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The Future of Common-Law Libel Actions Under the Fair Credit Reporting Act

In the past century, society has become more transitory and business relationships have come to span great geographical distances. During the latter part of the same part of the same period, mercantile credit reporting agencies have flourished and grown into a multi-million dollar industry. These agencies report upon the credit, morals, responsibility and general reputation of almost any American who seeks insurance, employment with a large firm, or credit. These agencies sell information to their subscribers under a contract which provides immunity from liability for erroneous information furnished to the subscriber by the agency. Prior to the enactment of the Fair Credit Reporting Act,¹ the subscriber further agreed that he would not reveal the information reported, particularly not to the subject of the report.

These credit reports range from a simple statement of one's payment record on charge accounts, to detailed investigative reports which delve into the most personal aspects of one's life. The courts have traditionally held such reports to be qualifiedly privileged in the public interest of expediting commerce. The judicial concept of the qualified privilege has thus precluded a person from obtaining legal discovery of what "factual" information is being published concerning him to a third party subscriber from whom he seeks insurance, employment, or credit.

This paper will discuss the Fair Credit Reporting Act, with emphasis on the future of common-law libel actions under the new statute.

Background

The general position of the courts in protecting these conditionally privileged reports has subjected the individual right of a person to be free from defamatory characterizations to the broader public policy of encouraging commerce. The judicial spirit and reasoning underlying this general position is plainly expressed in the case of *Watwood v. Stone's Mercantile Agency*.² In that case, a credit report was sent to a subscriber concerning Susie V. Watwood which falsely implied that Miss Watwood was the mother of a child born out of wedlock.³ Judge Edgerton, in dismissing Miss Watwood's claim, ruled that erroneous derogatory statements made in good faith did not make the agency liable because "the harm that such statements occasionally do to applicants for credit

1. Fair Credit Reporting Act, 15 U.S.C.A. § 1681 (1970).

2. *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160 (D.C. Cir. 1952).

3. In fact, Susie Watwood used her maiden name in her business but was married to Jacob M. Cohen and had no children.

is believed to be small in relation to the benefits that subscribers derive from frank reports."⁴ Addressing himself to the principle of qualified privilege, Judge Edgerton stated, "Privilege is of little value if it depends upon the existence of facts that are unknown or unknowable to the person affected."⁵

It would seem that a responsible corporation selling allegedly factual information about an individual would be able to ascertain marital status by a cursory inquiry, and the failure to do so would be evidence of bad faith; but the conditional privilege that the credit reporting bureaus have enjoyed has been so protective that judges seldom reason in this matter.

Numerous state decisions throughout the United States have held that malice is the only element in the credit report that can defeat the conditional privilege.⁶ Malice has been variously defined by these courts as actual malice, bad faith, express malice, lack of good faith, ill will, or a wanton and reckless disregard for the rights of the individual. Unless malice can be proved, numerous courts have held, the qualified privilege enables the credit reporting agencies to publish seriously damaging errors as alleged "information" with impunity, despite any fantastic falsehood their negligence creates.

Effect of the 1970 Federal Legislation

With the enactment of the Fair Credit Reporting Act, the Congress for the first time passed legislation to regulate credit reporting agencies. The importance of the conditional privilege has been greatly diminished by this congressional action. This Credit Reporting Act has provisions under which an individual can discover the nature of the information in his report and it provides a procedure which gives reasonable assurance of correcting any erroneous information. The individual consumer will know when a detailed investigative report is made on him, and if that report contains any adverse information.⁷ The wall of silence and secrecy, the refusals because "we don't think it feasible at this time," the "privilege" to ruin a person's career or credit because of negligence have been destroyed by the Fair Credit Reporting Act.⁸

4. *Watwood v. Stone's Mercantile Agency*, 194 F.2d at 161.

5. *Id.* at 162.

6. The majority of states hold that a necessary element of good faith is that the credit report must confine itself to responding to legitimate business requests. When the communication exceeds the requirements of the occasion, the courts have reasoned, as the Supreme Court of South Carolina expressed it, the privilege is lost because the qualified privilege is granted by reason of the occasion. *Cullum v. Dun & Bradstreet, Inc.*, 288 S.C. 384, 90 S.E.2d 370, 372 (1955).

7. Although the act itself says the consumer should know the "nature and substance" of any adverse information, the credit reporting agencies are interpreting this provision to mean they do not have to show the consumer the report itself. Interview with Jack Anderson, *Syndicated Columnist*, in Washington, D.C., August 9, 1971.

8. 15 U.S.C.A. § 1681o provides:

Any consumer reporting agency or user of information which is negligent in failing to

comply with any requirement imposed [upon consumer reporting agencies to follow reasonable procedures to assure maximum possible accuracy of the information in all consumer reports on an individual as contained in Sections 1681c, 1681e, 1681i, 1681k (2), 1681l, and 1681m] under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of —

- (1) any actual damages sustained by the consumer as a result of the failure;
- (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

The above-mentioned compliance procedures imposed by the statute upon the credit reporting agencies and the users of the reports are as follows:

- (a) 15 U.S.C.A. § 1681c (1970) regulates the reporting of obsolete information.
- (b) 15 U.S.C.A. § 1681e (1970) provides:

Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure a maximum possible accuracy of the information concerning the individual about whom the report relates.

- (c) 15 U.S.C.A. § 1681i (1970):

Procedure in case of disputed accuracy—Dispute; reinvestigation

(a) If the completeness of accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time 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 after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

Statement of dispute

(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

Notification of consumer dispute in subsequent consumer reports

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

Notification of deletion of disputed information

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish

However, this statute, which negates much of the previous case law, does not give the individual a *carte blanche* to the courthouse. The individual now has statutory rights to protect his name from defamation; but recovery in an action based upon the discovery proceedings provided in this act will still be intertwined with the common law of each state, particularly as each state court

notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

(d) 15 U.S.C.A. § 1681k (2)(1970) regulates the furnishing of public record information for employment purposes.

(e) 15 U.S.C.A. § 1681l (1970):

Restrictions on investigative consumer reports

Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished.

(f) 15 U.S.C.A. § 1681m (1970):

Requirements on users of consumer reports—Adverse action based on reports of consumer reporting agencies

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

Adverse action based on reports of persons other than consumer reporting agencies

(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature 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.

Reasonable procedures to assure compliance

(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 subsections (a) and (b) of this section.

has defined the elements of malice necessary to destroy the conditional privilege.

Negligence as a Cause of Action

The most radical change in the rights of the person reported upon, hereinafter called the "consumer" as in the statute, is the statutory right to sue for ordinary acts of negligence which result in actual damage to him in any United States District Court, regardless of the amount in controversy. Previously, mere negligence was not the basis for a cause of action in any state, regardless of the damages or defamation resulting from such negligence. Rather, a plaintiff had to allege and prove malice in order to recover from the credit reporting company.

In a libel action for the publication of a false report that the consumer was an excessive drinker, the Supreme court of Wisconsin in 1960 held that the consumer had failed to state a cause of action, although he had been damaged by a denial of liability insurance, because there was no allegation that the report was prepared with malice.⁹

Because of a report which stated erroneously that a consumer had been "unethical" in business, bankrupt, and arrested for larceny although he was a responsible member of the community in good financial condition, a consumer was denied financing for the purchase of a house. The Supreme Judicial Court of Massachusetts in 1961 held that mere negligence does not destroy the conditional privilege because the standard of reasonable care would "place undue limitations on communications which the law seeks to protect."¹⁰ The court further stated "The facts that these communications are confidential and that great speed may be required in their preparation militate against a rule that would destroy the privilege by proof of ordinary negligence."¹¹

In an action based on a report published to ten subscribers which stated that the corporation had gone out of business when in fact it was financially secure, the United States Court of Appeals for the Second Circuit held in 1957 that "the law of New York clearly requires more than mere negligence to destroy the privilege 'Malice . . . means more than mere negligence or want of sound judgment It means more than hasty or mistaken action.'"¹²

The congressional conference committee specifically determined that the standard of care under 15 U.S.C. § 1681 (1970) would be that of ordinary

9. *Barker v. Retail Credit Co.*, 8 Wis.2d 664, 100 N.W.2d 391, 392 (1960).

10. *Retailers Commercial Agency, Inc. v. Retailers Commercial Agency, Inc.*, 342 Mass. 515, 174 N.E.2d 376, 380 (1961).

11. *Id.* at 522, 174 N.E.2d at 380-81.

12. *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957).

negligence by deleting the provision in the Senate bill that made only gross negligence actionable. The House conferees, concerned with the difficulty of proving gross negligence, felt that reporting agencies should be held to a standard of ordinary negligence; and the Senate conferees agreed to insure a greater measure of accuracy.¹³ The standard of ordinary care, with the burden of proof shifting to the credit reporting agencies to show compliance with reasonable measures for accuracy, was reinforced in the legislative history by the example given by Senator William Proxmire on the floor of the Senate: "Thus, for example, if a reporting agency fails to follow reasonable procedures to assure the maximum possible accuracy of information in a credit report and is negligent in so doing, a consumer has the right to bring a civil action to recover any actual damages sustained."¹⁴

Now that 15 U.S.C. § 1681 (1970) is effective,¹⁵ the corporation which is reported to be bankrupt to ten firms with which it does business, as in *A.B.C. Needlecraft v. Dun & Bradstreet*, *supra*, can recover actual damages from the negligent credit reporting agency. A financially stable individual who is refused financing for a home because of the credit reporting agency's negligence in gathering information, as in *In re Retailers Commercial Agency, Inc.*, might be awarded any increased value on the home selected as well as the loss of equity in the home during the time he was forced to rent.

Section 1681n of the act deals with civil liability for willful noncompliance¹⁶ and Section 1681o deals with civil liability for negligent noncompliance. Both sections state that the credit reporting agency failing to comply with the provisions of the law designed to assure accuracy is liable to the consumer for the actual damages sustained by the consumer and reasonable attorney's fees. Section 1681n allows punitive damages as determined by the courts.

13. 116 CONG. REC. 17,635 (daily ed. Oct. 9, 1970).

14. *Id.*

15. 15 U.S.C.A. § 1681 (1970) became effective on April 26, 1971, which was 180 days after enactment.

16. 15 U.S.C.A. § 1681n (1970):

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed [upon the consumer reporting agencies to follow reasonable procedures to assure maximum possible accuracy of the information in all consumer reports on an individual as required by Sections 1681c, 1681e, 1681i, 1681k (2), 1681l, and 1681m] under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

- (1) any actual damages sustained by the consumer as a result of the failure;
- (2) such amount of punitive damages as the court may allow; and
- (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

For the provisions of Sections 1681c, 1681e, 1681i, 1681k (2), 1681l and 1681m see note 8, *supra*.

Libel as a Cause of Action

The future of common-law libel actions against the credit reporting agencies, which has been the bulk of all previous litigation against these concerns, lies in the interpretation of Section 1681h(e):

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of *defamation*, or invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, *based on information disclosed pursuant to Section 1681g, 1681h, or 1681m of this title*, as to *false information furnished with malice or willful intent to injure such consumer*.¹⁷

Section 1681g requires disclosure to consumers of the nature of what is in that consumer's file; Section 1681h spells out the conditions of disclosure to that consumer; and Section 1681m requires that when credit, insurance, or employment is denied (or the charge for credit or insurance is increased) because of adverse information in a credit report, the user of the credit report shall so advise the consumer and furnish him with the name of the credit reporting agency. These statutory discovery procedures will provide the only means of discovering a cause of action. Unauthorized disclosures of credit information and obtaining credit reports on false pretenses will be federal crimes with fines up to \$5,000 and/or imprisonment for not more than one year.¹⁸

Section 1681g(a)(2) requires that the sources of the information be disclosed unless it is an investigative report, and the sources for such an investigative report are only available to the plaintiff "under [the] appropriate discovery procedures in the court in which the action is brought."¹⁹ One avenue for defamation actions where false information is given regarding a consumer would be to sue the credit reporting agency's source of the false information if that source had acted maliciously or with intent to injure.²⁰

If the credit reporting agency reports that Mrs. Consumer is an unmarried mother, when in fact she is a childless married woman, and the user of the report denies credit to Mrs. Consumer, Mrs. Consumer can follow the discovery procedures provided in the act. If it were an "investigative consumer report,"

17. 15 U.S.C.A. § 1681h (1970) (emphasis added).

18. 15 U.S.C.A. §§ 1681q, and r (1970).

19. 15 U.S.C.A. § 1681g (a)(2) (1970).

20. The individual sources of information contained in the reports are secrets heretofore carefully guarded by the credit reporting agencies. In no case that this writer has studied has she seen where they reveal their sources.

Mrs. Consumer could get the name of the source from the credit reporting agency through court action; but if it were a "character-financial" report as the majority are, then the credit agency must tell Mrs. Consumer the source of information under Section 1681g(a)(2). If the source of the "unwed mother" information were Mrs. Mean Neighbor, who lives next door to Mrs. Consumer and knows Mrs. Consumer is childless and married, then it is possible Mrs. Consumer could proceed against Mrs. Mean Neighbor for slander, since Section 1681h(e) allows defamation suits for "false information furnished with malice or willful intent to injure such consumer."

Another avenue that defamation actions might take would be against the credit reporting agency itself if it subsequently republished the imputation that Mrs. Consumer was an unwed mother after Mrs. Consumer notified the agency of the error. Section 1681i required reinvestigation of the accuracy of items being disputed by the consumer and deletion if the information is inaccurate. If the reinvestigation proves the information inaccurate and such information is not then deleted, this would fulfill the statutory exception for a defamation action on the grounds of "false information furnished with malice or willful intent to injure such consumer" under Section 1681h(e), and punitive 1681(h) (e), and punitive damages would be allowed under Section 1681n for willful noncompliance with the law.

The most probable course that libel actions will take against the credit reporting agencies is based on the last clause in Section 1681h(e): "except as to false information furnished with malice or willful intent to injure such consumer."²¹ The judicial interpretations of what constitutes "malice" in credit reporting may afford an exception in many states to the prohibition in Section 1681h(e) against libel actions against the credit reporting agencies based on information disclosed to the consumer under Sections 1681h and 1681m.

The legislative history of the Fair Credit Reporting Act regarding common-law defamation suits is not as clear as it might be. Speaking to the House in a colloquy, Congresswoman Sullivan explained the bill's intent regarding defamation in the following manner:

The bill bars defamation and invasion of privacy suits against an agency, but only if the individual bases his suit on the information disclosed under the act. If the individual uses information obtained through independent sources, whether he has also obtained disclosures under the act or not, he may of course bring any action

21. The common-law action for libel is abolished under the statute unless the plaintiff-consumer can prove to the court that the false information was either (1) acquired by means other than those discovery procedures provided in the statute (which will be almost impossible without subjecting oneself to the criminal sanctions of Sections 1681q or 1681r) or (2) furnished with malice or willful intent to injure the consumer. S. REP. NO. 517, 91st Cong., 2d Sess., 6 (1970).

allowed by common law or statute. It is not intended that the bill grant immunity to an agency from such suits by individuals whenever the agency has furnished information under this act. In my opinion, this is made clear in the Senate committee report.²²

However, the Senate committee report does not state that one must obtain the information through independent sources. Since Sections 1681g, 1681h and 1681m (the statutory discovery procedures) provide the only means a person has to learn that he has been adversely affected by a false credit report; and since it will be a federal crime to obtain information under false pretences, the reference to independent sources seems superfluous. Furthermore, the common law allows libel actions when the report has been furnished with malice, and Mrs. Sullivan herself states that the bill is not intended to provide immunity to credit reporting agencies merely because they furnish the consumer with information. It could reasonably be assumed that judges will resolve this confusion by looking to what the Senate report actually does say regarding Section 1681h, and reading that part of the Senate report in conjunction with the statute itself.

The exact language of the Senate report regarding common-law defamation actions under Section 1681h states:

Reporting agencies, their sources and the users of information are given immunity from libel or other suits as a result of information in their credit file disclosed to consumers pursuant to Section 1681(g), 1681(h), and 1681(m) unless the information was furnished with malice or willful intent to injure the consumer. The immunity provisions under this section do not extend to information acquired by a consumer through other means.²³

Section 1681(h) could reasonably be interpreted by a judge, familiar with the depth and color that the word "malice" has assumed in defamation actions against credit reporting agencies, that credit reporting agencies are not given immunity from libel suits based on these discovery provisions when their reports are published with "malice," as malice is presently defined in the common law. The Senate report says, "Reporting agencies . . . are given immunity . . . unless the information was furnished with malice . . ." The statute itself says there shall be no "action or proceeding in the nature of defamation . . . based on information disclosed . . . except as to false information furnished with malice or willful intent to injure such consumer."²⁴ The words "unless" and "except" as used above seem to import a vastly different situation regarding

22. 116 CONG. REC. 10,052 (daily ed. Oct. 13, 1970).

23. S. REP. NO. 517, 91st Cong., 2d Sess., 6 (1970).

24. 15 U.S.C.A. § 1681h (e) (1970).

immunity from suit than that described by Mrs. Sullivan in her colloquy.

Malice as Defined in the Common Law

Since it is well settled that actions in derogation of a statute are to be strictly construed, this study will proceed on the assumption that the statute grants immunity from defamation suits *except* when the false information was furnished with malice, and will turn to the common law to investigate the meaning of "malice" in the context of publication by credit reporting agencies.

Operating on the premise that the conditional privilege or immunity in the law of defamation heretofore enjoyed by the credit reporting industry is a matter of public policy in the furtherance of commerce and the public welfare, the courts have generally demanded a stringent standard for an acceptable proof of malice since the general judicial opinion has been that the encouragement of commerce balanced the basic individual right to have one's reputation unattacked by false and defamatory allegations.²⁵ As one judge explained "The reason for the privilege is that in furnishing information the agencies are supplying a legitimate business need, and that without the privilege few would undertake to furnish such information, and the cost thereof would be high, if not prohibitive."²⁶

While the "legitimate business need" for erroneous information is questionable, the courts have usually held that extreme carelessness does not destroy the conditional privilege. The majority of the courts have held that it takes actual malice, as distinguished from the constructive malice inherent in a defamation, to defeat the qualified privilege. There are shades of difference in the various state decisions as to what constitutes actual malice, but most judicial decisions have held that actual malice extends beyond overt hostility and ill will to embrace a "conscious indifference to the rights of an individual" or a "reckless and wanton disregard of the truth." The line between extreme carelessness and a reckless and wanton disregard for the truth is impossible to define in the abstract and therefore must be predicated upon the facts of individual cases.

In one of the more enlightened decisions, *Dun & Bradstreet, Inc. v. Robinson*,²⁷ the Supreme Court of Arkansas upheld the lower court's definition of malice as being both personal (wherein the malice is based upon overt feelings of hostility and hatred) and impersonal (wherein the malice is based upon such

25. *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160, 161 (D.C. Cir. 1952).

26. *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 286 F. Supp. 899, 910 (W.D. Pa. 1968).

27. 233 Ark.168, 345 S.W.2d 34, 38-39 (1961).

conscious disregard of the consequences that it is tantamount to ill will). In this case, a new correspondent for Dun & Bradstreet, Mrs. Margaret Lawrence was asked if she had heard that Joe Robinson was going out of business. Having been told to report any unusual occurrences, she immediately telephoned the information to the Little Rock office. Four days later, the Dun & Bradstreet office in Little Rock reported without requests to 36 of its subscribers, who had requested information on Robinson in the past, that Robinson's business was "Reported Discontinued."²⁸

On appeal, the credit reporting bureau contended that the definition of actual malice by the trial court should be narrowed to malice in the moral sense, the feeling of hate and animosity, rather than the following definition of actual malice by the trial court in its jury instructions:

Malice is defined as the doing of a wrongful act, either in a personal sense, as the doing of an act intentionally that is wrong, or the doing of an act actuated by spite, grudge, hatred, ill will or evil intent, or in the impersonal sense, as the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will.²⁹

Rejecting the argument that the definition should be narrowed, the Supreme Court of Arkansas reasoned that the elimination of conscious indifference or reckless disregard would give unwarranted protection to a mercantile agency, "while placing an undue burden upon the individual or concern which has borne the brunt of untrue and damaging statements."³⁰ Because the Supreme Court of Arkansas felt that "prudence would have dictated that the company await further clarification,"³¹ the decision that Dun & Bradstreet had lost its privilege because of conscious indifference to the rights of Robinson was affirmed; and some degree of individual rights was recognized.

The Arkansas case is in sharp contrast to the District of Columbia case previously discussed, involving a childless married woman who was described as an unwed mother in a credit report. On the basis that marital status and number of dependents relate to credit status, the court of appeals affirmed the district court's ruling for the credit reporting agency because the "qualified privilege is broad enough to cover the statements in appellee's report."³² The

28. However, Mrs. Lawrence talked with Robinson's secretary the day after her telephone report, who stated that the report was not true. Mrs. Lawrence wrote rather than telephoned this information to the Little Rock office, which followed its first report to the 36 subscribers with the information that Robinson "denied reports that operation discontinued."

29. *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 172, 345 S.W.2d 34, 38 (1961).

30. *Id.* at 173, 345 S.W.2d at 39.

31. *Id.*, 345 S.W.2d at 40.

32. *Watwood v. Stone's Mercantile Agency*, 194 F.2d at 161.

holding that the credit reporting company was within the bounds of their conditional privilege was made in spite of the court's recognition that bad faith would defeat the privilege. There was no discussion in this case as to what degree of reckless disregard of the truth would constitute bad faith sufficient for the plaintiff to recover.

Florida law requires proof that the false publication is made from express malice, and malice is strictly construed. In *Hooper-Holmes Bureau v. Bunn*,³³ the credit reporting company falsely reported that an insurance agent, Bunn, had been fired for dishonesty. The plaintiff was able to obtain recovery in this case on the basis of an admission by the credit reporting company's agent of an intention to ruin the plaintiff insurance agent.³⁴ When the credit reporting company subsequently published the false information about Bunn's "dishonesty" after having been notified of the error, the Fifth Circuit found the willful publication of false and defamatory material to be express malice.³⁵

In a more recent Florida case, the Fifth Circuit includes in the definition of actual malice "such carelessness and willful disregard of [the individual's] rights as to amount in law to actual malice."³⁶ In this case, *Morgan v. Dun & Bradstreet, Inc.*, the credit reporting bureau republished false information after being notified of its error.³⁷ Judge James Coleman of the Fifth Circuit held that subsequent publication of false information with knowledge it is false satisfies the requirement for malice under Florida law.

The degree to which the courts moved during this century in protecting the credit reporting agencies can be clearly seen by comparing the 1902 case of *Douglas v. Daisley*³⁸ in Massachusetts with a 1961 Mississippi case, *Retail Credit Company v. Garraway*,³⁹ a case of first impression in that state. The First Circuit Court of Appeals, in *Douglass*, held that the credit reporting

33. 161 F.2d 102 (5th Cir. 1947).

34. The plaintiff Bunn accidentally discovered the error contained in his report and attempted to correct it with the credit reporting company's agent, Cohen. Because Bunn had allegedly hit a friend of Cohen's, Cohen refused to listen to Bunn and further stated that he would make it impossible for Bunn ever to secure employment in Miami. Two subsequent reports contained the same "information" about Bunn's dishonesty and prevented him from obtaining employment.

35. *Hooper-Holmes Bureau, Inc. v. Bunn*, 161 F.2d at 102.

36. *Morgan v. Dun & Bradstreet, Inc.*, 421 F.2d 1241, 1242 (5th Cir. 1970).

37. Judge Coleman found that Dun & Bradstreet continued to report implications that the plaintiff systematically defaulted on payments due his suppliers even though the evidence, visits to the Mobile, Alabama office of Dun & Bradstreet from 1961 to July, 1965, contradicted this error and put Dun & Bradstreet on notice of the falsity of the reports. In the opinion, Judge Coleman stated regarding the November, 1965, and March, 1966, reports sued upon, "The entire publication clearly implies that the plaintiff, Joseph F. Morgan, is a deadbeat and a fraud. As a result of this credit report plaintiff's credit was terminated, his ability to purchase for cash was impaired, and finally his Fort Walton, Florida, drug business was destroyed." *Id.* at 1242.

38. 114 F. 628 (1st Cir. 1902).

39. 240 Miss. 230, 126 So.2d 271 (1961).

agency must employ reasonable care to retain the privilege, but that an unavoidable mistake, lacking elements of negligence, would not destroy the conditional privilege and its immunity.⁴⁰ The court stated, "No privilege which affects the public at large grants immunity from negligent and careless acts."⁴¹ and held the credit reporting agency to the ordinary rule of due care.

Approximately sixty years later, in *Retail Credit Company v. Garraway*, *supra*, the Supreme Court of Mississippi adopted the national majority rule and held that the communication of a mercantile agency retains its privilege unless it is sent with malice.⁴² This court held that under Mississippi law the concept of actual malice would embrace reckless disregard of the truth, for "such gross disregard of the rights of the person published [by the information in the report] as will be equivalent to malice in fact."⁴³

The same year the Mississippi court set such stringent requirements to defeat the conditional privilege, the Massachusetts courts specifically stated that mere negligence did not destroy the conditional privilege, having already reversed their earlier holding in *Douglass*. In a thorough review of the cases outside Massachusetts as well as within it, the Supreme Judicial Court of Massachusetts in *In re Retailers Commercial Agency, Inc.*, reasoned that there is "no social utility in reports that are made recklessly or without reasonable grounds"⁴⁴ and therefore held that a reckless disregard of the truth would be equivalent to malice in regard to the conditional privilege. However, the court was careful to define its concept of the reckless disregard of the truth which would be tantamount to malice by stating that it must be "'more than mere negligence or want of sound judgment' and there must be 'more than hasty or mistaken action.'"⁴⁵ On the basis that good faith requires the credit reporting bureau to have reasonable grounds for believing the information published is true, the court found that the two conflicting credit reports regarding the same subject were sufficient evidence to submit to a jury for determination of the credit reporting agency's good faith.

40. A credit reporting agency published that the subject of the report had made an assignment for the benefit of his creditors, when in reality the person had made an assignment to secure endorsement on a note. The report was sent to the credit reporting company by one of its agents on a form which required details, unfurnished in this instance, about the nature of any such transaction.

41. *Douglass v. Daisley*, 114 F. at 634.

42. Mrs. Delores Garraway had obtained copies of her credit reports through the ruling of a Chancery Court. These Retail Credit Company reports falsely stated to an insurance company that Mrs. Garraway was a drunkard. The Supreme Court of Mississippi overruled the lower court and held that one could not obtain discovery of qualifiedly privileged reports via a pure bill of discovery in equity.

43. *Retail Credit Company v. Garraway*, 240 Miss. 230, 234, 126 So.2d 271, 275.

44. *Commercial Agency Inc. v. Retailers Commercial Agency, Inc.*, 342 Mass. 515, 519, 174 N.E.2d 376, 380 (1961).

45. *Id.*

According to the laws of New York, the malice required to remove a qualified privilege "can also consist of 'such a wanton and reckless disregard of the rights of another as is ill will's equivalent.'"⁴⁶

The definition of malice used by the courts runs like a refrain through the cases and is surprising in its uniformity. The definition of malice in *In re Retailers Commercial Agency, Inc.*, *supra.*, is almost a repetition of the one in *H.E. Crawford Company v. Dun & Bradstreet, Inc.*⁴⁷ In this North Carolina case, Dun & Bradstreet had falsely reported to 43 of its subscribers that Crawford had a judgment against him when in actuality a declaration against Crawford had been filed but not prosecuted. The Fourth Circuit stated in this case that "actual malice" had been variously defined but "all definitions in substance come down to the equivalent of 'bad faith.'"⁴⁸

Conclusion

Since the common-law requirements for establishing malice are so stringent, and since 15 U.S.C. 1681e prohibits actions for defamation unless the false information has been published with malice, most consumers will probably proceed in the future under Section 1681o, which allows actual damages for negligent noncompliance,⁴⁹ or under Section 1681n, which permits both actual and punitive damages for willful noncompliance with the statute. However, when the false information has been published with such a reckless and wanton disregard for truth as to be tantamount to malice, it is preferable to proceed under a libel action when the defamatory matter is normally considered libelous *per se* and there have been no monetary damages provable.

A whole body of law has been overturned by the Congress—a body of law which was uniquely uniform throughout the states—and it will take years for the new law to be interpreted sufficiently by the courts to determine what effect it will have on the law of libel in the area of credit reporting.⁵⁰

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46. *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957).

47. 241 F.2d 387 (4th Cir. 1957).

48. *Id.* at 395.

49. Although Section 1681o allows an action for negligence, Section 1681h (e) seems to limit severely that cause of action by precluding a negligence suit based on information disclosed under Sections 1681g, 1681h, or 1681m except as to false information furnished willfully or maliciously. As noted above, these statutory discovery procedures provide the only foreseeable means of determining what has been included in one's report negligently.

50. There have been no cases yet reported under the new law.