. The second largest source of the company's revenue stems from investigating job applicants. *NEW REPUBLIC*, April 27, 1968, at 11.

¹⁸Miller, *supra* note 10, at 649.

¹⁹1969 *Fair Credit Reporting Hearings*, at 88.

²⁰Miller, *supra* note 10, at 650.

There is overwhelming evidence that credit files on individuals can be obtained with great ease by persons not in the business of extending credit.²¹ For example, police agencies and federal investigators have regularly had access to most credit bureaus. Ironically, all too often the only person who lacks access to a credit dossier is the file subject himself.

Another problem with credit bureau procedures is that too much irrelevant information is finding its way into credit bureau files.²² Data has not been limited to information which bears directly on the question of a person's "credit standing."

Although it is generally recognized that a free flow of legitimate credit information is essential to the nation's economy, in view of the record of past abuses and negligent practices by some members of the credit bureau industry, means for combating such abuses have become necessary.

II. JUDICIAL REMEDIES

Most private legal actions against credit bureaus have been defamation suits. The common law tort of defamation is generally defined as an invasion of the interest in reputation or good name by communication to others which tends to diminish the esteem in which the plaintiff is held or to excite adverse feelings or opinions against him.²³ While this would seem to cover the situation where a credit-rating agency errs to the extent that the credit-applicant is harmed, the prevailing rule has been that the communication between the credit bureau and the creditor seeking information is privileged if the report was made honestly and in good faith.²⁴ In the law of defamation there has long been an exception to the general rule that statements or communications which are libelous or slanderous in nature are actionable. This exception is a privilege granted to certain publishers or communicators where it is in the furtherance of public or social interests to protect these people from suits.²⁵ The great weight of authority has held that this privilege extends to the

²¹1969 *Fair Credit Reporting Hearings*, at 92.

²²*Id.*, at 94.

²³W. PROSSER, *TORTS* (3d ed. 1964) at 754.

²⁴*Id.*, at 617.

²⁵36 AM. JUR. *Mercantile Agencies* at 184 (1941).

credit bureau/subscriber context.²⁶ A typical case is *Watwood v. Stone's Mercantile Agency*.²⁷ In that case the credit rating agency had reported that the appellant claimed to be single and to have one child. In fact, she was married and had no children. The Court awarded summary judgment to the agency, stating in part:

A jury might well think appellee's report suggested that appellant was unmarried and single But the usual rule, which we think should prevail in the District of Columbia, is that a mercantile agency's credit report to an interested subscriber is qualifiedly privileged; unless it is made in bad faith or for an improper purpose, the fact that it contains erroneous unfavorable statements about the plaintiff does not make the agency liable. The harm that such statements occasionally do to applicants for credit is believed to be small in relation to the benefits that subscribers derive from frank reports. Since marital status and number of dependents bear on credit, the privilege is broad enough to cover the statements in appellee's report.²⁸

But while this privilege granted to credit bureau reports exists, it is only conditional. "It does not exist if there was malice on the part of the agency making the communication, or such gross disregard of the rights of persons published on" as to constitute malice in fact.²⁹ Just what constitutes malice varies in different jurisdictions. Many hold that the privilege depends little, if at all, upon the question of due care.³⁰ Others hold that malice may be inferred if the defendant does not have reasonable or probable cause to believe his statement to be true.³¹ However, malice rarely exists in the typical case where an individual has been harmed by an inaccurate credit report, and, when it does exist, it is difficult to prove.

This conditional privilege afforded credit bureaus in defamation

²⁶*Id.* See also 30 ALR 2d 776 and 102 ALR 1070. However, some jurisdictions have not recognized the conditional privilege with regard to credit agencies. See *Pacific Parking Co. v. Bradstreet Co.*, 25 Idaho 696, 139 P. 1007 (1914). The British have not recognized it. *MacIntosh v. Dunn* (1908) A.C. 390.

²⁷194 F.2d 160 (D.C. 1952), 30 ALR2d 722, *cert. denied*, 344 U.S. 821 (1952).

²⁸194 F.2d, at 161.

²⁹36 AM. JUR., *supra* note 25, at 185.

³⁰See, e.g., *Douglas v. Darely*, 114 F. 628, 57 LRA 475 (1902).

³¹*Stationer's Corp. v. Dun & Bradstreet, Inc.*, 62 Cal.App.2d 412, 42 Cal.Rptr. 449, 398 P.2d 785 (1965). Growing public uneasiness with confidential personal investigations may lead to a higher duty being placed on such information gatherers as credit agencies. For example, in a recent California Superior Court decision, an insurance broker was awarded \$290,000 in damages from a credit reporting service which had labeled him a bad risk with no facts to support the allegation. *Roemer v. Retail Credit Company of Oakland*, No. 350251 (Superior Court of Alameda County decided Feb. 23, 1971).

actions can also be lost if the information is released to persons having no legitimate business interest in it.³² But even a superficial inquiry into the subscriber's motives will apparently insulate the credit bureau from liability.

A search of case authority shows that, in most jurisdictions, there has been no defamation remedy available in the typical case where false information given out by a credit bureau has harmed a consumer. More recently, different judicial theories to help consumers in this area have been attempted or contemplated.³³ These include suits for invasion of privacy against the release of information to persons having no legitimate interest in it or against the non-essential use of irrelevant personal information in a credit report. Basically the right of privacy may be defined as the right, within reason, "to be let alone."³⁴ Drawbacks to such suits include the following: publication, a requirement in such a suit, is usually not found; most information in a credit report is not overly sensitive and often concerns matters of public record; and in most cases credit reports are requested by legitimate subscribers. Other theories have been advanced that would destroy the privilege granted credit agency communications. These include the duty of reasonable care and "the denial of the defense of privilege where there has been excessive publication of defamation material."³⁵ However, these theories have seldom been employed by the courts. A further drawback to the use of new theories is simply the time that they would take to gain judicial acceptance.

In evaluating the effectiveness of judicial remedies as a means for combating the abuses of the credit-reporting process, it is clear that they are inadequate. First, under present practices a consumer is not likely even to know that he has been reported on, let alone know if some defamatory or highly personal information has been gathered on him. Even if he did know, and even if the report were false or inaccurate, most courts will not normally provide relief. The leading cases hold that credit bureaus can circulate information to credit-grantors and are privileged in this reporting against suits for defamation if the reports were furnished in good faith to someone

³²36 AM. JUR., *supra* note 25, at 185.

³³See Comment, *Credit Investigations and The Right to Privacy. Quest for A Remedy*, 57 GEO L. J. 509, 516-27 (1969); Karst, *The Files "Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 373 (1966); Green, *The Duty to Give Accurate Information*, 12 U.C.L.A. L. REV. 464 (1965); and A. WESTIN, *PRIVACY AND FREEDOM*, 324-5 (1967).

³⁴T. COOLEY, *TORTS* 29 (2nd ed. 1888).

³⁵1969 *Fair Credit Reporting Hearings*, at 439.

having a legitimate interest. In the large majority of situations in which the consumer is wrongfully harmed, it is by the communication of erroneous information to legitimate creditors and in such a situation the privilege has been held viable. The usual credit investigation does not generate information which would result in invasions of privacy if disseminated and malice is almost never involved in a typical credit report. Thus it is clear that judicial interpretation has not been helpful in dealing with the demonstrated problems in the collection and use of credit information. Given this fact, along with the increased evidence of the need for regulation of the credit reporting industry to combat these abuses, legislatures have responded to the problem.

III. LEGISLATIVE REMEDIES

Until recently, legislation regulating credit agencies was almost nonexistent. But in the past few years a movement has begun, both at the state and federal levels, to resolve the problems inherent in the collection of credit information and the furnishing of reports to creditors and others by credit agencies.

These attempts at legislative solutions to credit bureau problems speeded the Associated Credit Bureaus of America³⁶ (hereinafter the ACB of A) into proposing a set of guidelines aimed at self-regulation of the industry. These policies, entitled "Credit Bureau Guidelines to Protect Consumer Privacy" were offered as an alternative to any federal legislation, which ACB of A said was unnecessary. These guidelines would allow individuals to look at their credit files (provided that they agreed to a waiver of legal action against the credit bureau or its sources); would limit the access of governmental agencies to individual's names and addresses, except in cases of national security; would require that references to criminal or civil actions be accompanied by their disposition; and would provide for the updating of credit information.³⁷

Ultimately, Congress rejected the idea that industry regulation would be effective, finding several inadequacies in this attempt at voluntary self-regulation. First, no consumer organization partici-

³⁶The Associated Credit Bureau of America is the largest nationwide organization of independent credit bureaus. It contains more than 2,000 bureaus, serves over 365,000 credit grantors, and maintains files on approximately 100 million Americans. Miller, *supra* note 10, at 64a.

³⁷"Credit Bureaus Near a Day of Judgment," *BUSINESS WEEK*, Aug. 17, 1968, at 46.

pated in the development of the guidelines, although eight creditor groups were represented. Second, these guidelines were only recommendations and there was no guarantee that they could or would be enforced. Furthermore, even if the guidelines were followed by all ACB of A members, approximately one third of all credit bureaus do not belong to the association.³⁸

It was also believed that the substance of these guidelines did not really offer a workable solution to the problems. The guidelines did give a consumer limited access to his credit report, but the consumer would have to find out about the existence of an adverse credit report by himself. The guidelines assumed that an applicant who has been denied credit would realize that it was probably because of a bad credit report, that he would ask the creditor where the report came from, and that he would have no trouble receiving this information. These assumptions are not always accurate. Many people do not know that credit is usually denied on the basis of a credit report. And there is no guarantee that a user of a credit report will reveal to the applicant the identity of the agency which supplied the information.

Another substantive weakness of the industry recommendations was that access to credit files was only to be given if the consumer promised to take no legal action against the credit bureau or its sources of information. This, in essence, would have made the individual choose between ignorance and legal impotence.³⁹

Thus, it is evident that the industry did make an attempt to deal with many of its problems. But the fact remained that the proposals were weak in the area of access and that there was no guarantee of industry-wide enforcement. As a result, legislation appeared to Congress to be the best means for assuring remedies to the problems inherent in the credit bureau industry.⁴⁰

How far should legislation go in this area? In general, legislation should be enacted to assure the right of the consumer to obtain notice of information contained in credit reports which harm him, to have access to his credit files, to have errors corrected, and to have the confidentiality of such information protected. Credit information collected by bureaus should be required to be relevant to the credit-granting process, and those who can request credit reports should be limited. Legislation should also place a duty on agencies to insure that the information they collect is accurate. Thus, legislation should regulate the methods and procedures of both the gatherers and users

³⁸1969 *Fair Credit Reporting Hearings*, at 435.

³⁹BUSINESS WEEK, *supra* note 37, at 46.

⁴⁰See 1969 *Fair Credit Reporting Hearings*, at 2.

of information to prevent the potential for harm to consumers that inaccurate or misleading credit information carries. And finally, it should include statutory remedies for failure to comply with its provisions.⁴¹ Such legislation would give the consumer the comprehensive protection he needs in this area. Notice provisions would enable the consumer to initially learn if he was denied credit because of a credit report and would enable him to learn if such a report was accurate. The access and correction provisions would allow the consumer to prevent any further erroneous reports to be made and a requirement of notification of corrections to persons furnished the erroneous report would partially undo harms previously caused. A duty of accuracy on the bureaus themselves would hopefully clear up shoddy collection practices. And by limiting credit information to that relevant to the agencies' functions and by assuring confidentiality of files, privacy problems would be greatly reduced. Against this backdrop, we can now assess what has been done in this area.

An Oklahoma statute passed in 1965⁴² was the first legislation, either state or federal, which specifically dealt with the credit bureau problem. It concentrates on the issue of access and provides that whenever a person is going to submit an opinion dealing with the credit standing of any individual which will be used in a credit report, the person submitting such information shall first mail a copy of the information to the person about whom the opinion is given. This law also establishes civil and criminal penalties for willfully making false credit or financial reports.

While a first step, this statute does not adequately protect the consumer. It only provides for notification to the consumer of adverse opinions, whereas most credit bureaus deal only with facts. Furthermore, penalties cover only willful mistakes, while negligent or innocent misrepresentations are more often involved in these cases.

Since 1965, other states have passed laws attempting to regulate credit bureaus. California, Massachusetts, New Mexico, and New York have passed laws of varying degrees of effectiveness.⁴³ However, none has really provided comprehensive protection to the consumer for harms caused by the collection and use of credit-related information. For example, California, in 1970, passed a Consumer Credit

⁴¹See Comment, *Credit Bureaus and Consumers-Regulation and Remedy in New Mexico*, 10 NATIONAL RESOURCES JOURNAL, 177-79 (1970).

⁴²Okla. Stat. Ann. tit. 24, 9981-85 (1965).

⁴³CAL. CIV. CODE § 1750 *et seq.* (West 1954); MASS. GEN. LAWS Ch. 93, §§ 44-47 (1969); N. M. STAT. ANN. §§ 50-18-1 to 6; N. Y. SESS. LAWS, ch. 300 (1970). For a discussion of the New Mexico Act, see *Credit Bureaus and Consumers - Regulation and Remedy in New Mexico*, 10 NATIONAL RESOURCES JOURNAL, 181-7 (1970).

Reporting Act.⁴⁴ This Act gives a consumer access to his credit file upon request. The consumer can challenge items and the bureau is required to reinvestigate the record and delete inaccurate information; or if the dispute is unresolved, allow a consumer's statement of the dispute to be added to his file. Upon request of a consumer, the credit bureau must make known the mistake to its customers who have been given a copy of the inaccurate report. The Act also provides that a credit-applicant who is denied credit because of a report, upon request, can obtain from the creditor the identity of the credit bureau who issued the report.

This Act is more comprehensive than the Oklahoma statutes in that it has provisions covering access, notification, and corrections. But an applicant denied credit is only given the name of the credit bureau upon request, and as we have seen, many consumers do not know that they are denied credit because of the credit report. Thus, the correction provisions of the Act will not be of any use if the applicant for credit never gains access to the report in the first place. The Act also states that there shall be no civil or criminal penalties for false information contained in a report unless there has been a willful misrepresentation. Furthermore, there seems to be no enforcement provision for failure to follow any part of the act. Thus, while some state legislatures have attempted to solve the problem, none to date has done a thorough job of protecting the consumer.

Turning to federal legislation, congressional power to regulate commerce gives Congress ample authority to deal with credit reporting problems at the federal level.⁴⁵ Virtually all credit bureaus belong either to national credit associations or utilize national facilities and thus have a direct effect on interstate commerce. Those few that do not use such facilities nonetheless effect the flow of goods in interstate commerce and are thereby susceptible to federal legislation.

Since 1967, subcommittees in both Houses of Congress have held hearings on the threat to personal privacy posed by certain credit bureau activities.⁴⁶ The first legislative proposal was offered by Senator William Proxmire of Wisconsin in the spring of 1969.⁴⁷

⁴⁴CAL. CIV. CODE §§ 1750-1757 (West 1954).

⁴⁵*Accord*, N.L.R.B. v. Jones & Loughlin Steel Corp., 301 U.S. 1 (1939); U.S. v. Darby, 312 U.S. 100 (1941); and Wilhard v. Filburn, 317 U.S. 111 (1942).

⁴⁶*Hearings on Commercial Credit Before the Subcom. on Invasion of Privacy of the Senate Comm. on Government Operations* 90th Cong., 2d Sess., ser. 5 (1968); *Hearings on the Retail Credit Co. Before The Subcom. on Invasion of Privacy of the Comm. on Gov. Operations*, 90th Cong. 2d Sess., ser. 3 (1968); *Hearings on S.823 Before the Subcom. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. (1970).

⁴⁷S. 823, 91st Cong., 1st Sess. (1969).

It contained many good features but was weakened in committee, and when passed by the Senate, it represented a compromise between its supporters and credit bureau interests.⁴⁸

In response, Representative Lenore Sullivan of Missouri, head of the House Subcommittee on Consumer Affairs, introduced a stronger bill in the House.⁴⁹ However, this bill never got out of committee.

Senator Proxmire's bill was later added as an amendment to a bill already passed by the House which dealt with bank records and foreign transactions.⁵⁰ This bill passed the Senate and automatically went to a House-Senate Conference Committee, bypassing the usual House committees. In this committee, Proxmire's bill was strengthened in several respects and the entire bill was finally passed by both houses and signed by the President.⁵¹

The law amends the Consumer Credit Protection Act⁵² by adding to it a new title: Title VI — Consumer Credit Reporting. The stated purpose of the title is 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 information⁵³

How well does the Title IV accomplish these purposes?

The Act provides a means for the consumer to learn of an adverse credit report.⁵⁴ Whenever credit is denied or a credit charge increased either wholly or partly because of information contained in a credit report from a consumer reporting agency, the creditor must apprise the consumer of this fact and furnish him with the name and address of the agency making the report. However, the creditor need not inform the consumer of his right to see his file.⁵⁵

The Act gives consumers access to their credit files.⁵⁶ Upon request of the consumer, the reporting agency must disclose the nature and substance of all information contained in the file (except medical

⁴⁸See 115 Cong. Rec. 13900 (1969).

⁴⁹H.R. 16340, 91st Cong., 2d Sess. (1970).

⁵⁰H.R. 15073, 91st Cong. 2d Sess. §§ 601-622 (1970).

⁵¹Pub. L. No. 91-508; 82 Stat. 146 (1970). [hereinafter cited as Fair Credit Reporting Act].

⁵²15 U.S.C. §§ 1601 et seq.

⁵³Fair Credit Reporting Act, *supra* note 50, § 602 (4) (b).

⁵⁴*Id.*, § 615.

⁵⁵Creditors would have required to do so by Rep. Sullivan's bill. H.R. 16340 § 41, 91 Cong. 2d Sess (1970).

⁵⁶Fair Credit Reporting Act, *supra* note 50, §§ 609-610.

information),⁵⁷ the sources of such information (except the sources of information acquired and used solely in connection with an investigative consumer report),⁵⁸ and the recipients of any consumer report on the consumer for any purpose within a six-month period preceding the request and within two years if the report was furnished for employment purposes.

These disclosures are to be made without charge if the consumer requests access to his file within thirty days after he is notified by a creditor that he is being denied credit because of an adverse credit report.⁵⁹ Otherwise the consumer reporting agency may impose a reasonable charge on the consumer for making disclosure.

The Act also requires that agencies follow reasonable procedures to assure maximum possible accuracy of the information contained in its files,⁶⁰ and the Act provides a means for correcting disputed items on the consumer's credit file.⁶¹ If the consumer contests the accuracy or completeness of information contained in his file, the agency must reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If the item is found to be erroneous or inaccurate it must be deleted from the person's file. The agency must also inform the consumer of his right to request the agency to inform all creditors furnished a report containing the item within six months of this request that these items had been reported in error and are being expunged from the individual's records.

If the reinvestigation by the agency does not resolve the dispute, the consumer is given the right to file a statement concerning his version of the dispute. This statement, unless there are reasonable grounds to consider it frivolous, becomes part of the consumer's credit file. In any subsequent report containing the information in question, this statement or a summary thereof must be included.

The Fair Credit Reporting Act also has provisions covering obsolete information.⁶² For example, if the credit report is issued in connection with a credit transaction of less than \$50,000, it may not

⁵⁷*Id.*, § 603(i). "The term 'medical information' means information or records obtained, with the consent of the individual to whom it relates from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities." Apparently it was thought that raw medical information should only be tendered with the counsel of a physician or other medical trained personnel.

⁵⁸The term "investigative consumer report" is defined in The Fair Credit Reporting Act, *supra* note 50, § 603(e).

⁵⁹*Id.*, § 612.

⁶⁰*Id.*, § 607 (b).

⁶¹*Id.*, § 611.

⁶²*Id.*, §§ 604 and 607(a).

contain adverse items of information which antedate the report by more than seven years (fourteen years for bankruptcies). Another provision of the act places a duty on agencies to keep public record information up to date.⁶³

Other sections of the Act relate to the confidentiality of credit reports.⁶⁴ It must be noted, however, that there is no provision requiring an agency to maintain procedures designed to preserve the confidentiality of the files themselves.⁶⁵ The Fair Credit Reporting Act does limit the circumstances as to when a consumer reporting agency may furnish a report⁶⁶ and requires agencies to maintain reasonable procedures to limit the furnishing of consumer reports for the purposes listed. But the permissible purposes of consumer reports are defined so broadly that such interests as market researchers, detective agencies, lawyers, and various investigative groups are permitted access to credit bureau files.⁶⁷ Notwithstanding this section, a consumer reporting agency may furnish certain identifying information respecting any consumer, to a governmental agency.⁶⁸

The Act further creates criminal penalties for both obtaining credit information under false pretenses and for unauthorized disclosures by officers or employees of consumer reporting agencies.⁶⁹

Another provision of the Act relates to the disclosure of investigative consumer reports.⁷⁰ Unless the report is to be used for employment purposes for which the consumer has not specifically applied, permission from the consumer must be obtained before such a report can be requested. Furthermore, the person who requests such a report must, upon written request of the consumer, make a complete and accurate disclosure of the nature and scope of the investigation requested.

Perhaps the most important features of this legislation relate to its enforcement. Before being amended in conference, the Fair Credit Reporting Act effectively absolved credit bureaus from any liability for negligent reporting of erroneous information or for negligent failure to comply with the Act. But as finally enacted, the Act pro-

⁶³*Id.*, § 613.

⁶⁴*Id.*, §§ 604 and 607(a).

⁶⁵Such a duty was placed on agencies in Rep. Sullivan's bill. H.R. 16340, § 33.

⁶⁶Fair Credit Reporting Act, *supra* note 50, § 604.

⁶⁷Rep. Sullivan's bill would have limited the furnishing of consumer reports to those with a legitimate economic need for the information. H.R. 16340, § 34.

⁶⁸Fair Credit Reporting Act, *supra* note 50, § 608. This information is limited to the consumer's name, address, former addresses, places of employment or former places of employment.

⁶⁹*Id.*, § 619-20.

⁷⁰*Id.*, § 606.

vides that credit bureaus are now responsible to consumers for failure to exercise ordinary care in the gathering and dissemination of information.⁷¹ In short, they are liable for their own negligence.

Another important provision of the Fair Credit Reporting Act states that compliance with the Act, except where stated otherwise, is to be enforced by the Federal Trade Commission.⁷² This provision gives the Federal Trade Commission the "power to issue procedural rules in enforcing compliance with the requirements imposed under this title . . ." However, while not entirely clear, this provision does not appear to give the Trade Commission the broad authority to prescribe substantive regulations to carry out the purposes of the Act.

Finally, the Act does not effect state laws on this subject except to the extent of inconsistencies.⁷³ Thus states can still enact legislation to fill in gaps in the Federal Act.

It can be fairly said that the Fair Credit Reporting Act goes a long way toward correcting potential abuses in the collection, distribution and use of information for credit-related purposes.

It provides a means by which the consumer learns of adverse credit reports, guarantees him access to his file, and gives him the ability to correct disputed items. It places a duty on the credit reporting agencies to use due care in the gathering and disseminating of information and holds them responsible for any negligence in this regard. But its deficiencies make clear that the Act does not provide comprehensive protection against the misuse of credit information.

As previously stated, the biggest weakness of the new law seems to be the broad array of entities that are entitled to receive reports from credit bureaus. A wiser approach would limit the people who can obtain reports to those who need the information in connection with a legitimate economic transaction.

Another deficiency of the Act is that there is no provision which would prevent agencies from reporting information which is not reasonably relevant to the purposes for which it is sought.⁷⁴ Such a provision would protect against infringements of the individual's right to privacy.

The Act does not clearly give the Federal Trade Commission the authority to write rules defining and interpreting the substance of the new law.⁷⁵ Lack of such authority might be crucial because of the

⁷¹*Id.*, § 617.

⁷²*Id.*, § 621.

⁷³*Id.*, § 622.

⁷⁴Such a requirement was contained in H.R. 16340, § 54.

⁷⁵"What To Do If Your Credit Goes Bad", CONSUMER REPORTS, April 1971, at 259. Section 621(a) of the Act only gives the Federal Trade Commission power to issue "procedural" rules, whereas Rep. Sullivan's bill would have given the Board of

many vague words and phrases contained in the Act. Without explanatory rules, courts will have to grapple with such problems as what are "reasonable procedures" to insure accuracy and when is a request for a correction "frivolous." Also the Act alone, without accompanying regulation, does not clearly spell out the duties of credit agencies vis-a-vis accuracy of information and confidentiality of access.

It can also be argued that credit agencies should not be able to refuse reinvestigation of information upon its determination that a complaint is frivolous. Perhaps the safest way to insure corrections would be to require bureaus to check out all complaints.

The liability sections of the Act contain some drawbacks. While possibly the most important feature of the Fair Credit Reporting Act gives consumers the right to sue for negligent violations of its provisions, recovery is predicated upon a showing of actual damages. Thus in negligence cases, punitive damages are not allowed. Because of the difficulty in proving actual damages, some lawyers might be reluctant to take such cases.

Another shortcoming of the Act is its failure to state what kind of notice a creditor must give a consumer whom he turns down for credit because of an adverse credit report. Written notice within a certain time period should be provided for. It can also be argued that the credit agencies themselves should be required to inform the consumer of adverse information. Such a provision would eliminate the possibility of the creditor failing to inform the consumer. Under the current provision, adverse information doesn't come to the consumer's attention until it is used against him. And even if the file of the bureau that reported on the consumer is corrected, the same adverse information might remain on the files of other bureaus. Furthermore, unless or until these bureaus file a report on the individual, it would cost him money under the present Act to correct the information. An argument against placing such a duty on the credit bureau is the cost of informing consumers every time adverse bits of information turn up on them. Perhaps a middle course would be the best solution. That is, creditors should be required not only to inform consumers that they are being denied credit on the basis of an adverse credit report but also to inform them of their statutory right to see their files. And, if the information was erroneous or misleading, the particular credit bureau involved should be required to notify other credit reporting agencies of the correction. Such a requirement would prevent the same erroneous information from popping up in other credit bureau reports.

Governors of the Federal Reserve System the authority to prescribe substantive regulations to carry out its purposes. H.R. 16340, § 21.

IV. CONCLUSION

The credit reporting industry serves a vital function in the American economy, and that function will come to be evermore important as our economy becomes increasingly credit-oriented. However, the consumer's rights to privacy and to freedom from defamation are at least equally vital. Until recently these rights have received little attention. A review of state and case law seems to indicate that with few exceptions the injured consumer has had little recourse against the almost wholly protected credit agency. Courts have generally found no consumer rights to review, correct, or update credit reports. And, if and when the consumer found that credit was denied on the basis of incorrect information, he faced the burden of proving that it was done maliciously in order to obtain a recovery.

As writers began exposing many of the abuses of the credit reporting process and as consumer protection became a political issue, a few states passed statutes that attempted to deal with some of these problems. These initial efforts, such as California's Consumer Credit Reporting Act, were a start but did not provide the comprehensive protection needed in this area.

To best assure the rights of the consumer in this area, comprehensive regulation of the credit bureau industry was needed and such an effective means of regulation was attempted with the passage by Congress of the Fair Credit Reporting Act. As the first federal legislation to deal specifically with credit reporting problems, it is an encouraging step. It does not preempt this field from state regulation, however, leaving states free to enact tougher laws in this area, perhaps after learning the practical weaknesses of the federal legislation. But as things now stand the Fair Credit Reporting Act incorporates all the features of the few state laws in this area and goes far beyond them in coverage. However, it does have some major weaknesses, and it could be strengthened in the following respects:

(1) The scope of those entitled to receive reports should be narrowed to those with a legitimate economic need for the information;

(2) Creditors denying credit should be required to inform the consumer of his right to see his credit file and such notice should be in writing.

(3) When a mistake in a report is found by a reinvestigation prompted by a consumer request, credit reporting agencies should be required to inform other credit reporting agencies of the mistake;

(4) Agencies should not be allowed to report information which is not reasonably relevant to the purpose for which it is sought;

(5) Agencies should be required to maintain procedures designed

to preserve the confidentiality of information in their files;

(6) Persons requesting investigative consumer reports should be required to disclose the nature and scope of the investigation requested to the person reported on without the requirement that the consumer request such information;

(7) Unlimited damages should be available for negligent violations of the Act; and

(8) The Federal Trade Commission or some other appropriate administrative agency should be given authority to write rules defining and interpreting the substance of the Fair Credit Reporting Act.

With these additions it would be possible for the Act to provide full protection to consumers from possible harms in the collection, distribution, and use of credit information.

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