

1972

Comment: An Analysis of the Fair Credit Reporting Act

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Comment: An Analysis of the Fair Credit Reporting Act, 1 Fordham Urb. L.J. 48 (1972).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol1/iss1/10>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Comments

AN ANALYSIS OF THE FAIR CREDIT REPORTING ACT

Introduction

Consumer credit represents an industry of some \$129 billion.¹ More than 2500 credit bureaus offering services on a membership-and-fee basis² exist in the United States. Often, these credit and information bureaus have produced dossiers without sufficient regard for the truth, accuracy, or relevance of their information.³ As a result of difficulty in proof or the total lack of a cause of action, the individuals harmed were left without a remedy. Now, through the Fair Credit Reporting Act,⁴ Congress has attempted to provide some protection and remedy for the consumer against incomplete, inaccurate, or obsolete information.⁵ The Act is limited to information collected, used, or expected to be used in establishing the consumer's eligibility for personal credit or insurance, employment purposes, and certain other authorized purposes.⁶ Federal administrative enforcement of the Act is charged principally to the Federal Trade Commission.⁷

Background

Traditionally, when an individual suffered injury to his reputation by the dissemination of inaccurate information, his remedy was an action for defamation.⁸ However, in such actions, the courts have recognized a

1. Fed. Res. Bull., Aug. 1971, at A56. The total consumer credit breaks down into \$104,060 million of installment credit and \$25,644 million of non-installment credit. Installment credit held by financial institutions amounts to \$90,536 million: \$44,112 million held by commercial banks; \$31,098 million by finance companies; \$13,570 million by credit unions; \$1,756 million by other lenders. Retail outlets account for \$13,524 million of consumer credit: \$347 million by automobile dealers; and \$13,177 million by other retail outlets.

2. Time, Dec. 20, 1968, at 79.

3. Miller, Detour to 1984, *The Nation*, 1970, at 648.

4. 15 U.S.C. §§ 1681-1681t (1970) [hereinafter cited as the Act].

5. Various model and state statutes have been passed which deal with information reporting agencies. See, e.g., Cal. Civ. Code §§ 1750-57 (West Supp. 1972); National Consumer Act §§ 8.101-8.303 (Promulgated by the National Consumer Law Center, Boston College Law School, first final draft 1969) [hereinafter cited as N.C.A.]; N.Y. Gen. Bus. Law §§ 370-76 (McKinney Supp. 1971); N.M. Stat. Ann. §§ 50-18-1 to 18-8 (Supp. 1971); Okla. Stat. Ann. tit. 24, §§ 81-85 (1955).

6. 15 U.S.C. § 1681a(d) (1970).

7. *Id.* § 1681s.

8. See generally W. Prosser, *The Law of Torts*, 737-76 (4th ed. 1971).

qualified privilege of legitimate common interest.⁹ The privilege is applicable upon the theory that these bureaus perform a useful business service for the benefit of those who have a legitimate interest in obtaining the information.¹⁰ The qualified privilege is available to reporting agencies when their inquiries are made and the information is furnished to users in good faith. Conscious indifference and reckless disregard of the individual's rights are grounds for loss of the privilege.¹¹ Moreover, the privilege is limited to disclosures made to users having an apparent present interest in the report.¹²

A cause of action for invasion of privacy may provide a remedy¹³ to

9. See, e.g., *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775 (2d Cir. 1957); *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 286 F. Supp. 899 (W.D. Pa. 1968), vacated on other grounds, 308 F. Supp. 1068; *In re Retailers Commercial Agency, Inc.*, 342 Mass. 515, 520, 174 N.E.2d 376, 379 (1961); *Retail Credit Co. v. Garraway*, 240 Miss. 230, 126 So. 2d 271 (1961); *Barker v. Retail Credit Co.*, 8 Wis. 2d 664, 100 N.W.2d 391 (1960). Privilege is the modern term covering the common law defenses of justification or excuse. Privilege signifies that the action of the defendant furthered an interest of such social importance as to entitle the defendant to protection from liability for the invasion of a legally protected right of another. The greater the social value served by the defendant's action, the greater the immunity from liability that will be afforded. The qualified or conditional privilege, as distinguished from the absolute privilege, is conditioned upon the proper motive and reasonable behavior of the defendant while he invades the rights of the plaintiff. W. Prosser, *supra* note 8, at 98-99.

10. The English courts feel that information bureaus are mere business ventures trading for profit and deserve no privilege. *Macintosh v. Dun*, [1908] A.C. 390 (P.C.) (Austl.). The American minority following the English view are *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886) and *Pacific Packing Co. v. Bradstreet Co.*, 25 Idaho 696, 139 P. 1007 (1914).

11. *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 345 S.W.2d 34 (1961). However, mere negligence is not enough. *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775 (2d Cir. 1957); *H. E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387, 399 (4th Cir. 1957); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 901 (Tex. 1970).

12. Where the disclosure is a general publication, the reporting agency is liable if public interest is not present. See, e.g., *Pollasky v. Minchener*, 81 Mich. 280, 46 N.W. 5 (1890); *Hanschke v. Merchants Credit Bureau*, 256 Mich. 272, 239 N.W. 318 (1931); *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S.W. 358 (1893); *King v. Patterson*, 49 N.J.L. 417, 9 A. 705 (1887); *Sunderlin v. Bradstreet*, 46 N.Y. 188 (1871). However, once the privilege is established even irrelevant information may be published. *Wetherby v. Retail Credit Co.*, 235 Md. 237, 201 A.2d 344 (1964).

13. Since there was no cause of action for the invasion of privacy at common law, the recognition of this type of action varies from jurisdiction to jurisdiction.

the individual for an accurate but highly objectionable¹⁴ dissemination of information. This cause of action dates from a law review article¹⁵ by Samuel D. Warren and Louis D. Brandeis which first suggested the tort due to the growing excesses of the press.¹⁶

The right to privacy is generally divided into separate categories.¹⁷ An action for public disclosure of private facts is possible only if the dissemination constitutes a public disclosure¹⁸ and the invasion must be one which would offend a person of reasonable sensitivities.¹⁹ The difficulties in proof of these elements deter individuals from bringing this type of action against credit reporting agencies.²⁰

It was not until 1967²¹ that the Congress began to inquire into invasions of privacy by credit bureaus. In response to criticism, the Associated Credit Bureaus, Inc. proposed voluntary industrial guidelines. While these guidelines finally enabled the consumer to examine his credit file, access was premised upon an agreement to take no legal action against the credit

In New York, an action for the invasion of privacy is recognized only to the limited extent provided for by statute. See N.Y. Civ. Rights Law §§ 50-51 (McKinney 1948); *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933).

14. See generally Countryman, *The Diminishing Right of Privacy: The Personal Dossier and The Computer*, 49 *Tex. L. Rev.* 837 (1971).

15. Warren and Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890).

16. It has been suggested that the Warren and Brandeis article was written as a result of the reporting by the Boston "Yellow Press" of Mrs. Warren's entertaining social affairs. A. Miller, *The Assault on Privacy*, 170 (1971).

17. W. Prosser, *Privacy*, 48 *Calif. L. Rev.* 383, 383-386 (1960). The division of the right to privacy into four separate categories has not gone unchallenged. See E. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U.L. Rev.* 962 (1964); Kalven, *Privacy In Tort Law—Were Warren And Brandeis Wrong?*, 31 *Law & Contemp. Prob.* 326 (1966).

18. *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 11 (5th Cir. 1962).

19. *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954); *Reed v. Real Detective Publishing Co.*, 63 *Ariz.* 294, 162 P.2d 133 (1945); *Gill v. Hearst Publishing Co.*, 40 *Cal.* 2d 224, 253 P.2d 441 (1953); *Davis v. General Fin. & Thrift Corp.*, 80 *Ga. App.* 708, 57 S.E.2d 225 (1950); *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

20. See 7 *Cal. W.L. Rev.* 216, 222 (1970).

21. Miller, *supra* note 3, at 651. In 1968, Representative Cornelius E. Gallagher led a House subcommittee investigation into credit bureaus. *Bus. Week*, Aug. 17, 1968, at 44. In 1969, Senator William Proxmire introduced the first legislation in the Senate but the proposal was emasculated in committee. Miller, *supra* note 3, at 651.

bureau or its sources of information.²² Finally, on October 26, 1970, Congress passed the Fair Credit Reporting Act.²³ This comment will examine the Act and discuss the significance of the more important provisions.

Purpose of the Act

Credit is of prime importance in all consumer finance. Elaborate mechanisms have been developed to investigate and evaluate consumers as good or poor credit risks. Central among these mechanisms are consumer reporting agencies. As with any investigative agency, there is potential for abuse of the subject's rights and a need to prevent such abuse. Congress dealt with this potential by passing the Act, adopting as its purpose:

[T]o 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 information in accordance with the requirements of this subchapter.²⁴

The Act, then, is an attempt to protect consumers in their relationships with creditors, employers, insurance companies, governmental agencies and certain others who rely upon reports from consumer credit reporting agencies. "[F]airness, impartiality, and a respect for the consumer's right to privacy"²⁵ are mentioned as part of the reporting agencies' responsibilities.

Definitions

As defined in the Act, a "person" means "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity."²⁶

22. Bus. Week, Aug. 17, 1968, at 46.

23. The bill originally proposed and passed in the Senate has led one commentator to rephrase its preamble from "an Act, to enable consumers to protect themselves against arbitrary, erroneous and malicious credit information," S. 823, 91st Cong., 1st Sess. (1969) to "An Act, to protect credit bureaus against citizens who have been abused by erroneous credit and investigative information." Miller, *supra* note 3, at 669. Representative Leonor K. Sullivan of Missouri, Chairwoman of the House Subcommittee On Consumer Affairs, introduced a second draft expanding upon the features of the original Proxmire proposal. H.R. 16340, 91st Cong., 2d Sess. (1970). However, this bill was killed in committee. The final Act was the result of some eleventh hour maneuvering by Senator Proxmire. See generally Denny, *Federal Fair Credit Reporting Act*, 88 *Bank. L.J.* 579 (1971).

24. 15 U.S.C. § 1681(b) (1970).

25. *Id.* § 1681(a)(4).

26. *Id.* § 1681a(b).

A "consumer," on the other hand, is defined as an "individual."²⁷ The Act is therefore concerned primarily with providing protection to private consumers who seek credit, insurance or employment, although their involvements with organizations such as corporations, partnerships and other businesses may also be reflected in credit reports.

"Consumer reporting agencies" are those which regularly engage in assembling or evaluating credit and other information about consumers for the purpose of furnishing consumer reports to third parties, regardless of whether they charge a fee or perform as nonprofit cooperatives. The definition is likewise limited to those agencies which use any means of interstate commerce in preparing or furnishing such reports.²⁸

The Act also contains a definition of the term "consumer report."²⁹ The report can include a consumer reporting agency's communication of information relating to a consumer's credit, character, reputation or mode of living in order to determine a consumer's eligibility for personal credit or insurance, employment and for certain other purposes.³⁰

These inclusions are far-ranging, but there are also noteworthy categories excluded from coverage by the Act. Reports of information which relate solely to transactions between a consumer and the issuer of a report do not come under the regulation of the Act.³¹ Thus if a firm keeps its own records about transactions between itself and a consumer, it need not comply with the Act when furnishing this internal information to others.

Credit card issuers who authorize specific extensions of credit are also excluded from regulation. Reports of decisions to third parties who have requested persons to make specific credit extensions to consumers are similarly not covered.³² In this instance however, the third party must have informed the consumer of the name and address of the person asked to extend credit and that person must have made the disclosure required of a consumer reporting agency³³ for the exclusion to be effective; otherwise, the Act will apply.

The Act recognizes, under "consumer reports," the subcategory of "investigative consumer reports."³⁴ "Investigative consumer reports" are

27. *Id.* § 1681a(c).

28. *Id.* § 1681a(f).

29. *Id.* § 1681a(d).

30. *Id.*

31. *Id.*

32. *Id.* § 1681a(e).

33. *Id.* § 1681m(a).

34. *Id.* § 1681a(e).

reports or portions thereof which gather information pertinent to a consumer's character, reputation or mode of living from personal interviews with those who know the consumer or have knowledge of his reputation.

However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.³⁵

In short, the Act attempts to distinguish between information compiled with regard to the personal character and community reputation of the consumer from neighbors, friends, and associates (which would comprise an "investigative consumer report") and credit information arising from specific financial transactions of the consumer (which would make up a consumer report).³⁶ The former type is more rigidly controlled because of the greater propensity for error and damage which arises from such hearsay information. The latter type is more objectively verifiable.

All consumer information recorded and retained by a consumer reporting agency is covered by the Act. A consumer's "file" need not be one actually written or typed, but rather the term refers to any type of information storage and retrieval system, including computer tapes or cards.³⁷ Information gathered "for employment purposes" is not limited to mere prospective employment, but also includes data relevant to an employee's promotion, reassignment or retention.³⁸

"Medical information," which may only be obtained with the consent of the individual to whom it relates, includes information from physicians, medical practitioners, hospitals, clinics or other medically related facilities.³⁹

Obsolete Information

Every consumer reporting agency is charged with maintaining reasonable procedures to avoid reporting obsolete information,⁴⁰ which is specifically defined under the Act. If the consumer report is issued in connection with credit⁴¹ or insurance⁴² in an amount of \$50,000 or more,

35. Id.

36. Id. § 1681d.

37. Id. § 1681a(g).

38. Id. § 1681a(h).

39. Id. § 1681a(i).

40. Id. § 1681e(a).

41. Id. § 1681c(b)(1).

42. Id. § 1681c(b)(2).

or in connection with an individual's employment⁴³ at an annual salary of \$20,000 or more, all items of information may be reported without regard to their timeliness. However, if the report is not issued for one of these three purposes, specific time limits determining obsolescence apply.

In the case of bankruptcy, if the date of adjudication antedates the consumer report by more than fourteen years it is obsolete and may not be reported.⁴⁴ "Adjudication" is a technical word in bankruptcy relating to the power of the court to proceed under the Bankruptcy Act.⁴⁵ When individual consumers file voluntary petitions in bankruptcy, the date of filing is the date of adjudication.⁴⁶ If the consumer's petition is dismissed, the dismissal would relate back to the date of filing and could not be reported if the filing date was fourteen years prior, except in the case of a current status report for employment, discussed below. A Wage Earner Plan⁴⁷ under Chapter XIII of the Bankruptcy Act is not considered a bankruptcy under the Fair Credit Reporting Act.⁴⁸ However, if such a plan is not confirmed, the court may order it converted to straight bankruptcy⁴⁹ at which time adjudication occurs and the fourteen year period is applicable.

The Fair Credit Reporting Act also permits consumer reporting agencies to furnish data concerning bankruptcies wherein the consumer is involved as sole proprietor, partner, shareholder in a close corporation, spouse or relative.⁵⁰ These situations may present problems in determining whether the information is too old to be reported. In the case of a petition which is involuntary, adjudication occurs at the time of the entry of the court decree⁵¹ and may be reported for fourteen years after that date. If the adjudication is not made, a seven year time limit would control the reporting of the information.⁵²

Suits and judgments are not obsolete and may be reported if they ante-

43. *Id.* § 1681c(b)(3).

44. *Id.* § 1681c(a)(1).

45. 11 U.S.C. § 1(2) (1970).

46. *Id.* § 41f.

47. *Id.* §§ 1001-86. A Wage Earner Plan refers to a plan of composition or extension, or both, in a proceeding under Chapter XIII by an individual whose principal income is derived from wages, salary, or commissions.

48. Compliance With the Fair Credit Reporting Act, discussion published by the Division of Special Projects, Bureau of Consumer Protection, Federal Trade Commission [hereinafter cited as Discussion], 4 CCH Consum. Cr. Rpt. ¶ 11,306 (1971).

49. 11 U.S.C. § 1066 (1970).

50. 15 U.S.C. § 1681c (1970).

51. 11 U.S.C. § 41d (1970).

52. 15 U.S.C. § 1681c(a)(6) (1970).

date the consumer report by less than seven years or if the statute of limitations has not expired.⁵³ It should be noted that the statute of limitations for the enforcement of a judgment in many jurisdictions exceeds seven years.⁵⁴ Paid tax liens become obsolete when the date of payment antedates the consumer report by more than seven years.⁵⁵ The general seven year rule⁵⁶ on adverse information would cover the reporting of the attachment of a tax lien.

Accounts placed for collection or charged off to profit and loss are obsolete if they antedate the report by more than seven years.⁵⁷ "Account" is not defined by the Act, but a fair interpretation would seem to be the definition used by the Uniform Commercial Code:

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.⁵⁸

The starting date for the seven year period on such accounts would be the date of the last transaction on the account, either a charge or a payment.⁵⁹

Records of arrest, indictment or conviction of crime which antedate the consumer report by more than seven years from the date of disposition, release, or parole are obsolete and may not be reported.⁶⁰ The provisions of the Act create a series of starting dates for the time of measurement. Thus, in the case of an arrest, the criminal record could be reported for seven years following the dismissal or conviction.⁶¹ However, the Act indicates that a new seven year period would result upon release or parole from any resulting sentence. Given this latitude in the starting date, a reporting agency must be certain of maintaining procedures to assure accurate records as to the status of any reported action or risk noncompliance.⁶²

53. *Id.* § 1681c(a)(2).

54. See, e.g., Ala. Code tit. 7 §§ 582-83; Minn. Stat. Ann. § 541.04 (West 1947), N.Y. CPLR § 211(b) (McKinney 1972).

55. 15 U.S.C. § 1681c(a)(3) (1970).

56. *Id.* § 1681c(a)(6). This subsection provides for a seven year obsolescence period for all adverse items not specifically covered by § 1681c(a).

57. *Id.* § 1681c(a)(4) (1970).

58. Uniform Commercial Code § 9-106.

59. Discussion ¶ 11,306.

60. 15 U.S.C. § 1681c(a)(5) (1970).

61. A more stringent requirement has been suggested in the N.C.A. (*supra* note 5): "Such items [records of arrest, indictment or conviction of crimes] shall no longer be reported if at any time it is learned that in the case of a conviction a full pardon has been granted, or in the case of an arrest or indictment a conviction did not result." N.C.A. § 8.206(d).

62. 15 U.S.C. § 1681e(b) (1970).

Any other item of adverse information is obsolete when it antedates the report by more than seven years.⁶³ The Act fails to define "item" or "adverse." Arguably, any information could be construed to be "adverse." For example, the address of an applicant for insurance could adversely affect acceptance of his policy; likewise, a report containing the type of employment could be adverse.

Reporting Information

The Act provides that a consumer report may be furnished for a permissible purpose and no other.⁶⁴ Section 604 restricts the purposes for which a consumer report may be issued. These are limited to responses to valid court orders, to written requests by the consumer himself and to requests by certain other interested persons.⁶⁵ When deciding whether a permissible purpose exists, a consumer reporting agency must decide that there is a legitimate business need for the information.⁶⁶ This determination is not for the purpose of deciding whether the Act applies. The Act applies because the information was *collected* by the agency for a permissible purpose.⁶⁷ The sole reason for the determination is to decide whether the information may be made available.

To comply with the permissible purpose requirement, the reporting agency must require the prospective users to identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.⁶⁸ The reporting agency must fully examine these identifications and certifications, and when necessary, verify them by further investigation to satisfy the compliance procedures of section 607.⁶⁹

The meaning of "legitimate" must be given a broad definition consistent with the purposes of the Act and must be viewed in its relationship to the business need. A prospective user⁷⁰ should clearly indicate the need for the requested information so that no user may receive more than that to which he is entitled. This certification of purpose requires precision; thus a certification of "for employment purposes" would not be sufficient.

63. Id. § 1681c(a)(6).

64. Id. § 1681b.

65. Id.

66. Id. § 1681b(3).

67. Discussion ¶ 11,306.

68. 15 U.S.C. § 1681e(a) (1970).

69. Discussion ¶ 11,306; 15 U.S.C. § 1681(e) (1970).

70. 15 U.S.C. § 1681e(a) (1970).

Permissible employment purposes are only for the employment, promotion, reassignment or retention of the consumer and the specific purpose must be certified.⁷¹

Reporting to Consumer

A consumer has the right to learn from the reporting agency the nature and substance of all information, except medical information, on file at the time of the consumer's request.⁷² He also has the right to learn the sources of information, except those sources whose information was acquired for use in the preparation of an investigative report and used for no other purpose.⁷³ Moreover, the consumer has the right to learn the identity of the recipients of records for employment purposes within the prior two years⁷⁴ and recipients of records for any purpose within the prior six month period.⁷⁵

Disclosure of information in the consumer's files may be obtained by the consumer in person⁷⁶ or by telephone if a written request has been made.⁷⁷ The Act requires that the consumer give the agency reasonable notice of his intention to appear or call for disclosure.⁷⁸ The reporting agency must maintain a practice of making the disclosures during ordinary business hours.⁷⁹

The consumer is entitled to have one person accompany him during the disclosure of the nature and substance of his file.⁸⁰ Proper identification and a written statement granting the consumer reporting agency permission to discuss the consumer's file in that person's presence may be required of the consumer.⁸¹ Once identification and permission has been established, disclosures may be made. The consumer is not entitled to actually see or hold his file, but only to have its "nature and substance"

71. *Id.* § 1681a(h).

72. *Id.* § 1681g(a)(1).

73. *Id.* § 1681g(a)(2). However, if an action is brought under the Act, sources of investigative reports may be obtained by the consumer under discovery procedures.

74. *Id.* § 1681g(a)(3)(A) (1970).

75. *Id.* § 1681g(a)(3)(B).

76. *Id.* § 1681h(b)(1).

77. *Id.* § 1681h(b)(2).

78. *Id.* § 1681h(a).

79. *Id.*

80. *Id.* § 1681h(d).

81. *Id.*

disclosed.⁸² The reporting agency is required to have a qualified person available to explain the disclosures to the consumer.⁸³

If the consumer is denied credit, insurance or employment, or is forced to pay a higher charge for credit or insurance because of information in a consumer report from a reporting agency, the user of the report must advise the consumer of this fact and supply him with the name and address of the consumer reporting agency which made the report.⁸⁴ If a consumer is denied credit or must pay a higher charge for it because of information reflecting on the consumer's credit, reputation, character or mode of living received from some person other than a consumer reporting agency, the user of the information must disclose to the consumer at the time of the adverse action, his right to make a written request for the reasons of that action. Then, should the consumer make the written request within sixty days, the user must disclose the nature of the information he acted upon.⁸⁵ A user who violates reporting requirements may escape liability if he can show by a preponderance of the evidence that he maintained reasonable procedures to comply with them at the time of the violation.⁸⁶

Investigative Reports

Special rules apply to the preparation of an investigative consumer report.⁸⁷ Before such an investigative report may be started, the person requesting it must notify the consumer in writing, mailed or delivered to the consumer within three days after initiating the request for the investigative report.⁸⁸ This requirement does not apply if the investigative report is for unsolicited employment purposes,⁸⁹ that is, when a consumer has not applied for employment, but when the employer has an interest in hiring him and has requested an investigative report in this connection.

The notice to the consumer must disclose that an investigative report may be made and may include information as to his character, general

82. *Id.* Furthermore, this does not include medical information. 15 U.S.C. § 1681g(a)(1) (1970). The corresponding provision of the N.C.A. (*supra* note 5) would allow the consumer to "examine the information in his file." N.C.A. § 8.202(1).

83. 15 U.S.C. § 1681h(c) (1970).

84. *Id.* § 1681m(a).

85. *Id.* § 1681m(b).

86. *Id.* § 1681m(c).

87. *Id.* § 1681d.

88. *Id.* § 1681d(a)(1)(A).

89. *Id.* § 1681d(a)(2).

reputation, personal characteristics and mode of living.⁹⁰ The writing must also notify the consumer of his right to request additional disclosures with respect to the nature and scope of the report.⁹¹ To receive further disclosures, the consumer must make a written request to the investigative agency within a reasonable time.⁹² Within five days after receiving the consumer's written request, the agency must make a complete and accurate disclosure of the "nature and scope" of the investigation.⁹³ This secondary disclosure of "nature and scope" does not provide the consumer with any information of a specific personal nature, but may suggest that further "in person" disclosure be requested to determine the "substance" of the investigation.⁹⁴

A special obsolescence rule applies to all investigative consumer records. This rule requires that any "adverse" information that has been used in an investigative report may not be included in any subsequent report⁹⁵ unless the information has been verified while making the subsequent report. There are two exceptions: information which is a matter of public record and information received within three months prior to the subsequent report.⁹⁶

A person requesting an investigative report may escape liability for failing to notify the consumer, either of the investigative report or of its nature and scope, if that person can show by a preponderance of the

90. *Id.* § 1681d(a)(1).

91. *Id.* § 1681d(a)(1)(B).

92. *Id.* § 1681d(b).

93. *Id.*

94. *Id.* A typical initial consumer investigative notice would be:

"Thank you for considering this company as your insurance carrier. In compliance with Public Law No. 91-508 (Fair Credit Reporting Act), this will advise you that a routine inquiry may be made concerning your character, general reputation, personal characteristics and mode of living.

Upon your written request, made within a reasonable period of time, we will furnish additional information as to the nature and scope of this report." The Home Insurance Company, Form H24879F (Apr. 1971).

In response to timely inquiry the consumer might receive:

"This is in response to your recent request. The report we requested will furnish such general information as your residence, marital status, number of dependents, occupation, general health, habits, reputation and mode of living.

In addition, if automobile coverage is involved, the report will also include information about the physical description of the automobile(s) and its use, driver experience, prior losses, if any, motor vehicle violations, and driver physical impairments, if any." The Home Insurance Company, Form H2488F.

95. 15 U.S.C. § 1681i (1970).

96. *Id.*

evidence that he has maintained reasonable procedures to supply the consumer with the information which is required to be disclosed.⁹⁷

Public Record Information

Information collected for reporting for employment purposes and which is taken from public records must be up to date when the report is issued.⁹⁸ The reporting agency may escape the timeliness requirement if, at the time the public information report is released, it notifies the consumer that public record information is being reported to a user.⁹⁹ The notification must include the user's name and address. The requirements apply only to information that is "likely to have an adverse effect upon a consumer's *ability to obtain* employment."¹⁰⁰ As indicated, the Act does not define "adverse." Moreover, it would seem that "ability to obtain" would encompass not only the situation where the consumer has sought employment, but also his retention or promotion. Section 603(h) of the Act defines "employment purposes" as including the evaluation of a consumer for "employment, promotion, reassignment or retention as an employee."¹⁰¹

In addition to the timeliness requirement for employment purposes, the Act generally requires that the reporting agency maintain procedures to assure maximum possible accuracy.¹⁰² This general rule covers not only the maintenance of an accurate file, but also the accurate transmission of the report, as in the situation where file data is converted and transmitted by machine-readable coding.¹⁰³ Machine and transmission line failures are also included.¹⁰⁴

Informational Disputes

As has been indicated, the consumer has a right to learn the nature and substance of his file.¹⁰⁵ The Act also provides a procedure for challenging any information in the consumer's file on the grounds of incompleteness or inaccuracy.¹⁰⁶ If the consumer wishes to dispute an item, he must directly convey the dispute to the consumer reporting agency

97. Id. § 1681d(c).

98. Id. § 1681k(2).

99. Id. § 1681k(1).

100. Id. § 1681k (emphasis added).

101. Id. § 1681a(h).

102. Id. § 1681e(b).

103. Discussion ¶ 11,306.

104. Id.

105. 15 U.S.C. § 1681g(a)(1) (1970).

106. Id. § 1681i(a).

within a reasonable time.¹⁰⁷ What constitutes a reasonable time will, of course, vary with the circumstances. This may become an area of conflict if agencies become obstinate or respond slowly. Demand for investigation is not necessary,¹⁰⁸ the reporting agency's duty results from the dispute. However, if the agency has reasonable grounds to believe that the dispute is frivolous or irrelevant, no reinvestigation is required.¹⁰⁹

The Federal Trade Commission discussions¹¹⁰ on "frivolous and irrelevant" are aimed at curtailing any abuses by reporting agencies. Frequent refusals to reinvestigate by a consumer reporting agency may well point to negligent noncompliance, but no doubt there will be occasions when the consumer will dispute an item of information yet will have no facts with which to support the dispute, thus providing the reporting agency with "reasonable grounds" for refusing to reinvestigate.

If reinvestigation by the consumer reporting agency fails to resolve the dispute, two avenues are open. If the information cannot be verified, the item of information must be deleted.¹¹¹ If the information is verified but the dispute is still unresolved, the consumer may file a brief statement setting forth his version of the disagreement.¹¹² The reporting agency must include a notice of dispute and the consumer's statement or summary of it in any subsequent reports containing the information in question.¹¹³

The statement issued by the consumer may be quite diluted under provisions of the Act. If the consumer reporting agency provides the consumer with assistance in preparing the statement, the statement may be limited to one hundred words.¹¹⁴ The Act does not, however, require the consumer to use the reporting agency's assistance in preparing the statement.¹¹⁵ In either situation, the reporting agency may condense the statement into a "clear and accurate codification or summary"¹¹⁶ if it wishes. Therefore, the consumer and his attorney should take special care and insist on examining the codification or summary before it is released, disputing it when necessary.

The consumer has the right to have notification of any such conden-

107. *Id.*

108. *Id.*

109. *Id.*

110. Discussion ¶ 11,306.

111. 15 U.S.C. § 1681i(a) (1970). Likewise, if the information proves to be inaccurate, it must be deleted.

112. 15 U.S.C. § 1681i(b).

113. *Id.* § 1681i(c).

114. *Id.* § 1681i(b).

115. *Id.*

116. *Id.* § 1681i(c).

sation or summary sent to specifically designated users who have already received the disputed information in a consumer report.¹¹⁷ The consumer will be advised of his right to have the notification sent. However, the consumer must request that notification be sent and must specify the persons to whom it must be sent. Moreover, only those persons who have received the disputed or deleted information with respect to employment purposes within the two prior years or those who within the prior six months received a consumer report for any purpose may be designated by the consumer to be notified.¹¹⁸

Enforcement

The Act delegates responsibility for enforcement against consumer reporting agencies and other persons, with specified exceptions, to the Federal Trade Commission.¹¹⁹ A violation of the Act is deemed to constitute "an unfair or deceptive act or practice in commerce in violation of section 41 (a) of the Federal Trade Commission Act"¹²⁰ and is to be enforced under Section 5(b), regardless of whether or not the person involved is engaged in commerce or meets any other jurisdictional tests of the Federal Trade Commission Act.¹²¹

If the Federal Trade Commission has reason to believe that a violation of the Act has occurred and that a proceeding is in the public interest, it may take action. The Federal Trade Commission will then issue and serve the person alleged to be in violation with a complaint stating the charges and giving at least thirty days notice of a hearing. The person served has a right to appear and show cause why an order should not be entered by the Commission requiring him to cease and desist from the alleged violations. If after the hearing the Commission is of the opinion that the conduct violates the law, it shall make a written report stating its findings and issue and have served upon the person charged an order to cease and desist from his conduct.¹²² The person may protest this order by appeal to the appropriate court of appeals within sixty days of the issuance of the Commission's order. The court of appeals may then affirm, modify or set aside the order of the Commission.¹²³

The Federal Trade Commission is granted procedural, investigative

117. Id. § 1681i(d).

118. Id.

119. Id. § 1681s(a).

120. Id.

121. Id.

122. Id. § 45(b).

123. Id. § 45(c).

and enforcement powers, including power to issue procedural rules for enforcement, to require filing of reports, production of documents and appearance of witnesses. The penalties, privileges and immunities of the Federal Trade Commission Act apply to persons violating the Fair Credit Reporting Act.¹²⁴

The Federal Trade Commission is thus given broad responsibility and power in this area, but this is a potential drawback because of the Commission's many other duties. It must find sufficient time and adequate manpower to devote to these new areas of concern when its budget may not be correspondingly expanded.

There are exceptions to the Federal Trade Commission's authority for enforcement. Authority to enforce the Fair Credit Reporting Act has been delegated to other governmental agencies having closer supervisory relationships with special types of consumer reporting agencies.¹²⁵ These provisions help somewhat to alleviate the burden on the Federal Trade Commission, yet in spreading the responsibility among these various agencies, there is a possibility of confusion as to which agency an aggrieved consumer should contact to make a complaint. Careful attention must be paid not only to which act controls, but also to which person or board is empowered to supervise the regulation of consumer reporting agencies and users within these special categories.

States are not preempted from passing their own legislation with regard to information concerning consumers, for state laws continue to apply except insofar as they are inconsistent with the Act.¹²⁶ Consequently, additional relief may be sought through state courts or agencies in various jurisdictions.

Remedies

Consumers may well be dissatisfied with the remedies provided by the Act. Rights to actions for defamation, invasion of privacy or negligence

124. Id. § 1681s(a).

125. Id. § 1681s(b). The Federal Deposit Insurance Act, 12 U.S.C. § 1818 (1970), regulates national banks, member banks of the Federal System and banks insured by the Federal Deposit Insurance Corporation. The Home Owners Loan Act of 1933, 12 U.S.C. § 1464(d) (1970), the National Housing Act, 12 U.S.C. § 1730 (1970), and the Federal Home Loan Bank Act, 12 U.S.C. §§ 1426i, 1437 (1970), control institutions subject to them. Federal Credit Unions are controlled under the Federal Credit Union Act, 12 U.S.C. §§ 1751-90 (1970); common carriers subject to acts regulating commerce are controlled under those acts, 49 U.S.C. § 1 (1970); air carriers are controlled under the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1432 (1970); there are also activities regulated by the Packers and Stockyards Act, 1921, 7 U.S.C. §§ 181-231 (1970).

126. 15 U.S.C. § 1681t (1970).

against consumer reporting agencies, users of information or persons furnishing information to consumer reporting agencies, are limited rather than enlarged.¹²⁷ These actions may always be brought concerning information a consumer has discovered under the disclosure provisions of the Act when such information was furnished with malice or willful intent to injure the consumer.¹²⁸ Malice and willful intent are difficult to establish and expectation of success on these suits is rather dismal.¹²⁹

However, two new causes of action for consumers are specifically provided for by the Act: one for willful and one for negligent noncompliance with the requirements imposed by the Act on consumer reporting agencies or users of information. In the case of willful noncompliance, the consumer may be awarded actual damages, punitive damages at the court's discretion, costs and reasonable attorney's fees.¹³⁰ Where there is negligent noncompliance, actual damages, costs and reasonable attorney's fees may be granted, but punitive damages may not be.¹³¹ Actions for these remedies may be brought in federal district courts, regardless of the amount in controversy. The statute of limitations for these suits is two years from the date on which liability arises,¹³² except where the defendant materially and willfully misrepresented information required to be disclosed. In such cases the action may be brought within two years after a consumer's discovery of the misrepresentation.¹³³

These new causes of action are more likely to compensate an aggrieved consumer, but he must show that there has been a failure to comply with regulations of the Act. He must, however, also show more than mere noncompliance if he is to be successful. Negligence or willfulness are necessary elements and there may be difficulty of proof.

Conclusion

The Act is a step toward protecting consumers in the vital area of informational data, but by no means should it be regarded as a final resolution of problems in this area.

The enforcement procedure under the Federal Trade Commission and other governmental agencies is cumbersome and highly complex, especially since many of these agencies are already overworked.

127. *Id.* § 1681h(e).

128. *Id.*

129. *Iverson v. Frandsen*, 237 F.2d 898 (10th Cir. 1956).

130. 15 U.S.C. § 1681n (1970).

131. *Id.* § 1681o.

132. *Id.* § 1681p.

133. *Id.*

The impact of the Act cannot be fully evaluated until the issue of negligent noncompliance has been decided. Until then the consumer has only a potentially good statute which provides recovery in states where there might not have been recovery before. The really difficult question is whether the Act will make a difference. Will people pursue their remedies and rights; will they report violations?