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Minnesota and the Fair Credit Reporting Act: A Proposed Reform of an Inadequate Law

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MINNESOTA AND THE FAIR CREDIT REPORTING ACT: A PROPOSED REFORM OF AN INADEQUATE LAW

John Smith felt assured of being promoted to vice-president by the Major Industries Corporation. After ten years of hard work, he was finally receiving recognition.

Because the vice-presidency was an important position, the company followed its usual procedure of applying for an insurance policy on Mr. Smith's life, naming the company as sole beneficiary. Also following its standard procedure, the insurance company, upon receipt of the application, requested information on Mr. Smith from a credit reporting bureau. Unable to locate more than a few colorless statements in its files about Mr. Smith, the credit reporting bureau began interviewing Mr. Smith's neighbors. When the report was forwarded to the insurance company, it contained a statement from undisclosed sources that Mr. Smith was known to abuse alcohol. The report further stated that these anonymous sources had seen Mr. Smith's garbage cans piled high with beer cans.

When the insurance company refused to issue a policy on Mr. Smith's life, Major Industries Corporation requested and received the reason for this refusal. Mr. Smith was not promoted. Because he never learned about the report, he did not have the opportunity to explain that the piles of beer cans were from his son's collection. Periodically, he ordered his twelve year old to cull out and discard the duplicates.

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I. Introduction

The story of Mr. Smith may appear to be a fantasy. Although the specific facts are fictional, Mr. Smith's problem is real. As the credit reporting industry grows, individual privacy diminishes. Today, credit bureaus maintain approximately 120,000,000 files on consumers and respond daily to numerous requests for information. When an individual applies for insurance, credit, or even employment, the information contained in a credit bureau's file on that individual often will be the basis for granting or denying the benefit sought. What if that information is false, misleading, or obsolete? To whom and for what purpose can an individual's credit file be revealed?

In response to these concerns, Congress enacted the Fair Credit Reporting Act (FCRA) in 1970. The Act, through its elaborate system of rules and procedures, is designed to protect the individual's right to privacy and fair treatment while at the same time permitting credit bureaus to perform their necessary function. By substituting special remedies for traditional common law causes of action, the FCRA has had a substantial impact on consumers. This Note attempts to analyze the FCRA and its impact on the Minnesota consumer. After a brief discussion of the deficiencies of common law regulation of credit report-
ing abuses, this Note will examine the definitional problems of the FCRA, and its regulatory provisions. Following this is a discussion of the limitations of the FCRA that have resulted from inconsistent interpretations of the Act, with emphasis on how the FCRA has been interpreted in Minnesota. As a backdrop for a proposal of supplementary legislation in Minnesota, this Note examines both the responses of other state legislatures to the problem of credit reporting abuse and an analogous response of the Minnesota Legislature to the need for individual privacy. Finally, this Note offers a proposed credit reporting statute for Minnesota, which is designed to remedy some defects in the FCRA, and offer better protection for the Minnesota consumer.

II. REGULATION OF CREDIT REPORTING UNDER THE COMMON LAW

The history of the credit reporting industry is not unblemished. With the industry maintaining approximately 120,000,000 dossiers, a certain amount of abuse occurs. Although historically abuses of credit reporting have been regulated by the common law, the common law has not always provided the injured consumer with an effective remedy. If a

7. See notes 18-37 infra and accompanying text. Credit reporting abuse is defined functionally in terms of the types of activities that the Fair Credit Reporting Act [hereinafter cited as FCRA] was designed to prevent. The reporting of false information regarding a consumer is the most obvious type of abuse. Other examples include reporting of obsolete information, reporting information for illegitimate purposes, and failing to make required disclosures to consumers. Cf. 1973 Hearings, supra note 1, at 638 (statement of John H.F. Shattuck) (listing the injuries to which subjects of credit reports are most commonly subjected). See generally A. NEIER, DOSSIER: THE SECRET FILES THEY KEEP ON YOU 133-45 (1975); notes 97-100 infra and accompanying text.

8. See notes 43-73 infra and accompanying text.
9. See notes 74-103 infra and accompanying text.
10. See notes 104-69, 192-202 infra and accompanying text.
11. See notes 170-91 infra and accompanying text.
12. See notes 263-71 infra and accompanying text; Appendix.
13. See notes 203-42 infra and accompanying text.
14. See notes 243-62 infra and accompanying text.
15. See Appendix.
16. See note 1 supra and accompanying text.
17. See 1973 Hearings, supra note 1, at 619 (statement of Arthur R. Miller); Note, Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act, 47 S. CAL. L. REV. 1070, 1090 (1974) ("As many as one out of every 20 reports prepared may contain material errors."); Note, Protecting the Subjects of Credit Reports, 80 YALE L.J. 1070, 1090 (1974)
reporting agency disseminated false information, the consumer could bring a libel action to recover damages.²⁰ In some jurisdictions, common law actions for negligence and invasion of privacy have afforded consumers relief from credit reporting abuses.²¹ Although the Minnesota court has not yet adopted the invasion of privacy tort, it explicitly left open the possibility for recognizing this common law action.²² Minnesota has, however, recognized the tort of libel as a remedy for the reporting of false credit or employment information.²³ Because the courts recognized the legitimate business interests


²². See Hendry v. Conner, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975) (per curiam); cf. Note, Tortious Invasion of Privacy: Minnesota as a Model, 4 WM. MITCHELL L. REV. 163, 177 (1978) ("[T]he court in Hendry did not refute a common law right of privacy."). Addressing the issue of whether to recognize invasion of privacy in Hendry v. Conner, the Minnesota court stated:

Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy. . . . It is not necessary for the disposition of this case to decide whether a cause of action for invasion of privacy should be recognized in Minnesota. It is sufficient to hold that, even if we were to do so, the conduct of defendant . . . does not constitute a violation of plaintiff's privacy.


Similarly, Minnesota has not recognized an action in negligence for misstating credit information. Apparently, the South Carolina Federal District Court is the only court that has done so. See Serino v. Dun & Bradstreet, Inc., 267 F. Supp. 396, 398 (D.S.C. 1967) ("Extensive research by counsel and independent research by the court have failed to disclose any case sufficiently close to the facts of this case as to constitute precedent that there is, or is not such a cause of action.").

²³. See, e.g., Northwestern Detective Agency, Inc. v. Winona Hotel Co., 147 Minn. 203, 179 N.W. 1001 (1920) (credit); Hoff v. Pure Oil Co., 147 Minn. 195, 179 N.W. 891 (1920) (employment); Froslie v. Lund's State Bank, 131 Minn. 435, 155 N.W. 619 (1915) (credit); Hebner v. Great N. Ry., 78 Minn. 289, 80 N.W. 1128 (1899) (employment); McDermott v. Union Credit Co., 76 Minn. 84, 79 N.W. 673 (1899) (credit); Trebby v. Transcript Publishing Co., 74 Minn. 84, 76 N.W. 961 (1898) (credit); Traynor v. Sielaff, 62 Minn. 420, 64 N.W. 915 (1895) (credit); Zier v. Hofflin, 33 Minn. 66, 21 N.W. 862 (1885) (credit); Woodling v. Knickerbocker, 31 Minn. 268, 17 N.W. 387 (1883) (credit).

²⁴. See, e.g., Roemer v. Retail Credit Co., 3 Cal. App. 3d 368, 372-73, 83 Cal. Rptr. 540,
of many who depend on credit reports, judicial recognition of a qualified privilege to report credit information frequently made the recovery of damages very difficult in such libel actions. The privilege was conditioned on the agencies furnishing information in a good faith response to honestly-made inquiries. Even if the credit bureau was negligent, however, its qualified privilege covered the reporting of credit information or business information, including an individual's past employment history. The privilege was justified on the theory that making such information freely available outweighed the occasional harm that resulted from reporting false information.

Ordinarily, proof of a defamatory statement would warrant recovery by the consumer in a libel action. Assertion of the qualified privilege, however, insulated the credit bureau from liability unless the con-
sumer could prove malice. Because malice is seldom a reason for publishing the defamatory statement in reporting abuse cases, and because even when present, malice is difficult to prove, the injured consumer often was left without an effective remedy. Weakened by the qualified privilege, libel actions offered little protection from credit reporting abuses. As a result, the credit reporting industry effectively went unregulated. Injured consumers were not compensated for the damages they had suffered.

III. THE FAIR CREDIT REPORTING ACT

When Congress recognized the failure of common law remedies to protect the consumer from credit reporting abuses, it enacted the FCRA as part of the Consumer Credit Protection Act. The FCRA

33. See, e.g., Lowry v. Vedder, 40 Minn. 475, 475, 42 N.W. 542, 543 (1889); 1973 Hearings, supra note 1, at 667 (statement of Lewis A. Engman, Chairman, Federal Trade Commission); W. PROSSER, supra note 18, § 115, at 794-95; Note, supra note 31, at 1297.


35. Note, supra note 25, at 255.

36. See 1973 Hearings, supra note 1, at 638-39 (statement of John H.F. Shattuck); id. at 667 (statement of Lewis A. Engman); Note, supra note 31, at 1297.

37. 1973 Hearings, supra note 1, at 637 (statement of John H.F. Shattuck); see Note, supra note 31, at 1298.


begins by stating that "[t]he banking system is dependent upon fair and accurate credit reporting," and that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." The stated purpose of the Act is the protection of these interests. The interests of the commercial sector and of the consumer, however, are not always compatible. If a prospective creditor needs an accurate piece of information that can be procured only through invasion of an individual's privacy, the interests of the creditor and the individual conflict. In enacting the FCRA, Congress attempted to balance these conflicting interests and arrive at an effective and workable piece of legislation. Despite the intentions of Congress, the FCRA contains gaps in its protection that need to be closed by supplemental state legislation to provide adequate protection against credit reporting abuses. Because many of the deficiencies of the FCRA have resulted from the Act's definitions and the judicial interpretations of its statutory language, an analysis of the primary definitions and regulations must precede any extensive critique of the Act.

A. The Consumer Report

The definition of a "consumer report," perhaps the most confusing of the Act's definitions, poses the FCRA's greatest challenge to judicial interpretation. Section 1681a(d) defines consumer report, first, as the communication of any information by a consumer reporting agency. L. No. 95-630, § 2001, 92 Stat. 3641, 3728 (adding the Electronic Fund Transfer Act), reprinted in [1978] U.S. CODE CONG. & AD. NEWS.

43. The FCRA defines the following terms: person, consumer, consumer report, investigative consumer report, consumer reporting agency, file, employment purposes, and medical information. See Fair Credit Reporting Act § 603(b)-(i), 15 U.S.C. § 1681a(b)-(i) (1976). For examples of administrative interpretations of the term consumer report, see Kelly, How the Fair Credit Reporting Act Reaches You and Your Client, 48 HENNEPIN LAW. 10 (May-June 1979).
44. See Fair Credit Reporting Act § 603(d), 15 U.S.C. § 1681a(d) (1976), which defines consumer report as follows:

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment pur-
Second, the communication must bear relation to a "consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." The communication must be "used or expected to be used or collected" for certain purposes. These purposes include "(1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title." This definition becomes complete when cross-referenced with the "other purposes authorized under section 1681b of this title." Besides serving as part of the FCRA's definition of consumer report, section 1681b is simultaneously a list of the permissible purposes for which consumer reports may be issued. A report may be furnished in response to a court order, or according to the written instructions of the subject consumer. Reporting agencies may give reports to third parties only if that person intends to use the information for a credit transaction involving the consumer, for employment purposes, for underwriting insurance involving the consumer, or for determining the consumer's eligibility for a governmental license or other benefit. To this is added a catch-all provision: a report may be given to any person whom the agency poses, or (3) other purposes authorized under section 1681b of this title.

Id.
45. Id.
46. Id. (emphasis added).
47. Id.
48. Id.
49. See id. § 604, 15 U.S.C. § 1681b, which provides:
A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
1. In response to the order of a court having jurisdiction to issue such an order.
2. In accordance with the written instructions of the consumer to whom it relates.
3. To a person which it has reason to believe—
(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
(B) intends to use the information for employment purposes; or
(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.
reasonably believes "has a legitimate business need for the information in connection with a business transaction involving the consumer." In this lengthy manner, sections 1681a(d) and 1681b combine to form the completed definition of consumer report.

A careful reading of the above sections reveals that this lengthy definition is not a model of statutory clarity. According to section 1681a(d), a consumer report is partially defined by who reports the information, and partially defined by the character of the information reported. The section also states that the meaning of a consumer report is entirely dependent upon the purposes for which the information is used or expected to be used.

This concept of use or expected use of the information presents the
first infirmity in the definition of a consumer report. Although the drafters do not explain who “uses” the information, an obvious inference is that the person who obtains the information is the “user.” Certainly, neither the consumer nor the reporting agency has any direct interest in using such information for the purposes authorized by the Act. An inference as to who expects the information to be used for these purposes is not so easily drawn, however. The consumer, the reporting agency, and the user might each have an expectation of how the information should be used.58

An understanding of “expected to be used” is essential because a finding that the information is used or expected to be used for one of the authorized purposes is a prerequisite to a finding that the information is a consumer report.59 In turn, a finding that the information is a consumer report must be made before the FCRA is applicable.60 With the meaning of the phrase “expected to be used” neither obvious nor explained in the Act, courts face obvious difficulties when asked to interpret the Act and its definition of consumer report. When confronted with this situation, courts have been forced either to ignore this ambiguous phrase “expected to be used” or second guess Congress by making the determination of who expects the information to be used for these specified purposes.61

The second problem in defining a consumer report under the FCRA arises from the dual purpose of section 1681b. That section both defines consumer report2 and lists the permissible purposes for which consumer

58. See notes 144-69 infra and accompanying text.
61. See notes 144-69 infra and accompanying text. Compare Henry v. Forbes, 433 F. Supp. 5, 8 (D. Minn. 1976) (“[A] report is a ‘consumer report’ only if it is prepared for one or more of the specific uses provided in § 1681a and § 1681b.”) and Gardner v. Investigators, Inc., 413 F. Supp. 780, 781 (M.D. Fla. 1976) (“Title 15, § 1681 [sic] defines a ‘consumer report’ in terms of its use.”) with Hansen v. Morgan, 582 F.2d 1214, 1218 (9th Cir. 1978) (“[The credit bureau] must have supplied this information with the expectation that the [defendants] would use it for purposes consistent . . . with the FCRA . . . .” (emphasis added)) and Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 672 (M.D.N.C. 1978) (“[T]he credit report would be a consumer report because it was expected, by the [credit bureau] to be used for one of the purposes in § 1681a(d).” (emphasis in original)).
reports can be issued. Under the FCRA, a consumer report may not be issued except for a permissible purpose. If a consumer reporting agency distributes a consumer report for any but a permissible purpose, it risks civil or criminal liability. To determine whether the information is a consumer report, however, the reader must look to the very same permissible purposes. This result severely limits the FCRA's restrictions on the use of a consumer report. For example, if certain information is used for a specified purpose, that information, by definition, is a consumer report. Because the information was used for a permissible purpose, the person who issued the report is in compliance with the Act. On the other hand, if that very same information is used for a purpose not designated as permissible, the report is not a consumer report. If the report is not a consumer report, its use is not regulated by the FCRA. Consequently, the section 1681b limitations on the use of a consumer report would not apply to such information when used for an illegitimate purpose.

Although the FCRA appears to provide civil or criminal liability if a consumer reporting agency discloses information for any but a permissible purpose, the definition of consumer report could appear to exclude such liability. The dual nature of section 1681b narrows the definition of consumer report, which, in turn, limits the FCRA's scope of application, often rendering the limitation on the use of consumer reports absolutely meaningless. Certain misuses of consumer information thereby go unregulated, diminishing the FCRA's protection of personal privacy.

63. See id. § 604, 15 U.S.C. § 1681b. This section states: "A consumer reporting agency may furnish a consumer report under the following circumstances and no other . . . ."

64. See Hansen v. Morgan, 582 F.2d 1214, 1219 (9th Cir. 1978) (consumer reporting agency can issue a report only for purposes listed in section 1681b); Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1360 (D. Ariz. 1975) (issuing a report for a purpose not permitted by FCRA is a violation of the Act); Fair Credit Reporting Act §§ 616-617, 15 U.S.C. §§ 1681n-1681o (1976) (civil liability for failure to comply with any FCRA requirement); id. § 620, 15 U.S.C. § 1681r (criminal penalties for unauthorized disclosure).


66. See note 60 supra and accompanying text.

67. See Henry v. Forbes, 433 F. Supp. 5, 10 (D. Minn. 1976); cf. Hansen v. Morgan, 582 F.2d 1214, 1220 (9th Cir. 1978) (narrow reading of the Act could defeat the FCRA's
B. The Consumer Reporting Agency

The FCRA defines a "consumer reporting agency" as "any person which ... regularly engages ... in the practice of assembling or evaluating ... information on consumers for the purpose of furnishing consumer reports to third parties." A consumer reporting agency can be a corporation, an individual, or a government agency, regardless of whether the activity is undertaken for profit. Simply stated, a consumer reporting agency is any person or entity that issues consumer reports.

When coupled with the definition of consumer report, the statutory definition of consumer reporting agency reveals some circular reasoning encompassed within these FCRA terms of art. While the FCRA defines a consumer report, in part, as "any ... communication of any information by a consumer reporting agency," it defines a consumer reporting agency as something which issues consumer reports. The resulting definitional circle must be broken before the FCRA can be applied to consumer reports issued by consumer reporting agencies in the context of actual litigation.

C. Regulatory Provisions

In addition to delineating the specific permissible purposes for which consumer reports may be issued, the FCRA is comprised of many other rules and procedures that regulate the activity of credit reporting. Some of these rules govern the general obligations of a consumer reporting agency toward every type of consumer report that it might hold. For example, before a consumer report can be issued, the issuing agency must know the user's identity and have reason to believe that the report will be used only for permissible purposes. The agency is obligated to

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69. Id. This section provides that a consumer reporting agency is a "person" which engages in the activity of furnishing consumer reports. See id. "Person" is defined as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." Id. § 603(b), 15 U.S.C. § 1681a(b).
70. See id. § 603(f), 15 U.S.C. § 1681a(f).
73. See id. § 603(f), 15 U.S.C. § 1681a(f).
74. See note 49 supra and accompanying text.
75. See Fair Credit Reporting Act § 607(a), 15 U.S.C. § 1681e(a) (1976). If a report is
use reasonable procedures to assure the maximum possible accuracy of the information that it reports. Even if the information is accurate, the agency is prohibited from disseminating the information if it is obsolete. Generally, obsolete information includes bankruptcies more than fourteen years old and any other adverse information more than seven years old. An exception permits obsolete information to be reported when the report is used for a transaction involving employment at an annual salary equal to or greater than $20,000, or for transactions involving credit or life insurance worth $50,000 or more.

Consumers have certain inspection rights under the FCRA. Upon request, a consumer reporting agency must disclose to the consumer the nature and substance of all information on the consumer contained in the agency's files. This disclosure requirement pertains only to the

issued for an impermissible purpose, the consumer reporting agency risks liability. See, e.g., Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1360 (D. Ariz. 1975) (issuing a report for a purpose not permitted by FCRA is violation of the Act).

Whether a consumer reporting agency can release information in response to the order of a government agency or grand jury subpoena without violating the FCRA is a matter of dispute. See FTC v. Manager, Retail Credit Co., 515 F.2d 988, 992-98 (D.C. Cir. 1975) (FTC subpoena enforceable without court order); In re TRW, Inc., 460 F. Supp. 1007 (E.D. Mich. 1978) (grand jury subpoena is a court order within meaning of FCRA); In re Credit Information Corp., 457 F.Supp. 969 (S.D.N.Y. 1978) (grand jury subpoena is not a court order within meaning of FCRA); United States v. Puntorieri, 379 F. Supp. 332 (E.D.N.Y. 1974) (IRS summons requires court order for enforcement); United States v. Bremicker, 365 F. Supp. 701 (D. Minn. 1973) (IRS summons does not require a court order); Kansas Comm'n on Civil Rights v. Sears, Roebuck & Co., 216 Kan. 306, 320-21, 532 P.2d 1263, 1275-76 (1975) (compliance with subpoena of state agency will not violate FCRA). See generally Fair Credit Reporting Act § 604(1), 15 U.S.C. § 1681b(1) (1976) (court order is a permissible purpose for which a consumer reporting agency may furnish a consumer report); id. § 621(a), 15 U.S.C. § 1681a(a) (enforcement of FCRA generally delegated to FTC); see also Ollestad v. Kelley, 573 F.2d 1109 (9th Cir. 1978) (federal agencies such as the FBI are not consumer reporting agencies under FCRA).


80. See id. § 609(a)(1), 15 U.S.C. § 1681g(a)(1). The failure to make full disclosure can
nature and substance of the information; disclosure of an actual copy of the consumer’s file is not required. The reporting agency must reveal the sources of its information, except when the information is acquired and used solely in preparing an investigative consumer report. Agencies also must disclose the names of recent recipients of any reports on the consumer. The FCRA provides the consumer with the means to ascertain whether the information contained in the credit file is accurate. If the file contains erroneous information, the consumer may notify the agency that he disputes the accuracy of the file. Upon notification the agency must either delete the information or verify its truthfulness. If the consumer still disputes the accuracy of the information after reinvestigation by the consumer reporting agency, the consumer may have his own statement of reasons for the dispute inserted in the file. Subsequently issued reports on that consumer must note that the information is disputed and must provide a copy or summary of the consumer’s version of the disputed information to the recipient.

Users of consumer reports have responsibilities under the FCRA as
well. If a consumer is denied insurance, credit, or employment because of information contained in a consumer report, the person who used the information must notify the consumer that such action was taken because of information contained in the report. Similarly, if the cost of credit or insurance to the consumer is increased because of such information, the consumer must be notified. In either circumstance, the user must provide the consumer with the name and address of the consumer reporting agency issuing the report.

D. Remedies

If the provisions of the FCRA are complied with, the consumer reporting agency is granted immunity from suits for defamation, negligence, and invasion of privacy. Because these common law remedies were fraught with difficulties and were largely ineffective, their partial demise has not been mourned. If a reporting agency issues false information with either malice or a willful intent to injure the consumer, however, immunity from common law tort liability disappears. In these instances, the actions for defamation, negligence, and invasion of pri-

88. See Fair Credit Reporting Act § 615, 15 U.S.C. § 1681m (1976) (requiring user of consumer report to notify consumer why credit or insurance was denied or why cost of credit or insurance was increased); id. § 619, 15 U.S.C. § 1681q (establishing criminal penalty for obtaining “information on a consumer from a consumer reporting agency under false pretenses”); id. § 620, 15 U.S.C. § 1681r (criminal penalty imposed upon officer or employee of consumer reporting agency for knowingly providing information to third party who does not have proper authority to receive the information); cf. Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 670 (M.D.N.C. 1978) (only in sections 1681d, 1681m, 1681q, and 1681r does the FCRA place requirements upon persons who are not consumer reporting agencies). See generally Fair Credit Reporting Act § 606, 15 U.S.C. § 1681d (1976) (special provision applying to investigative consumer reports).


90. See id.

91. See id. Failure to do so can result in the user being held liable for violating the Act. See Carroll v. Exxon Co., 434 F. Supp. 557, 559-61 (E.D. La. 1977).

92. Fair Credit Reporting Act § 610(e), 15 U.S.C. § 1681h(e) (1976) provides:

[N]o consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, or any user of information . . . except as to false information furnished with malice or willful intent to injure such consumer.


93. See notes 18-37 supra and accompanying text.

94. Fair Credit Reporting Act § 610(e), 15 U.S.C. § 1681h(e) (1976); cf. Peller v. Retail Credit Co., 359 F. Supp. 1235, 1237 (N.D. Ga. 1973) (absent an allegation of malice or willful intent to injure the consumer, common law tort claims cannot be maintained under the FCRA), aff'd mem., 505 F.2d 733 (5th Cir. 1974). The practitioner should be careful not to split his cause of action. Once an action has been dismissed because the FCRA is inapplicable, a second action under common law tort theory can be barred by res judicata. See Ley v. Boron Oil Co., 454 F. Supp. 448, 451 (W.D. Pa. 1978).
vacy remain in force as additional theories of recovery. When the FCRA is inapplicable, as when the definition of consumer report is not satisfied, the Act does not preempt the common law.

In addition to this limited retention of common law remedies, the FCRA has generated substantive rights for consumers that did not exist at common law. Under the Act, consumers can bring actions against an agency for failure to disclose information, or for failure to conduct a proper investigation of disputed information, and against a user for obtaining information from a consumer reporting agency under false pretenses. If an agency or user has negligently failed to comply with the Act, the injured consumer can recover actual damages and attorney's fees. For a willful failure to comply, the consumer additionally

96. Common law tort actions are forbidden when based upon information revealed pursuant to the Act’s disclosure provisions. See id. The Act’s disclosure provisions relate only to information held or disseminated by a consumer reporting agency. See id. §§ 609-610, 16 U.S.C. §§ 1681g-1681h, 1681m. A consumer reporting agency, as discussed earlier, is something that issues consumer reports. See id. § 603(f), 15 U.S.C. § 1681a(f); notes 68-73 supra and accompanying text. Thus, a protracted analysis of the Act as a whole leads to the conclusion that consumer reports are required as a prerequisite to the effectiveness of the Act’s disclosure provisions.
may recover punitive damages. Consumers may bring FCRA actions in any federal district court or state court of general jurisdiction.

IV. Judicial Interpretations of the Fair Credit Reporting Act

Inconsistent interpretations of the FCRA by the courts have thwarted the Act's remedial purposes of guarding against false reports and invasions of privacy. Because of these varying interpretations, neither consumers nor reporting agencies can be certain of their rights and obligations under this Act. By its terms, the FCRA applies only to consumer reports. Therefore, the existence of a consumer report, as defined in the Act, is a prerequisite to successfully maintaining a civil action under the FCRA. The difficulties encountered in determining whether a report is in fact a consumer report are unfortunate. In those situations in which the existence of a consumer report is not obvious, the courts cannot turn to the definition for guidance. The lack of clarity in the statutory language produces conflicting decisions as courts attempt to determine what Congress meant to include in the term.

A. The Purpose of the Report

The purpose for which a report is issued controls the definition of a consumer report. The courts, unfortunately, do not agree on the exact

102. See id. § 616(1)-(3), 15 U.S.C. § 1681n(1)-(3). For examples of such recoveries under the FCRA, see Collins v. Retail Credit Co., 410 F. Supp. 924, 928, 933 (E.D. Mich. 1976) (jury awarded $300,000 punitive damages; remittitur to $50,000); Millstone v. O'Hanlon Reports, Inc., 383 F. Supp. 269, 276 (E.D. Mo. 1974) ($2,500 actual damages; $25,000 punitive; $12,500 in attorney's fees plus costs), aff'd, 528 F.2d 829 (8th Cir. 1976); Nitti v. Credit Bureau of Rochester, Inc., 84 Misc. 2d 277, 375 N.Y.S.2d 817 (Sup. Ct. 1975) ($10,000 punitive damages; $8,000 attorney's fees).

103. Fair Credit Reporting Act § 618(p), 15 U.S.C. § 1681p (1976) ("An action to enforce any liability created under [the FCRA] may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction . . . .").


105. This problem was anticipated by at least one member of Congress before the Act was passed. See 116 Cong. Rec. 36576 (1970) (remarks of Rep. Brown) ("[T]here is considerable confusion about how this bill will be interpreted. The definitions are so vague that no one is certain what is included as a 'consumer credit report' nor who or what is to be construed as a 'consumer credit reporting agency.'").

role that the purpose plays. A narrow reading of the FCRA's definition of a consumer report can lead to the conclusion that only those reports actually issued for the Act's specifically designated purposes are consumer reports. A report issued for any other purpose therefore could not be a consumer report. Some courts have followed this reasoning, holding that reports on private individuals, when issued for a purpose not specified in the Act, do not constitute consumer reports. Accordingly, these courts conclude that an FCRA violation cannot occur because a consumer report is not involved.

In *Sizemore v. Bambi Leasing Corp.*, the plaintiff wanted to lease business equipment from the defendant Bambi. When Bambi contemplated selling the lease to the defendant bank, the bank sought a credit report on the Sizemore Company and received a business report favorable to Sizemore but inconclusive. An unfavorable personal credit report on Mr. Sizemore was obtained by the bank from the defendant credit bureau. After the bank refused to buy the lease, and Bambi refused to enter into the lease agreement with Sizemore, Bambi informed Sizemore that the rejection was not based upon any information obtained from the consumer reporting agency.

Sizemore brought suit against the leasing corporation, the bank, and the credit reporting agency, alleging a violation of the FCRA. A Georgia

107. Compare, e.g., Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975) (used or expected to be used for any purpose allowable within section 1681a(d)) with, e.g., Henry v. Forbes, 433 F. Supp. 5, 8 (D. Minn. 1976) (prepared for one of the specific uses allowable).

108. See Henry v. Forbes, 433 F. Supp. 5, 8-9 (D. Minn. 1976) ("Defendants correctly assert that the report on plaintiff prepared by Retail Credit was not an 'investigative consumer report' because, while it contained some of the information described by the statute, it was not prepared for any of the enumerated purposes."); Gardner v. Investigators, Inc., 413 F. Supp. 780, 781 (M.D. Fla. 1976) (complaint fails to state a cause of action when report not prepared for any of the enumerated purposes in FCRA); Wrigley v. Dun & Bradstreet, Inc., 375 F. Supp. 969, 970 (N.D. Ga.) (use of credit report for determining whether commercial credit should be extended falls outside ambit of FCRA), aff'd mem., 500 F.2d 1183 (5th Cir. 1974); Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 254 (N.D. Ga. 1973) (application for commercial credit not within the cloak of protection afforded by the Act); Porter v. Talbot Perkins Children's Servs., 355 F. Supp. 174, 178 (S.D.N.Y. 1973) (child adoption agencies are not subject to obligations provided by FCRA); Fernandez v. Retail Credit Co., 349 F. Supp. 652, 654 (E.D. La. 1972) (report used to establish eligibility for business insurance not a consumer report under the Act); Krumholz v. TRW, Inc., 142 N.J. Super. 80, 84, 360 A.2d 413, 415 (App. Div. 1976) (bank mortgage loan transaction report falls outside protection of the Act).

109. See cases cited in note 108 supra.


111. See id. at 253.

112. See id.

113. See id.

114. See id.

115. See id.
Federal District Court dismissed Sizemore's complaint, finding that the report was not a consumer report within the meaning of the FCRA.\textsuperscript{116} The court explained that the personal credit report was issued for the purpose of business credit, not for the purpose of personal, family, or household credit.\textsuperscript{117} Because business credit is not one of the purposes listed in the FCRA, no violation of the Act occurred.\textsuperscript{118} In considering only the actual use of the credit information to determine whether the FCRA applied,\textsuperscript{119} the court narrowed the definition of consumer report, thereby limiting the applicability of the FCRA.

By adopting a broader definition of the term consumer report, other courts have imposed liability for the misuse of personal credit reports, even though the reports were actually used for a purpose not specifically designated in the Act.\textsuperscript{120} The Washington Supreme Court recently followed this approach in Rasor v. Retail Credit Co.\textsuperscript{121} In Rasor the plaintiff, a motel operator, applied for a small business loan to build additional rooms for her motel.\textsuperscript{122} As security for the loan, the plaintiff had to obtain life insurance.\textsuperscript{123} Before issuing a policy, the life insurance company procured a report from the defendant, a credit reporting agency.\textsuperscript{124} The report stated that the plaintiff "had a reputation of living with more than one man out of wedlock."\textsuperscript{125} The life insurance company refused to issue a policy and properly notified the plaintiff that its decision was influenced by a report from the defendant.\textsuperscript{126} When the plaintiff disputed the information contained in the report, the defen-
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A second report was issued, which stated that the plaintiff and her boyfriend "do not live together." Subsequently, the plaintiff was able to obtain life insurance, but at a higher cost. She brought an action against Retail Credit Company for issuing an inaccurate report. The jury returned a verdict for the plaintiff and the defendant appealed.

The threshold question facing the Supreme Court of Washington was whether the report was a consumer report as defined by the FCRA and thereby fell within the Act. The information had been assembled initially by the defendant for purposes of personal credit or insurance. According to the court, the information was therefore a consumer report. The court further found that the defendant's act of reissuing the report for the purpose of business insurance did not change the character of the report. Although the report was issued for life insurance for the plaintiff's business, the court held that it was still a consumer report within the meaning of the FCRA and the plaintiff therefore was entitled to the protections of the Act.

Rasor presented a factual situation substantially similar to Sizemore. Both cases involved personal reports on private individuals issued for business purposes. Nevertheless, the two courts reached opposite results. The Sizemore court reasoned that, because the report was issued for a business purpose, it was not a consumer report. Antithetically, the Rasor court ignored the actual use of the report, looking instead to the purpose for which the information was originally collected. Relying on what it saw as a factual distinction, the Rasor court attempted to

127. Id.
128. Id.
129. See id. at 520, 554 P.2d at 1044.
130. See id. at 520, 554 P.2d at 1045.
131. See id. at 517-18, 554 P.2d at 1043.
132. See id. at 521, 554 P.2d at 1045.
133. See id. at 518, 554 P.2d at 1043-44.
134. See id. at 523-25, 554 P.2d at 1046-47.
135. See id.
136. See id.
137. See id. at 525, 554 P.2d at 1047.
139. Compare Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 254 (N.D. Ga. 1973) ("It is manifest that the use of a credit report in connection with a lease application for business purposes... is therefore without the cloak of protection afforded by the Act.") with Rasor v. Retail Credit Co., 87 Wash. 2d 516, 525, 554 P.2d 1041, 1047 (1976) ("[The] report prepared by appellant was a 'consumer report' entitled to the protections of the Fair Credit Reporting Act.").
140. See 360 F. Supp. at 254.
141. See 87 Wash. 2d at 522-24, 554 P.2d at 1045-47.
reconcile its holding with that of the court in Sizemore. The court contended that its case was different because the report on the plaintiff possibly could have been used in a consumer transaction. The conclusion, however, ignored the fact that the Sizemore report also could have been used in a consumer transaction.

The real distinction between the two cases is the difference in interpretation of the term consumer report. The broader interpretation in Rasor expands the applicability of the FCRA, while the narrower interpretation of Sizemore restricts the applicability of the Act. Thus, when a reporting agency issues a personal report on a private individual for business purposes, the consumer is protected by the FCRA if the reasoning of Rasor is followed, but not if the Sizemore interpretation is adopted. The extent of protection, therefore, depends on the jurisdiction in which the FCRA action is brought.

B. The Expected Use of the Report

The FCRA defines consumer report as information "used or expected to be used" for various purposes. The seemingly innocuous phrase "expected to be used" has plagued the courts with its inherent ambiguity. Arguably, a reporting agency, or a user of a consumer report, might expect information compiled by a reporting agency to be used for the FCRA's designated permissible purposes. This expectation of use could occur at the time the information is collected or at the time a user requests the information. Whenever the expectation of use occurs, however, it fulfills the definitional requirements, qualifying the information as a consumer report. Perhaps trying to ignore this ambiguous phrase, most courts do not discuss expected use when they attempt to define a consumer report. The reasons for the general reluctance of courts to discuss the concept of expected use are still a matter of conjecture, for the courts neither state the reasons in their decisions nor make them apparent.

In Belshaw v. Credit Bureau, however, the court at least recognized the existence of the phrase. In Belshaw, the plaintiff sued the defendant credit bureau for issuing a report on the plaintiff for some unspecified purpose, concededly a purpose not designated as permissible by the

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142. See id. at 523, 554 P.2d at 1046.
143. See Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 255 (N.D. Ga. 1973) (fact that defendant credit bureau handled only personal credit reports deemed irrelevant to issue of whether the report was a "consumer report").
145. See cases cited in note 108 supra.
147. Id. at 1359-60 (any report "that could be used for one of the purposes enumerated in § 1681a" is a consumer report (emphasis in original) (footnote omitted)).
Act.\textsuperscript{148} In moving to dismiss, the defendant argued that, because the report was not issued for a permissible purpose, it could not be a consumer report within the meaning of the Act.\textsuperscript{149} The Arizona Federal District Court rejected this argument, finding that a consumer report is any "information that could be used for one of the purposes enumerated" in the Act.\textsuperscript{150} The court reasoned that restricting the definition of consumer report to those reports used only for certain purposes "flies in the face of the legislative intent."\textsuperscript{151} Furthermore, the \textit{Belshaw} court found the broader reading of the definition, which it adopted, better promoted the congressional purpose of protecting individual privacy.\textsuperscript{152} In \textit{Rasor}, the Supreme Court of Washington followed the analysis of \textit{Belshaw} in adopting the broader reading of the term expected use.\textsuperscript{153} But, although both courts mentioned the phrase "expected to be used," they did not elaborate upon its meaning.\textsuperscript{154}

In failing to specify who must expect the information to be used in a certain manner, the FCRA appears to contemplate some ethereal person carrying this expectation. Because the phrase may be interpreted by objective or subjective standards,\textsuperscript{155} the already ambiguous definition of consumer report is further clouded. To resolve the problem, both \textit{Belshaw} and \textit{Rasor} indicate that an objective determination of expected use should be made.\textsuperscript{156} If the information is reasonably capable of being used for the Act's purposes, it will qualify as a consumer report. However, a subjective determination seems equally possible. Under this approach, if one of the parties to the transaction—and the FCRA does not specify which party—actually expected the report to be used for the designated purposes, the information will qualify as a consumer report.\textsuperscript{157}

\textsuperscript{148} See id. at 1358-59.
\textsuperscript{149} See id.
\textsuperscript{150} Id. at 1359-60 (emphasis in original).
\textsuperscript{151} Id. at 1359.
\textsuperscript{152} See id.
\textsuperscript{153} See \textit{Rasor} v. \textit{Retail Credit Co.}, 87 Wash. 2d 516, 522-23, 554 P.2d 1041, 1046 (1976).
\textsuperscript{156} See \textit{Belshaw} v. \textit{Credit Bureau}, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975); \textit{Rasor} v. \textit{Retail Credit Co.}, 87 Wash. 2d 516, 522-23, 554 P.2d 1041, 1046 (1976); cf. Lee v. Bishop's Serv., Inc., No. 76-3729 (S.D.N.Y. July 6, 1978) ("[T]he Court concludes that a report is a 'consumer report' if it objectively comes within the definition of § 1681a(d)." (emphasis added)).
\textsuperscript{157} See Hansen v. Morgan, 582 F.2d 1214, 1218 (9th Cir. 1978) ("[T]he Pocatello Credit Bureau . . . supplied this information with the expectation that [defendants] would use it for purposes consistent . . . with the FCRA . . . . As such it is a consumer report.\textsuperscript{157}}
In *Rice v. Montgomery Ward & Co.*, the North Carolina Federal District Court adopted a subjective determination of expected use. The plaintiff in *Rice* had applied for a credit card from the defendant Montgomery Ward. When her application was rejected, she sued for violation of the Equal Credit Opportunity Act, claiming she was denied credit because of her status as a divorced woman. The defendant procured two credit reports on the plaintiff to be used in litigating the original claim. Alleging that the defendant had procured the consumer reports under false pretenses, in violation of the FCRA, the plaintiff moved to file a supplemental complaint. In challenging the plaintiff's motion, the defendant argued that these reports were not consumer reports because they were obtained for purposes other than those specified in the Act. The court granted the plaintiff's motion, finding that these were consumer reports because the reporting agency expected them to be used for the purposes designated in the Act. In reaching its conclusion, the court gave additional meaning to the phrase "expected to be used" by deciding that it refers to that use expected by the consumer reporting agency issuing the report.

With so many courts avoiding the issue, the *Rice* court should be commended for struggling with the concept of expected use. The *Rice* opinion presents a well-reasoned approach to the clarification of a significant ambiguity within the FCRA. Because the Act already requires reporting agencies to use reasonable procedures to ascertain the user's identity and purpose, a reporting agency is in a position to have expect-
tations concerning the use of the report. The court’s choice of a subjective determination, however, creates a potential problem. If the reporting agency expects to issue the report for a nonpermissible purpose, and if the report is actually used for a nonpermissible purpose, the report will fail to meet the technical requirements of the consumer report definition. In these circumstances, because the agency’s subjective determination of expected use would control whether the report would qualify as a consumer report, consumer protection would depend on being able to prove the actual expectations of the issuing agency. It can hardly be argued that the FCRA drafters intended to rely upon reporting agency discretion to determine whether a consumer report is present.

C. The FCRA in Minnesota

In Minnesota, the enactment of the FCRA expanded the remedies available for credit reporting abuses. Under the common law in Minnesota, a consumer could recover damages only if the defendant had maliciously furnished false information. While retaining this recovery, the FCRA has supplemented it with recovery for any failure to comply with the Act, even though neither malice nor false statements are present. By providing easier standards of proof and abolishing the qualified privilege to defame, the FCRA seemingly has increased the protection of individual privacy in Minnesota. In Henry v. Forbes, however, the Minnesota Federal District Court narrowed the scope of protection provided by the Act. The plaintiff, Betty Henry, was an aide and secretary to a state legislator. The defendant, Forbes, was a lobbyist, working themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. 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.

Id.

166. See Hansen v. Morgan, 582 F.2d 1214, 1218 (9th Cir. 1978).

169. Cf. id. at 1220 (“[T]he objectives of the act could be defeated if users could obtain information from consumer reporting agencies under false pretenses with impunity.”); Hoke v. Retail Credit Corp., 521 F.2d 1079, 1083-84 (4th Cir. 1975) (reading the definition of consumer report as restrictively as argued by the reporting agency would limit the FCRA’s coverage rather than the reporting agency’s activities), cert. denied, 423 U.S. 1087 (1976); Lee v. Bishop’s Serv., Inc., No. 76-3729 (S.D.N.Y. July 6, 1978) (“It would subvert both the language and the intent of the legislation to allow a reporting agency to claim exemption whenever it is merely informed that the purposes for the report are legitimate within the meaning of § 1681b.”).

170. See notes 23-37 supra and accompanying text.


173. See id. at 7.
on behalf of the Minnesota Railroads Association. 174 Forbes obtained information from the defendant Retail Credit Company on the plaintiff's personal background, employment, and financial status for an undetermined use in connection with his work as a lobbyist. 175 The person who contacted Retail Credit explained that the information was needed to process a claim for damages against a railroad. 176 Upon discovering that she was being investigated, Henry brought an action alleging that the investigation had been conducted in a manner that violated her rights under the FCRA. 177 The court granted the defendant’s motion for summary judgment, holding that the facts as alleged did not fall within the ambit of the FCRA, 178 because the court found that the report was not a consumer report in that it had been issued for a purpose other than those enumerated in the Act. 179 The court reasoned that the definition of a consumer report is entirely dependent upon the purpose for which the report is requested. 180 The defendant may not have had any legitimate need or use for the report when it was requested, but because the report was not issued for any of the FCRA’s specified purposes, it was not covered by the Act. 181 The reasoning in Henry resembles that of Sizemore and its progeny. Not only did the Henry court decline to follow the broader definitional approach embraced by the Belshaw and Rasor courts, Henry also criticized the Belshaw decision as reading nonexistent provisions into the FCRA. 182 Henry departs from Belshaw and Rasor in that it failed to discuss the concept of expected use. 183 Instead, Henry relied on actual use and adopted the narrower interpretation of consumer report. 184

174. Id. at 6.
175. See id. at 7.
176. See id.
177. See id. at 6-7.
178. Id. at 10-11.
179. See id. at 9-10.
180. See id. at 8.
181. See id. at 10.
182. See id. at 9 (“Unfortunately, despite the ambiguities, the Court cannot read into the statute provisions that do not exist, as did the court in Belshaw . . . .”). Compare id. (criticizing Belshaw) with Rasor v. Retail Credit Co., 87 Wash. 2d 516, 522-23, 554 P.2d 1041, 1046 (1976) (relying on Belshaw).
183. Compare Henry v. Forbes, 433 F. Supp. 5, 10 (D. Minn. 1976) (“[A]ction by a credit reporting agency generally is not within the ambit of the Act unless the information is gathered for use in a ‘consumer report.’ ”) with Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975) (“[T]o be meaningful, ‘consumer report’ must be interpreted to mean any report made by a credit reporting agency of information that could be used for one of the purposes enumerated in § 1681a.” (emphasis in original) (footnote omitted)) and Rasor v. Retail Credit Co., 87 Wash. 2d 516, 522, 554 P.2d 1041, 1046 (1976) (the character of a consumer report “may not be changed by its subsequent use for business purposes”).
Thus, the FCRA, as it has been interpreted by a Minnesota Federal District Court judge, provides no remedy for certain misuses of information on consumers. The result is less protection for Minnesota consumers than for consumers in jurisdictions adopting the broader reading of the FCRA. The Rice court recognized this when, criticizing Henry, it stated:

[Montgomery Ward's] position is fully supported by the District Court's decision in Henry v. Forbes. . . . [This] Court, however, must decline to follow the decision in Henry because, as this court views it, the Henry court's restrictive view of the FCRA's scope is not supported by the language of § 1681a(d). Furthermore, if this court were to hold that the FCRA does not apply where the recipient of the information obtains it for an unauthorized purpose, it would undermine the consumer's right to privacy, one of the policies underlying the FCRA.

By adopting a restrictive definition of consumer report, Henry limits the applicability of the FCRA to those situations in which the report actually is used for a designated purpose. If a consumer applies for a credit card, and the creditor obtains information from a consumer reporting agency, the consumer will be protected from the dissemination of false information and from invasions of privacy. If an enemy or a stranger wants the information for a nonexistent or illegitimate purpose, on the other hand, the Minnesota consumer will not be protected by the FCRA, regardless of how the information might reasonably be expected to be used. Under Henry, expected use is not considered. As the Henry court itself noted, its decision permits protection under the FCRA only for very limited uses of personal credit information and potentially permits flagrant abuses to go unchecked. The result is less protection for the Minnesota consumer. By leaving a wide gap in the Act's protective mechanisms, permitting certain misuses of consumer credit information to go unchallenged, and thereby diminishing the protection of personal

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185. Id. at 10 ("[T]he Act clearly does not provide a remedy for all illicit or abusive use of information about consumers."); see id. at 11 ("[I]ndividuals are not protected against abuse of the credit reporting apparatus unless their circumstances are within the narrow bounds of coverage under the Act.").


187. See Henry v. Forbes, 433 F. Supp. 5, 10 (D. Minn. 1976) ("If defendant Forbes had had an unsavory or illegal purpose in having plaintiff's background investigated, the information could not be part of a 'consumer report'—and plaintiff would have had no remedy . . . .").

188. See id. at 11 ("[I]ndividuals are not protected against abuse of the credit reporting apparatus unless their circumstances are within the narrow bounds of coverage under the Act.").

privacy, the *Henry* decision has limited the usefulness of the FCRA in Minnesota. Although the FCRA may be a step in the right direction, its infirmities, as it has been interpreted by the Minnesota Federal District Court, render it incapable of completely protecting the consumer from credit reporting abuses.

The impact of *stare decisis* from the *Henry* decision is quite limited, however. Either the Eighth Circuit Court of Appeals or the United States Supreme Court could overrule the interpretation of the FCRA adopted in *Henry*. Similarly, a Minnesota state court or the Minnesota Federal District Court could choose to abandon the *Henry* interpretation and adopt an alternative view of the FCRA.

**D. Reconciling the Differing Interpretations of "Consumer Report"—An Impossibility**

As discussed above, the courts have exhibited two quite different approaches to defining a consumer report. Some courts have looked only to actual use, thereby narrowing the definition of consumer report. Under this approach, a consumer report can exist only if the report is actually used for a designated purpose. Courts that discuss expected use find the "actual use" approach taken by the *Sizemore* court too restrictive and argue that it is inconsistent with the FCRA's purpose of protecting the individual's right to privacy and ensuring fair treatment. After discussing the concept of expected use, these courts hold...

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Similarly, a federal district court's interpretation of federal law is not binding upon a state supreme court. State courts are bound only by interpretations of the United States Supreme Court. See Stevens v. Federal Cartridge Corp., 226 Minn. 148, 151, 32 N.W.2d 312, 314 (1948) ("It is established law that the decisions of the United States Supreme Court on the construction of a federal statute are binding on state courts."); Edelstein v. Duluth, M. & I.R. Ry., 225 Minn. 508, 519, 31 N.W.2d 465, 471 (1948) ("In cases involving rights arising under a federal statute, the decisions of the Supreme Court of the United States are controlling.").


that if a reasonable expectation that the information will be used for a
designated purpose exists, the information will qualify under the defini-
tion as a consumer report.¹⁹⁴

Until recently, some courts attempted to reconcile the differing ap-
proaches by noting that the FCRA applies only to a transaction in which
a consumer seeks credit or some other benefit.¹⁹⁵ A report issued pur-
suant to a consumer transaction, they explain, is distinguishable from
a report issued for social service,¹⁹⁶ identification,¹⁹⁷ or commercial credit
purposes.¹⁹⁸ While this distinction may have some validity, it cannot
erase the differences between the various courts’ approaches. In recent
years, several courts have recognized that the Sizemore and Belshaw
approaches cannot be reconciled.¹⁹⁹

Absent resolution of the conflicting interpretations by the United
States Supreme Court or clarification by Congress of the meaning of

¹⁹⁴ See, e.g., Hansen v. Morgan, 582 F.2d 1214 (9th Cir. 1978). In Hansen, the Ninth
Circuit reasoned as follows:

Since the Pocatello Credit Bureau knew nothing of the Morgans’ real reason for
requesting the report, it must have supplied this information with the expectation
that the Morgans would use it for purposes consistent . . . with the
FCRA . . . . And unless the Bureau was generally collecting such information
for purposes not permitted by the FCRA, it must have collected the information
in the report for use consistent with the purposes stated in the act . . . . Accord-
ingly, the credit report . . . was . . . expected to be used . . . for the purpose
of establishing the Hansens’ consumer eligibility for credit transactions. As
such it is a consumer report under the FCRA.

Id. at 1218 (emphasis added).

¹⁹⁵ See, e.g., Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1359 (D. Ariz. 1975); Risor

1973) (“Social service agencies, such as adoption agencies, were not intended to be in-
cluded in the sweep of the Act.”).

used to establish identity of an attorney is not a consumer report within the FCRA).

¹⁹⁸ See, e.g., Wrigley v. Dun & Bradstreet, Inc., 375 F. Supp. 969, 970 (N.D. Ga.)
(commercial credit), aff’d mem., 500 F.2d 1183 (5th Cir. 1974); Sizemore v. Bambi Leasing
Credit Co., 349 F. Supp. 652, 654 (E.D. La. 1972) (business insurance); Krumholz v. TRW,
transaction).

(criticizing Henry); Henry v. Forbes, 433 F. Supp. 5, 9 (D. Minn. 1976) (criticizing
Belshaw); Gardner v. Investigators, Inc., 413 F. Supp. 780, 791-82 (M.D. Fla. 1976) (criti-
cizing Belshaw).

²⁰⁰ The United States Supreme Court has declined every opportunity to decide an
appeal under the FCRA. See Information Dynamics, Ltd. v. Greenway, 424 U.S. 936
(1976), dismissing cert. to 524 F.2d 1145 (9th Cir. 1975); Retail Credit Corp. v. Hoke, 423
consumer report under the FCRA, the conflict will continue to affect consumers. Until the conflict over the definition is resolved, consumer rights under the FCRA will continue to vary among different jurisdictions. This lack of uniformity among the various federal courts as to what constitutes a consumer report clouds the scope of the FCRA’s applicability for both the consumer and the reporting agency. While the consumer cannot determine at what point his personal rights will be protected, the reporting agency faces the uncertainty of not knowing when it is engaging in an illegal practice.

V. State Regulation of Credit Reporting

A. The States’ Responses to the FCRA—Supplementary Legislation

Although the FCRA represents an improvement over the common law in its ability to protect consumers, the Act, as applied in Minnesota, does not adequately protect the individual’s rights to privacy and fair treatment. While the FCRA does supersede common law regulation of the credit reporting industry, it does not preempt the entire field of regulating credit reporting; states are free to enact supplemental legislation not inconsistent with the FCRA. Taking advantage of this pro-


202. Cf. Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 672 (M.D.N.C. 1978) ("[I]f this Court were to hold [as did the court in Henry], it would undermine the consumer's right to privacy, one of the policies underlying the FCRA.").

203. See Fair Credit Reporting Act § 610(e), 15 U.S.C. § 1681h(e) (1976). Section 1681h(e) states:

Except as [otherwise provided in the FCRA], no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to [the FCRA], except as to false information furnished with malice or willful intent to injure such consumer.


204. Section 1681t provides:

This subchapter does not annul, alter, affect or exempt any person . . . from complying with the laws of any State with respect to the collection, distribution or use of any information on consumers, except to the extent that those laws are inconsistent with any provisions of this subchapter, and then only to the extent of the inconsistency.


205. Retail Credit Co. v. Dade County, 393 F. Supp. 577, 580-81 (S.D. Fla. 1975) ("Congress has spoken to allow state regulation consistent with the provisions of the
vision of the FCRA, several states have enacted laws regulating the
activity of credit reporting. Some of these statutes offer good examples
for the Minnesota Legislature to follow in its effort to protect private
individuals; in contrast, other state laws also suggest what should not
be done.

A few states have enacted modified definitions of consumer report
that avoid the difficulties encountered in applying the FCRA. Connecticut's statute applies to "credit reports," defined as any representa-
tion made by a "credit rating agency" concerning a consumer's credit
Other states have elected not to define consumer report, apparently
leaving it to judicial decisions. Oklahoma's statute only makes reference
to persons who "furnish . . . [a] financial or credit rating." Similarly,
New Mexico's statute, while it defines consumer and credit bu-
refau, applies to "all information about that particular consumer."
Because these statutes do not employ vague and confusing terms such as expected use or use for permissible purposes, their simple wording covers a broad spectrum of reports, thereby avoiding the FCRA’s definitional problems and offering more consistent protection for consumers.

Commentators have criticized the FCRA for placing no limitation on the quality or relevancy of the information reported.\textsuperscript{213} The Maine credit reporting statute attempts to solve this problem by prohibiting the reporting of irrelevant information.\textsuperscript{214} The statute provides no guidance, however, for determining what is and what is not relevant. Phrasing the relevancy requirement in such vague terms seems to be an impracticable approach. By contrast, New York’s relevancy requirement is phrased in more specific language,\textsuperscript{215} prohibiting the reporting of information relative to race, religion, color, ancestry, or ethnic origin.\textsuperscript{216} Statutes in several other states specifically prohibit the reporting of any criminal arrest or indictment if the individual either was pardoned or not convicted.\textsuperscript{217} These specific relevancy requirements appear to be more workable than Maine’s vague ban on reporting irrelevant information. When the relevancy requirement designates what information cannot be reported, the statutes can effectively extend protection beyond the FCRA’s singular prohibition against reporting obsolete information.

Another deficiency of the FCRA recognized in many states is the FCRA’s failure to require reporting agencies to disclose more than the nature and substance of any information on the consumer.\textsuperscript{218} Conse-
quently, many states require reporting agencies to disclose the actual contents of the consumer's file when the consumer so requests.\textsuperscript{219} Oklahoma has gone even further, requiring a consumer reporting agency to send the consumer an advance copy of any report before it is sent to the user.\textsuperscript{220} In New York, reporting agencies must give the consumer advance notice that a report will be issued.\textsuperscript{221} Although the two states' statutes accomplish the same result of informing the consumer that his background is being investigated, the difference in methods gives the New York consumer less advance information. In Oklahoma, the consumer actually sees the report before it is sent to the user,\textsuperscript{222} whereas the New York consumer only receives notice of the report and must take further action to ascertain its contents.\textsuperscript{223}

Having recognized problems in the FCRA, many states have enacted their own solutions. By carefully drafting their statutes to effectively avoid or circumvent the definitional problems of the FCRA, these states have apparently succeeded in extending consumer protection beyond federal law.

\section*{B. Constitutional Considerations}

Although states are permitted to enact additional legislation, such legislation cannot be inconsistent with the FCRA.\textsuperscript{224} This limitation places constitutional restrictions on the regulation of credit reporting by the states.\textsuperscript{225} Therefore, any statutes enacted in the future must be carefully drafted to avoid the potential problem of inconsistency with the FCRA.

\begin{itemize}
\item \textsuperscript{220} See Polin v. Retail Credit Co., 469 P.2d 1004, 1005 (Okla. 1970) (dictum) (statute requires that customers be mailed a copy of all written opinions to be submitted to any retail business concern); Okla. Stat. Ann. tit. 24, § 82 (West 1955).
\item \textsuperscript{222} See Okla. Stat. Ann. tit. 24, § 82 (West 1955) (“Whenever an opinion . . . upon the financial or credit standing of any person is about to be submitted . . . the person, firm or corporation submitting such opinion shall first mail a copy of such opinion to the person about whom the opinion is given.”).
\item \textsuperscript{224} See Fair Credit Reporting Act § 622, 15 U.S.C. § 1681t (1976).
\item \textsuperscript{225} See Retail Credit Co. v. Dade County, 393 F. Supp. 577, 579-81 (S.D. Fla. 1975) (ordinance invalid under supremacy clause because inconsistent with the FCRA).
\end{itemize}
In 1974, Dade County, Florida enacted several ordinances intended to supplement and strengthen the FCRA.224 These ordinances required a consumer reporting agency, upon the consumer's request, to disclose actual copies of the consumer's file, to disclose all medical information on the consumer that it might hold, and to disclose the names and sources of all information used in investigative consumer reports.227 Furthermore, the ordinances removed the reporting agency's immunity from common law tort liability, forbade any investigator of an agency from visiting private residences to obtain information, and placed upon the reporting agency the burden of proving, in the event of a criminal prosecution under the ordinance, that the agency used reasonable procedures to ensure accuracy of reported information.228

When a credit reporting agency opposed these ordinances and brought an action to enjoin their enforcement, all but one of the ordinances were found to be unconstitutional.229 In Retail Credit Co. v. Dade County,230 a Florida Federal District Court held that requiring the disclosure of medical information and names of sources of information for investigative reports was inconsistent with the FCRA.231 The FCRA exempts these types of information from its disclosure requirements, effectively giving credit reporting agencies a privilege to conceal such information.232 The Dade County court determined that a local law could not alter a privilege granted by a congressional act.233 Similarly, the ordinance that removed agency immunity from common law tort liability also was held to be inconsistent with the FCRA.224 Because of inconsistencies with the FCRA, the ordinances were unconstitutional under the supremacy clause.235

Two additional ordinances were invalidated on other constitutional grounds. First, placing the burden of proof in a criminal prosecution upon reporting agencies to show that they maintained reasonable procedures was held to violate the requirements of due process.236 Second, the ordinance prohibiting investigators from visiting private residences was found both to violate due process and to place an undue burden on

226. See id. at 579 & n.1, 584 n.11, 585 n.15, 586 nn.16 & 17.
227. See id. at 581-85.
228. See id. at 583-84, 585 & n.15, 586 & n.16.
229. See id. at 579, 589-90.
231. See id. at 582-83.
233. See 393 F. Supp. at 581-83.
234. See id. at 583-84.
235. See id. at 581 n.6.
236. See id. at 586, 589.
commerce. The remaining ordinance, which required credit reporting agencies to disclose the actual contents of any file to the consumer, was upheld. The ordinance was not inconsistent with the FCRA, and did not violate either the commerce clause or the due process clause of the United States Constitution.

The primary teaching of Dade County is that state credit reporting laws cannot abridge rights that the FCRA specifically grants to consumer reporting agencies. Such legislation violates the FCRA's prohibition against inconsistent state laws. As the Dade County court noted, however, states are still free to enact regulations stricter than those provided in the FCRA. Therefore, although the Minnesota Legislature should take steps to give better protection to Minnesota consumers, it must draft legislation that avoids the constitutional faults that invalidated the ordinances in Dade County.

C. The Minnesota Data Privacy Act

To date, Minnesota has not enacted laws to regulate the credit reporting industry, although the Legislature has taken other significant steps in the realm of consumer protection. For example, the Legislature already has recognized individual privacy as an interest deserving protection. As a result, the Minnesota Data Privacy Act (MDPA) was enacted. Because the MDPA shares some similarities with the

237. See id. at 587-89.
238. See id. at 584-85.
239. See id. at 585.
240. See id. at 581 (state credit reporting laws may not frustrate the effectiveness or purpose of the FCRA).
242. See 393 F. Supp. at 580.
243. One proposed reform was introduced during the Minnesota legislative session of 1977. See H.F. 1645, 70th Minn. Legis., 1977 Sess. (requiring credit bureaus to notify consumers when a credit rating file has been established or changed). The bill died after reference to the House Committee on Commerce and Economic Development. See 2 MINN. H.R. JOUR. 2868 (1977).
244. See, e.g., MINN. STAT. §§ 325.93-.9325 (1978) (regulating credit cards and credit card billing disputes); id. §§ 325.933-.938 (regulating home solicitation sales); id. §§ 325.94-.947 (regulating consumer credit sales); id. §§ 325.951-.954 (providing special warranties for sales to consumers).
245. See id. §§ 15.162-.169, as amended by Act of June 5, 1979, ch. 328, 1979 Minn. Sess. Law Serv. 914 (West); Note, supra note 22, at 166 & nn.15 & 16.
FAIR CREDIT REPORTING ACT

FCRA,\textsuperscript{247} the MDPA can serve as an excellent model for improving the regulation of credit reporting in Minnesota.

The MDPA regulates the dissemination of information by state government agencies and defines the rights of citizens who are subjects of the data.\textsuperscript{248} Basically, the MDPA provides that any private or confidential information stored or collected by a state agency cannot be released except according to law or with the subject individual's consent.\textsuperscript{249} An individual has the right to see any public or private, but not confidential, data concerning him that the state has collected\textsuperscript{250} and to dispute its accuracy.\textsuperscript{251} If the consumer disputes the information, the state agency must either correct the inaccuracy or record the individual's statement of disagreement.\textsuperscript{252} This statement then must be disclosed simultaneously with any data.\textsuperscript{253} These MDPA procedural and regulatory provisions closely resemble those of the FCRA.\textsuperscript{254}

Like the MDPA, the FCRA also regulates state agencies,\textsuperscript{255} including

\begin{itemize}
\item See MINN. STAT. §§ 15.163-.165, 1671 (1978), as amended by Act of June 5, 1979, ch. 328, §§ 8-13, 24, 1979 Minn. Sess. Law Serv. 914, 916-19, 923 (West); Mitau, supra note 246, at 659-62.
\item See MINN. STAT. § 15.165 (1978).
\item See id. § 15.165(3). Private, public, and confidential data are Minnesota Data Privacy Act terms of art. See id. § 15.162(2a), (5a)-(5b), as amended by Act of June 5, 1979, ch. 328, § 3, 1979 Minn. Sess. Law Serv. 914, 914 (West).
\item See MINN. STAT. § 15.165(4) (1978).
\item See id.
\item Id.
\item Compare Fair Credit Reporting Act § 603(b), 15 U.S.C. § 1681a(b) (1976) ("person" defined to include any "government or governmental subdivision or agency") and id. § 603(f), 15 U.S.C. § 1681a(f) ("consumer reporting agency" means any person which . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information . . . for the purpose of furnishing consumer reports") and id. § 604(3)(D), 15 U.S.C. § 1681b(3)(D) ("determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality" is a permissible purpose for furnishing a consumer report) with MINN. STAT. § 15.162(6) (1978), as amended by Act of June 5, 1979, ch. 328, § 4, 1979 Minn. Sess. Law Serv. 914, 914 (West) (defining "responsible authority" in a state agency as "the state official designated by law" and in a political subdivision as "the individual designated by the governing body of that political subdivision") and MINN. STAT. § 15.165 (1978) (establishing responsible authority's obligation to individual citizens under the Minnesota Data Privacy Act).
them within the definition of a consumer reporting agency. A comparative analysis of these two statutes reveals some major differences, however. The most obvious difference is that the MDPA applies only to state government, while the FCRA applies to the private as well as the public sector. The MDPA is broader in that it regulates the dissemination of all data held by state agencies, not merely that used for a few specified purposes. In regulating all such data, the MDPA avoids definitional problems of the type that plague the FCRA; the MDPA leaves no room and no need for conjecture about how the information was used or expected to be used. If a state agency holds the information, the private individual is protected. While the MDPA requires disclosure of the actual contents of any state-held file or record upon the citizen's request, the FCRA's disclosure requirement only permits the consumer to see the nature and substance of the information held by a consumer reporting agency. Because the FCRA permits reporting agencies to avoid full disclosure by being less than candid with consumers, some commentators have criticized the FCRA's limited disclosure requirement. To whatever extent this is a problem in the FCRA, it is avoided by the MDPA.

256. See Fair Credit Reporting Act § 603(b), 15 U.S.C. § 1681a(b) (1976) ("person" defined to include "government or governmental subdivision or agency"); id. § 603(f), 15 U.S.C. § 1681a(f) ("consumer reporting agency" defined, in part, as "any person").

257. Compare Minn. Stat. §§ 15.162-.169 (1978), as amended by Act of June 5, 1979, ch. 328, 1979 Minn. Sess. Law Serv. 914 (West) with Fair Credit Reporting Act § 603(b), 15 U.S.C. § 1681a(b) (1976) ("The term 'person' means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.") and id. § 603(f), 15 U.S.C. § 1681a(f) (defining consumer reporting agency as "any person which . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information . . . for the purpose of furnishing consumer reports").

258. See Minn. Stat. § 15.162(3) (1978) ("Data on individuals' includes all records, files and processes in which an individual is or can be identified . . . .").


260. Compare Minn. Stat. § 15.165(3) (1978) ("An individual who is the subject of stored private data on individuals shall be shown the data [and] shall be informed of the content and meaning of that data . . . .") with Fair Credit Reporting Act § 609(a)(1), 15 U.S.C. § 1681g(a)(1) (1976) (upon request, every consumer reporting agency shall disclose "[t]he nature and substance of all information . . . in its files on the consumer").


262. But see Mitau, supra note 246, at 662 ("The Minnesota Data Privacy Act, while commendable as an initial effort, simply does not go far enough to protect emerging expectations of informational privacy.").
The MDPA's protection of personal privacy offers a good example for the Minnesota Legislature to follow in enacting an improved credit reporting statute. Through such an effort, the restrictive holding of *Henry v. Forbes* and other FCRA problems can be effectively avoided and the Minnesota consumer's rights to privacy and fair treatment better protected.

VI. CONCLUSION

When the common law proved to be of little help in protecting the consumer's interest in fair treatment and privacy, Congress responded by adopting the FCRA. Although Congress intended to improve the protection of individual privacy and fair treatment, that goal has been frustrated by inconsistent applications of the FCRA by the courts. As a consequence of the ambiguous definition and the resulting inconsistent applications of the Act, the FCRA better protects personal privacy in some jurisdictions than in others.

In the scenario at the beginning of this Note, John Smith never learned why he was not promoted. If he had discovered the source of his problem and sought relief under the FCRA, his chance of success would depend, to a great extent, on where his federally-created cause of action was litigated. The court's initial inquiry would be whether the information disseminated by the credit bureau would qualify as a consumer report. If the information was assembled initially for purposes of consumer credit, or if the information was expected to be used for a purpose designated by the FCRA, then, in some jurisdictions, the information would qualify as a consumer report. On the other hand, because the insurance policy on Mr. Smith's life was being sought for a corporate business purpose, some jurisdictions would find that the information did not constitute a consumer report. Whether or not Mr. Smith would receive the benefit of the FCRA's regulations and remedies depends on a court's classification of the information. If it would not qualify as a consumer report, the FCRA would not apply, and Mr. Smith would be left with little more than a common law action for defamation to protect his interests.

Would Mr. Smith have adequate protection in Minnesota? Quite probably, he would not. With state statutory law on credit reporting still nonexistent in Minnesota, Mr. Smith would have only a common law defamation action or an action under the FCRA. The effectiveness of

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263. *See* notes 104-202 *supra* and accompanying text.
264. *See* note 202 *supra* and accompanying text.
265. *See* notes 120-37 *supra* and accompanying text.
266. *See* notes 110-19 *supra* and accompanying text.
267. *See* notes 106-09 *supra* and accompanying text.
268. *See* notes 16-103 *supra* and accompanying text.
the FCRA, however, has been seriously curtailed by the restrictive holding of Henry v. Forbes. Because of Henry, Minnesota consumers do not enjoy the protection of personal privacy and fair treatment that the FCRA should afford. Although the FCRA may be a significant step toward improved protection of personal privacy, its shortcomings, as it has been interpreted by the Minnesota Federal District Court, have rendered the Act incapable of achieving its original purpose.

The Minnesota Legislature, using the statutes of other states as models, should enact supplementary credit reporting laws to overcome the limitation on the FCRA's protection of personal privacy. A concern for individual privacy already has been expressed in the MDPA and should provide the impetus for supplementation of the FCRA. Within the supplementary legislation, clarification of the term consumer report could be achieved by a specific statement that the statute applies to all distributions of information on a private individual by a credit bureau. The Legislature also should consider restricting the types of information that can be reported, excluding such information as the individual's race and religion and other similar information, which would have no bearing on insurability, credit worthiness, or employment qualifications. Finally, to improve on the FCRA's disclosure requirements, the legislation should require consumer reporting agencies to disclose the actual contents of its files to the subject consumer, with exceptions for medical and other information for which mandatory disclosure would cause constitutional problems. This additional disclosure requirement would enable the consumer to ensure accuracy and completeness of the information.

As society becomes more complex, the need, or at least the demand, for credit information increases. At the same time, individuals express a mounting concern that they are losing the few remaining vestiges of their personal privacy. In drafting supplementary legislation, the Minnesota Legislature should balance the interests of the users of credit information and the consumer. By clarifying the rights and obligations of both consumers and credit reporting agencies, the Legislature can cure the deficiencies of the existing law and improve the quality of protection from credit reporting abuse. The Legislature can, by broadening the applicability of credit reporting laws, extend its policy of protecting personal privacy to every John Smith.

270. See notes 185-91 supra and accompanying text.
271. Cf. 116 CONG. REC. 35941 (1970) (remarks of Sen. Proxmire) ("In view of the growing importance of credit information in our economy, we must give consumers a higher degree of protection against the consequences of an inaccurate or misleading credit report.")
APPENDIX: A PROPOSED CREDIT REPORTING ACT FOR MINNESOTA

Section 1. DEFINITIONS. For the purposes of this Act:
(a) The term “consumer” means an individual;
(b) The term “credit bureau” means any person or organization engaging in the practice of assembling or reporting information on consumers that relates to credit, reputation, personal characteristics, or mode of living, collected for the purpose of furnishing such information to third parties.\(^1\)

Section 2. PURPOSES FOR WHICH CREDIT BUREAUS MAY FURNISH INFORMATION ON CONSUMERS. A credit bureau may furnish information on consumers under the following circumstances and no other:
(a) In response to the order of a court having jurisdiction to issue such an order.
(b) In accordance with the written instructions of the consumer to whom it relates.
(c) To a person which it has reason to believe—
   (1) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
   (2) intends to use the information for employment purposes; or
   (3) intends to use the information in connection with the underwriting of insurance involving the consumer; or

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A definition of “consumer report” or some similar term is omitted intentionally from the Proposed Act. This definition has caused the greatest problem in applying the Fair Credit Reporting Act and, in some cases, has narrowed the Act’s scope of consumer protection. See notes 43-67 supra and accompanying text. There appears to be no good reason why this definition is necessary, so the Proposed Act covers all information reported by credit bureaus that relates to consumers. Following the lead of other states, it would appear wise to exclude this definition. See, e.g., N.M. Stat. Ann. §§ 56-3-1 to -8 (1978); Okla. Stat. Ann. tit. 24, §§ 81-85 (West 1955); Tex. Rev. Civ. Stat. Ann. art. 9016 (Vernon Cum. Supp. 1978-1979).
(4) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(5) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.²

Section 3. PROHIBITED INFORMATION. No credit bureau shall report or maintain in its file on a consumer, information:

(a) relative to a consumer's race, religion, color, ancestry, or ethnic origin, or;

(b) relative to an arrest or a criminal charge unless—

(1) such charges are still pending; or

(2) there has been a criminal conviction for such offense, and there has been no pardon for such offense.³

Section 4. COMPLIANCE PROCEDURES. Every credit bureau shall maintain reasonable procedures designed to avoid violations of this Act and to limit the furnishing of information on consumers to the purposes listed under section 2 of this Act. 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 credit bureau

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² Section 2 of the Proposed Act is an almost verbatim copy of the FCRA's list of permissible purposes for consumer reports. The only changes are that "credit bureau" has been substituted for the FCRA term "consumer reporting agency," and "information on consumers" has replaced "consumer report." Compare Proposed Act § 2 with Fair Credit Reporting Act § 604, 15 U.S.C. § 1681b (1976).


Reports of arrests, indictments, or convictions are prohibited by the FCRA when the report antedates release, parole, or disposition of the criminal action by more than seven years. See Fair Credit Reporting Act § 605(a)(5), 15 U.S.C. § 1681c(a)(5) (1976). No provision is made by the FCRA for criminal charges that did not result in conviction, or for which an individual has been pardoned. Proposed Act § 3(b) is recommended as a provision covering this matter. It is taken essentially from similar provisions of several states. See CAL. CIV. CODE §§ 1785.13(a)(6), 1786.18(a)(6) (West Cum. Supp. 1979); KY. REV. STAT. § 431.350 (1975); N.M. STAT. ANN. § 56-3-6(A)(5) (1978); N.Y. GEN. BUS. LAW § 380-j(a)(1) (McKinney Cum. Supp. 1978-1979).
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 any information relating to a consumer. No credit bureau may furnish information relating to a consumer to any person if the credit bureau has reasonable grounds for believing that the information will not be used for a purpose listed in section 2 of this Act. Whenever a credit bureau prepares information on a consumer, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the consumer about whom the information relates.

Section 5. DISCLOSURE. Subdivision 1. Except as otherwise provided by law, upon the consumer’s request a credit bureau shall permit the consumer to read an accurate copy of all information about that particular consumer that it maintains in its records, provided the consumer making the request presents adequate identification.

Subd. 2. Whenever a consumer requests disclosure pursuant to this section, the consumer shall be informed by the credit bureau of the consumer’s right to dispute the accuracy of any information that is disclosed. In case of dispute, the credit bureau shall either delete the disputed information from its records, or verify its accuracy. If the consumer continues to dispute the information after its accuracy has been verified by the credit bureau, the credit bureau shall inform the consumer of the consumer’s right to file a brief statement setting forth the nature of the dispute.

Subd. 3. Whenever a statement of a dispute is filed, unless there are reasonable grounds to believe that it is frivolous or irrelevant, the credit bureau shall, in any subsequent report of 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 summary thereof.

4. Proposed Act § 4 is taken directly from Fair Credit Reporting Act § 607, 15 U.S.C. § 1681e (1976). Only technical alterations have been made to conform it to the Proposed Act. Its purpose is to ensure that credit bureaus have the same obligations under the Proposed Act as they do presently under the FCRA, the only difference being that the Proposed Act would have wider application because it avoids the use of a confusing definition of consumer report.

5. This disclosure provision is broader than that contained in the FCRA. First, it requires disclosure of the actual contents of information relating to the consumer, not merely the nature and substance of the information that the FCRA requires to be disclosed. See Fair Credit Reporting Act § 609, 15 U.S.C. § 1681g (1976). Disclosure of the actual contents of a consumer’s file apparently is something that credit bureaus already do on some occasions. See, e.g., Henry v. Forbes, 433 F. Supp. 5, 7 (D. Minn. 1976) (“She... visited the local Retail Credit office and had the report read to her.”). This practice is not universal however. See, e.g., Rasor v. Retail Credit Co., 87 Wash. 2d 516, 519, 554 P.2d 1041, 1044 (1976) (“She was not allowed to read the report but was informed of its contents...”). The purpose for such a provision in the Proposed Act is to prevent less than full disclosure by a credit bureau. See generally Millstone v. O’Hanlon Reports, Inc., 383 F. Supp. 269, 275 (E.D. Mo. 1974) (“[The defendant violated] § 1681g(a)(1) in that
Section 6. REQUIREMENTS ON USERS OF INFORMATION.

Subdivision 1. No person shall obtain information from a credit bureau under false pretenses.

Subd. 2. No person shall use information obtained from a credit bureau for any purpose other than those designated in section 2 of this Act.

it failed to disclose... the nature and substance of all the information contained in its files concerning Millstone. To say that O’Hanlon was parsimonious in its disclosure in this case would be an exercise in understatement.


Proposed Act § 5 begins with the statement “[except as otherwise provided by law.” This is designed to prevent the Proposed Act from being construed to require the disclosure of medical information. Medical information receives a special exemption from the FCRA's disclosure requirement. See Fair Credit Reporting Act § 609(a)(1), 15 U.S.C. § 1681g(a)(1) (1976). Any attempt to override this FCRA privilege may result in the invalidation of the Proposed Act's disclosure requirement. Cf. Retail Credit Co. v. Dade County, 393 F. Supp. 577, 582-83 (S.D. Fla. 1975) (invalidating county ordinance requiring disclosure of medical information because such disclosure would be inconsistent with the FCRA).

Subdivision 2 of Proposed Act § 5 requires credit bureaus to advise consumers of their right to dispute the accuracy of information contained in a credit bureau's records. This right has been given to consumers by the FCRA. See Fair Credit Reporting Act § 611(a), 15 U.S.C. § 1681i(a) (1976). Presently, nobody is required to advise the consumer that this right exists. The purpose for adding this requirement is to make it easier for the consumer to employ the FCRA’s self-help remedies.

Subdivision 2 further requires credit bureaus to advise consumers of their right to file a brief statement setting forth the nature of the dispute when the accuracy of information in the credit bureau's records cannot be resolved. This right is given to consumers by Fair Credit Reporting Act § 611(b), 15 U.S.C. § 1681i(b) (1976). The reason for adding this provision, which requires credit bureaus to advise consumers of this right, is also to aid the consumer in using the self-help remedies given by the FCRA. New York already has a similar provision in its credit reporting law. See N.Y. GEN. BUS. LAW § 380ff(a)(McKinney Cum. Supp. 1978-1979).

Subdivision 3 is taken from Fair Credit Reporting Act § 611(c), 15 U.S.C. § 1681i(c) (1976). It is included in the Proposed Act to clarify that the remedy is available to the consumer under the new law.

6. Subdivision 1 of Proposed Act § 6, when read in conjunction with Proposed Act § 7, imposes civil liability upon any person who obtains information from a credit bureau under false pretenses. The FCRA already prohibits this activity, and provides for criminal penalties in case of a violation. See Fair Credit Reporting Act § 619, 15 U.S.C. § 1681q (1976). Some courts have construed the FCRA as also providing for civil liability against a user who violates this provision. See, e.g., Hansen v. Morgan, 582 F.2d 1214, 1219 (9th Cir. 1978); Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 671 (M.D.N.C. 1978). The purpose for including this requirement in the Proposed Act is to make it clear that civil liability will attach to such a violation.
Section 7. CIVIL LIABILITY. Any credit bureau or user of information that fails to comply with any requirement imposed by this Act with respect to any consumer is liable to that consumer for the sum of—

(a) any actual damages sustained by the consumer as a result of the failure to comply; and

(b) in the case of any successful action to enforce any liability under this Act, the costs of the action together with reasonable attorney's fees as determined by the court.

In the event that a credit bureau or user of information willfully fails to comply with any requirement imposed by this Act, the consumer shall also be entitled to recover punitive damages of not less than one hundred dollars or more than five thousand dollars for each violation as the court deems proper.7

Section 8. INJUNCTIVE RELIEF. In addition to any other remedy contained in this Act, injunctive relief shall be available to any applicant aggrieved by a violation or threatened violation of this Act.8

Subdivision 2 tightens the requirements presently imposed by the FCRA, and is the second most significant difference between the Proposed Act and the FCRA, next to the abolition of the definition of consumer report. Under present law, consumer reporting agencies may furnish consumer reports only for certain permissible purposes. See Fair Credit Reporting Act § 604, 15 U.S.C. § 1681b (1976). Users of reports must certify the purpose for which the information is sought, see id. § 607(a), 15 U.S.C. § 1681e(a), and risk legal sanctions if they obtain a report under false pretenses, see id. § 619, 15 U.S.C. § 1681q. The definition of consumer report, however, provides the FCRA's major loophole. Because consumer report is defined, in part, as a report used for a permissible purpose, a report used for some other purpose might not be a consumer report. See notes 106-19 supra and accompanying text. According to some courts, the FCRA does not apply in these circumstances because of the absence of a consumer report. See, e.g., Henry v. Forbes, 433 F. Supp. 5, 9-10 (D. Minn. 1976). Subdivision 2 of Proposed Act § 6, coupled with the Proposed Act's intentional omission of the definition of consumer report, is designed to close this loophole. It clarifies the position that users may not obtain any information on consumers, except when they actually use the information for the permissible purposes.

7. Proposed Act § 7, providing civil liability for negligent failure to comply with the Act, adopts the same remedies as are presently available under the FCRA for negligent noncompliance. See Fair Credit Reporting Act § 617, 15 U.S.C. § 1681o (1976). The remedies for willful noncompliance are also the same, compare id. § 616, 15 U.S.C. § 1681n with Proposed Act § 7, except that the Proposed Act includes minimum and maximum ceiling amounts on punitive damages. California has such a provision in its credit reporting law. See CAL. CIV. CODE § 1785.31(a)(2)(B) (West Cum. Supp. 1979). The reason for minimum and maximum ceiling amounts on punitive damages is to avoid excessive punitive damage awards, while at the same time making it worthwhile for the consumer to pursue his remedy in the event of a willful violation. Cf. 15 U.S.C. § 1640(a)(2)(A) (1976) (liability to individuals for Truth in Lending violations shall not be less than $100 nor greater than $1000).

8. The equitable remedy of injunctive relief is inserted in the Proposed Act so that violations can be prevented. California also has such a provision. See CAL. CIV. CODE § 1785.31(b) (West Cum. Supp. 1979).
Section 9. SEVERABILITY. If any provision of this Act or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect other provisions or applications of this Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.  

Section 10. LIMITATION OF ACTIONS. An action to enforce any liability created under this Act may be brought in any appropriate court of competent jurisdiction within two years from the date on which the liability arises except that if a defendant has materially and willfully misrepresented any information required under this Act to be disclosed to a consumer, the action may be brought at any time within two years after the discovery by the consumer of the misrepresentation.  

9. The severability provision is included in the Proposed Act for the obvious reason of attempting to avoid invalidation of the entire act in the event that one provision is held to be unconstitutional. Section 9 is copied from New York's law. See N.Y. GEN. BUS. LAW § 380-s (McKinney Cum. Supp. 1978-1979).  