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Case Comments

Houghton v. New Jersey Manufacturers Insurance Co.: A Narrow Interpretation of the Scope Provisions of the Fair Credit Reporting Act Threatens Consumer Protection

INTRODUCTION

In November 1977, Bernice Rosenfeld's automobile struck Donna Houghton's automobile from behind.[1] Houghton sued Rosenfeld for the injuries she sustained in the collision.[2] Rosenfeld's insurer, New Jersey Manufacturers Insurance Company, defended the action.[3] While preparing for trial, the insurance company requested[4] that Equifax, a consumer reporting agency,[5] investigate Houghton and prepare a written report including general financial information.[6] Equifax submitted to the insurance company a report containing information obtained from public records, personal interviews with Houghton's neighbors,[7] and existing credit files.[8] Houghton did not

1. Brief for Appellee at 4, Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3d Cir. 1986) (No. 85-1601), *rev'g* 615 F. Supp. 299 (E.D. Pa. 1985).

2. Houghton v. New Jersey Mfrs. Ins. Co., 615 F. Supp. 299, 301 (E.D. Pa. 1985), *rev'd*, 795 F.2d 1144 (3d Cir. 1986). Houghton also included a claim for lost earnings. *Id.*

3. *Id.* at 304 (the insurance company defended Rosenfeld as required by its contract with her).

4. The insurance company submitted its request on a preprinted form supplied by Equifax, indicating that it sought the report to investigate Houghton's claims in a lawsuit against its insured. *Id.* at 301 n.1.

5. A "consumer reporting agency" is an individual or corporation

> which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Fair Credit Reporting Act § 603, 15 U.S.C. § 1681a(f) (1982). For the definition of "consumer report," see *infra* note 20.

6. *Houghton*, 615 F. Supp. at 301. The insurance company asked Equifax to investigate Houghton's activities since the accident, her medical history, and her general financial condition. *Id.*

7. *See* Brief for Amicus Curiae, Equifax Servs., Inc., Houghton v. New

receive notice of the insurance company's request for the report and did not know that the report existed.[9] In November 1979, Houghton settled her claim with the insurance company.[10]

Four years later, Houghton learned of Equifax's report and requested that the insurance company disclose the substance of the report to her.[11] The insurance company repeatedly refused to disclose the report.[12] Houghton then filed suit in federal district court alleging that the insurance company[13] had violated provisions of the Fair Credit Reporting Act[14] (FCRA) that mandate notice and disclosure[15] to consumers[16] by users[17] of "investigative consumer reports."[18] On motion for summary judgment, the insurance company argued that the Equifax re-

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Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3d Cir. 1986) (No. 85-1601) (copy of Equifax's report appended to the brief). The interviews reflect information dangerous to consumers because it is colored by the source's perceptions and biases. For example, one neighbor judged Houghton's financial status based on one factor, the number and make of the family cars. *Id.* The bank, however, may have owned the cars and every other asset Houghton possessed.

8. *Houghton,* 615 F. Supp. at 302. Equifax's report stated, "We did check available credit files through a confidential source, and we are unable to come up with any financial irregularities." *Id.* at 302 n.2.

9. *Id.* at 301. See *infra* note 60 and accompanying text concerning notice and disclosure requirements for investigative consumer report users under the Fair Credit Reporting Act.

10. *Houghton,* 615 F. Supp. at 302.

11. *Id.*

12. *Id.*

13. Houghton has filed a separate lawsuit against Equifax which is currently pending in the United States District Court for the Eastern District of Pennsylvania, Houghton v. Equifax, Inc., No. 85-2855 (E.D. Pa. filed May 21, 1985). This suit was stayed pending the resolution of outstanding criminal charges filed against Houghton. Brief for Appellant at 5, Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3d Cir. 1986) (No. 85-1601).

14. 15 U.S.C. §§ 1681-1681t.

15. *Id.* § 1681d. Houghton alleged violations of §§ 1681d(a) and 1681d(b) of the FCRA. These provisions require users of investigative consumer reports to notify the consumer of the report, disclose the report's nature, and make further disclosures upon written request by the consumer. *See infra* note 60 and accompanying text.

16. The FCRA defines "consumer" as an "individual." 15 U.S.C. § 1681a(c).

17. The FCRA distinguishes between users of consumer information and consumer reporting agencies, imposing different obligations on each. *See infra* notes 49-64 and accompanying text.

18. The FCRA defines an "investigative consumer report" as:

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

port did not constitute an "investigative consumer report" within the meaning of the FCRA.[19] Because the FCRA's "investigative consumer report" definition is derived from that statute's "consumer report" definition,[20] the determinative issue was whether Equifax's report was a "consumer report" within the Act's scope.[21] The United States District Court for the Eastern District of Pennsylvania found for Houghton[22] and granted her $14,770 in damages and attorneys fees.[23]

In *Houghton v. New Jersey Manufacturers Insurance Co.*, the Third Circuit Court of Appeals reversed.[24] The Third Circuit held that the FCRA did not apply to the Equifax report because the report neither appeared on its face to be a consumer report,[25] nor had the insurance company requested the report for a purpose that would render it a consumer report under the FCRA.[26] The insurance company, therefore, was not legally

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15 U.S.C. § 1681a(e) (emphasis added). See *infra* note 20 for the FCRA's definition of a "consumer report."

19. *Houghton,* 615 F. Supp. at 302.

20. An "investigative consumer report" is a species of "consumer report," differing only in the method by which the information is collected. *See supra* note 18. Thus, a court must first determine whether a "consumer report" exists before considering provisions applicable to an "investigative consumer report."

The FCRA defines consumer report as

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance 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.

15 U.S.C. § 1681a(d).

21. No party disputed that an investigation as contemplated by the "investigative consumer report" definition had occurred. The insurance company expressly hired Equifax to conduct a "Special Activities Check." *See* Brief for Amicus Curiae, Equifax Servs., Inc., Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3rd Cir. 1986) (No. 85-1601) (copy of request form appended to the brief). Equifax's Special Activity Check necessarily involved "personal interviews with neighbors" as required by the investigative consumer report definition. *Id.*

22. *Houghton,* 615 F. Supp. at 304-05.

23. *Id.* at 310. The court awarded Houghton $3,500 in compensatory damages, $3,500 in punitive damages, $7,770 for attorney's fees, and $1,284.66 in costs. *Id.*

24. Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3d Cir. 1986), *rev'g* 615 F. Supp. 299 (E.D. Pa. 1985).

25. *Id.* at 1147. See *infra* notes 111-16 and accompanying text.

26. *Id.* at 1148. See *infra* notes 104-10 & 117-23 and accompanying text.

obligated to comply with the FCRA's notice and disclosure provisions.[27]

The Third Circuit in *Houghton* interpreted narrowly the FCRA's consumer report definition in a suit against a *user* of consumer reports.[28] The consumer report definition is crucial because it controls the Act's applicability—generally, consumers enjoy the Act's protections only when a *consumer report* is involved.[29] Adoption of the *Houghton* court's narrow interpretation in a suit against a *consumer reporting agency*, the primary entity regulated by the FCRA, would limit drastically the Act's scope. Such a limitation would jeopardize consumer rights with respect to the reporting industry and frustrate consumers' ability to avoid erroneous reporting. The threat of erroneous reporting is significant; the consumer reporting industry issues more than one hundred million consumer reports annually,[30] and approximately five million consumers are victims of inaccurate reporting each year.[31]

This Comment rejects the Third Circuit's interpretation of the FCRA. Part I introduces the FCRA's legislative history and scope provisions, and examines pre-*Houghton* case law interpreting the Act's scope. Part II analyzes the *Houghton* deci-

27. *Id.* at 1150. For a discussion of the FCRA's notice and disclosure provisions, see *infra* note 60 and accompanying text.

28. *See infra* notes 104-23 and accompanying text.

29. *See infra* notes 54-60 & 64 and accompanying text. For a discussion of the Act's protections that do not hinge on the information's status as a consumer report, see *infra* notes 61-63 and accompanying text.

30. *Fair Credit Reporting Act — 1973: Hearings on S. 2360 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93rd Cong., 1st Sess. 20 (1973) [hereinafter *Hearings on S. 2360*] (testimony of Mr. John L. Spafford, President, Associated Credit Bureaus, Inc., that the association's members, representing 80 to 90% of the industry, released 100 million reports in 1972). One consumer reporting agency alone currently receives 100,000 requests for consumer reports daily. Boothe v. TRW Credit Data, 557 F. Supp. 66, 69 (S.D.N.Y. 1982).

31. *See* Ackerley v. Credit Bureau, 385 F. Supp. 658, 659 (D.C. Wyo. 1974) (stating that one out of every 20 reports contains material errors).

Massive dissemination to meet demand combined with agency policies that reward employees for high output lead to the considerable number of reporting inaccuracies. Equifax, for example, pays each investigator a bonus based on output. Hauser v. Equifax, Inc., 602 F.2d 811, 815 (8th Cir. 1979). Similarly, O'Hanlon Reports pays its investigators a commission equal to one third of the fee charged to the client requesting the report. Millstone v. O'Hanlon Reports, Inc., 383 F. Supp. 269, 273 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976). An employee's incentive to maximize income naturally creates high volume reporting. Indeed, Equifax's investigators prepare approximately 12 to 15 reports daily, *see Hauser*, 602 F.2d at 815, and O'Hanlon's investigators average 140-160 reports every two weeks. *Millstone*, 383 F. Supp. at 273.

sion and its resolution of the statutory construction issue. Part III analyzes the problems posed by the ambiguity of the FCRA's definition of consumer report and proposes that courts read the Act's definitional section broadly and differentiate between user and reporting agency defendants. The Comment concludes that the proposed approach would achieve results consistent with legislative intent and ensure consumer protection.

I. THE FAIR CREDIT REPORTING ACT AND PRE-*HOUGHTON* INTERPRETATIONS

As consumer reporting agencies operating on a national scale began computerizing their operations,[32] Congress passed the FCRA in 1970[33] to address mounting concerns about report-

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32. The rapid proliferation of reporting operations facilitated by computers and the new capabilities for interlocking data bases was the impetus for Congress's heightened concern for consumers' privacy. *See generally Commercial Credit Bureaus: Hearings Before a Special House Subcomm. on Invasion of Privacy of the Comm. on Government Operations,* 90th Cong., 2nd Sess. (1968) [hereinafter *Privacy Hearings*] (exploring the privacy and due process issues raised by the credit reporting industry's growth and modes of operation). In 1966, the executive branch had suggested establishing a national data bank containing information on every U.S. citizen to be used to evaluate government programs and policies. *Id.* at 2. "The 'big-brother is watching' overtones of this project plus congressional opposition led to its quick abandonment." 115 CONG. REC. 2411 (1969) (statement of Senator Proxmire); *see generally* McNamara, *The Fair Credit Reporting Act: A Legislative Overview,* 22 J. PUB. L. 67, 71-73 (1973) (reviewing the rise and fall of the national data bank concept). An analogous data bank, however, was developing in the private sector without any public safeguards. 115 CONG. REC. 2411 (1969) (statement of Senator Proxmire). One credit reporting agency was growing at a rate of 50,000 new files a week and estimated that nearly every adult in the United States would be in its computer data bank within five years. *Id.* at 2410. *See also id.* at 33,408 (statement of Senator Proxmire) (computerized reporting industry has capability of covering every U.S. citizen, and nearly every adult is currently covered).

Errors in data reporting were common, *see Privacy Hearings, supra,* at 109 (statement of Senator Proxmire) (approximately one percent of all reports disseminated mistake the identity of the report's subject); *see also supra* note 31, and computerization foreshadowed wider distribution of harmful data. Senator Proxmire consequently introduced the Fair Credit Reporting Bill, which was the first serious attempt at comprehensive regulation of the industry. 115 CONG. REC. 2410 (1969); *see* McNamara, *supra,* at 69 (the first credit reporting bill, introduced by Congressman Zablocki of Wisconsin in 1968, was never reported out of committee).

33. The Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681t (1982)) is Title VI of the Consumer Credit Protection Act of 1968.

ing abuses.[34] Congress recognized that consumers faced an "organized conspiracy of silence"[35] between agencies and users and rarely discovered that a consumer report was the source of a denial of consumer benefits[36] until after significant injury had occurred.[37] Moreover, common-law remedies for the dissemina-

34. The committee report accompanying the Fair Credit Reporting Bill summarized specific abuses identified during the Senate hearings. S. REP. NO. 517, 91st Cong., 1st Sess. 3-4 (1969). Consumers generally had been unaware that they had been damaged by adverse reports because the standard subscription contract between an agency and its clients prohibited users from disclosing the report's contents or the agency's identity. *Id.* at 3; *see also infra* note 35. Even if the consumer did learn of the adverse report and the reporting agency's identity, the agency would refuse the consumer access to her file and would not reinvestigate or correct inaccurate information. S. REP. NO. 517, 91st Cong., 1st Sess. 3 (1969). When challenged by a consumer, insurance reporting companies denied that they even made the alleged reports. *Id.* Credit bureaus wore down persistently inquisitive consumers by charging for reinvestigation services or by scheduling a requested interview weeks away. *Id.* Moreover, agencies had little respect for consumer confidentiality. For example, a television reporter easily gained access to reports by posing as the representative of a fictitious company claiming to offer the consumers credit. *Id.* at 4. Many reports containing highly personal information were based on subjective and biased opinions and often were irrelevant to the purpose for which the report was requested. *Id.* Additionally, agencies were notorious for reporting public record information such as arrests or bankruptcies without updating it to reflect final dispositions. *Id.* Furthermore, agencies did not delete adverse information from a consumer's file after the passage of time. *Id.* Thus, some consumers were burdened for life by earlier credit difficulties, even after improving their performance. *Id.*

35. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 91st Cong., 1st Sess. 2 (1969) [hereinafter *Hearings on S. 823*]. Consumer reporting agencies typically bound their subscribers to a code of silence. A typical contract clause provided that " 'all reports, whether oral or written, will be kept strictly confidential; except as required by law, no information from reports nor your identity as the reporting agency will be revealed to the persons reported on.' " 115 CONG. REC. 2412 (1969) (statement of Senator Proxmire).

36. *See, e.g.,* 115 CONG. REC. 33,409 (1969) (statement of Senator Proxmire noting that the consumer often does not know she is being damaged by consumer reports because of the collusion between agencies and report users).

37. The legislative hearings on the FCRA are replete with stories of individuals maligned by false or inaccurate reports. *See Hearings on S. 823, supra* note 35, *passim.* Senator Proxmire, introducing his bill in the Senate, provided the following examples:

> A Pennsylvania woman was turned down for major medical coverage by an insurance company. After repeated interviews with company officials and the Pennsylvania insurance commissioner, the woman's husband finally learned the reason. A credit report indicated she was an alcoholic. In actual fact, the woman had never consumed more than a dozen drinks in 20 years of married life. . . .
>
> [A] California man . . . was falsely arrested and convicted of a felony in 1962 on a case of mistaken identity. In 1963 the real criminal confessed. Despite his innocence, the man has never been able to ob-

tion of inaccurate or misleading information were wholly inadequate to redress the aggrieved consumer's privacy and reputation interests.[38]

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tain any credit since even though he is a successful real estate broker. . . .

A Washington attorney was recently denied employment because his credit report included information about two cases of intoxication that occurred 20 years ago.

An Oregon businessman, having difficulty obtaining credit, finally managed to see his credit report. He discovered a false charge of bankruptcy which had allegedly occurred 16 years ago. The credit bureau refused to make the correction.

115 CONG. REC. 2411-13 (1969); *see also* J. SHARP, CREDIT REPORTING AND PRIVACY 93-100 (1970) (collection of case histories).

Such stories are not surprising considering that agencies imposed quota requirements as high as 14% for the reporting of adverse information. *Hearings on S. 823, supra* note 35, at 186-87, 294-95. Agency investigators risked an unfavorable evaluation of their job performance unless they uncovered adverse information. *Id.* at 187 & 295.

A recent investigation conducted by the Federal Trade Commission, culminating in a lengthy complaint, indicates that the FCRA has not entirely eliminated these questionable practices of pressuring agency employees to produce adverse information. *See In re* Equifax Inc., 96 F.T.C. 844, 844-53 (1980), *rev'd in part,* 678 F.2d 1047 (11th Cir. 1982). The Commission's complaint charged the largest consumer reporting agency in the United States, Equifax, with numerous violations of the FCRA, including the use of operating procedures that pressured investigators to produce adverse information, thus creating an unreasonable risk of inaccuracy and falsification. *Id.* at 851; *see also id.* at 913 (Equifax stressed to its employees that reporting adverse information was central to the overall success and marketability of the company's services.). The administrative law judge found for the FTC apparently on this theory. *Id.* at 945 (findings 401-405). The Eleventh Circuit, however, set aside this portion of the decision on the basis that the evidence failed to support the inference that the company's procedures created an unreasonable likelihood of inaccuracy. Equifax Inc. v. FTC, 678 F.2d 1047, 1053 (11th Cir. 1982).

38. For general discussions of common law remedies, see J. SHARP, *supra* note 37, at 25-85; Blair & Maurer, *Statute Law and Common Law: The Fair Credit Reporting Act,* 49 MO. L. REV. 289, 297-301 (1984); Ullman, *Liability of Credit Bureaus After the Fair Credit Reporting Act: The Need for Further Reform,* 17 VILL. L. REV. 44, 44-58 (1971); Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy,* 57 GEO. L.J. 509 (1969); Note, *Protecting the Subjects of Credit Reports,* 80 YALE L.J. 1035, 1049-61 (1971) [hereinafter Note, *Protecting Subjects*].

Before the FCRA, victims of inaccurate, intrusive, or malicious credit reporting had to rely primarily on the common law remedy of defamation. To state a cause of action, the plaintiff was required to show the publication of a false and defamatory statement concerning the plaintiff. RESTATEMENT (SECOND) OF TORTS § 558 (1977). The common law, however, accorded credit bureaus a conditional privilege which required plaintiffs to prove excess publication or actual malice before recovery was permitted. Blair & Maurer, *supra,* at 298-300; *see generally* Smith, *Conditional Privilege for Mercantile Agencies.*—MacIntosh v. Dun, 14 COLUM. L. REV. 187 (1914). Plaintiffs rarely overcame this standard, and maligned consumers were most often left without a remedy. *See* Note, *Protecting Subjects, supra,* at 1050-51 (conditional privi-

To vindicate consumer interests, Congress sought to establish consumer due process by granting consumers the right to know of, challenge, and correct inaccurate information disseminated about them.[39] Congress also recognized that widespread dissemination of consumer information[40] raises legitimate privacy concerns.[41] At the same time, Congress acknowledged

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lege, requiring showing of actual malice, precludes recovery because express intent to harm is rare).

39. *Hearings on S. 823, supra* note 35, at 2. Senator Proxmire, the bill's original sponsor, asserted that the goal of his bill was to ensure that the reporting system would serve consumers as well as the reporting industry. *Id.* Inaccurate, outdated, or misleading information in an individual's credit file often led to a denial of credit, insurance, or employment. *See, e.g., id.* at 84-87, 94, 393-98, 402-05, 407-14, 418-24; *Fair Credit Reporting: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency on H.R. 16340,* 91st Cong., 2d Sess. 243-54, 287-89 (1970) [hereinafter *Hearings on H.R. 16340*]. The FCRA is designed to decrease the risk of erroneous reporting and to afford remedies when the injury incurred is due to negligent or intentional misconduct.

40. The credit reporting industry, maintaining well over 135 to 150 million files, issues one or more reports per family every year. *Hearings on H.R. 2360, supra* note 30, at 20 (John L. Spafford, President, Associated Credit Bureaus, Inc., (ACB) testifying that firms belonging to ACB represent approximately 80-90% of the industry and maintain roughly 120 million files).

41. Before enacting the FCRA, Congress held numerous hearings to investigate the consumer reporting industry and its invasion of consumer privacy. *See generally Hearings on H.R. 16340, supra* note 39 (inquiring into the privacy and due process issues raised by consumer reporting methods and the necessity and desired form of federal legislation); *Hearings on S. 823, supra* note 35 (exploring the need to balance consumers' privacy interests against the need for consumer reporting and debating the ability of the Fair Credit Reporting Bill to accomodate these competing interests); *The Credit Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary Pursuant to S. Res. 233,* 90th Cong., 2nd Sess. (1968) (exploring the antitrust implications of the reporting industry's highly concentrated nature, its operational methods, and the likely impact of introducing computer technology into the field); *Privacy Hearings, supra* note 32 (prompted by the computerization of consumer reporting, the committee examined the problems of unauthorized access and inaccuracy, and considered legislation designed to ensure the protection of consumers' privacy); *Retail Credit Co. of Atlanta, Ga.: Hearing Before a Special Subcomm. on Invasion of Privacy of the House Comm. on Government Operations,* 90th Cong., 2nd Sess. (1968) (investigating the extent to which the practices of the Retail Credit Co. infringe citizens' privacy interests). Commentators also raised the privacy issue. *See, e.g.,* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society,* 67 MICH. L. REV. 1091 (1969) (exploring the implications of computerization and the rise of an information-based society for personal privacy, including the threatened loss of control over access, accuracy, and use of personal data); Miller, *Computers, Data Banks and Individual Privacy: An Overview,* 4 COLUM. HUM. RTS. L. REV. 1 (1972) (commentary on growth of various data banks in society; their uses and misuses; the risks that attend computerization, centralization, and unre-

that creditors, insurers, employers, and others must have available adequate information to evaluate the risks involved in con-

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strained circulation of information; and the need for legislation to preserve personal privacy).

Routinely reported information often is irrelevant to an individual's insurance, employment, or credit worthiness. Credit reports may cover the subject's sexual habits and moral background, for example. *Hearings on S. 823, supra* note 35, at 56 (statement of Mr. Caemmerer, State Senator, New York). The legislative hearings on the FCRA revealed that, in particular, the insurance reporting firm's reports generally contain information including:

> Racial or ethnic descent; drinking habits; reasons for drinking; domestic trouble; immoral conduct; gambling activities; use of drugs; type or reputation of associates; general character and reputation; type of neighborhood; family reputation; housekeeping habits; condition of yard; number of bathrooms per resident;. . . reasons for divorce or separation; care of children; attitude toward authority; quarrelsome behavior; abuse of family; argumentative, antagonistic, antisocial or uncooperative attitudes; and common law marriage.

115 CONG. REC. 33,409-10 (1969); *see Hearings on S. 823, supra* note 35, at 196-202, 278-87, 306-12 (sample report forms from Retail Credit Company, American Service Bureau, and O'Hanlon Reports); Note, *Fair Credit Reporting Act: The Case for Revision,* 10 LOY. L.A.L. REV. 409, 435-37 (1977) (arguing that FCRA should be amended to regulate the gathering and reporting of irrelevant information). Senator Proxmire reported that industry representatives admitted that some questions are "silly, unnecessary, and unduly intrusive." 115 CONG. REC. 33,410 (1969). An insurance investigator with 20 years experience maintained that "credit investigations are frequently characterized by hearsay evidence, inaccuracies, incompetent investigators, and snide insinuations." *Id.* at 2411.

Congress intended that consumer confidentiality and privacy be respected through responsible reporting. The committee report accompanying S. 823 states that the bill was designed to protect consumers from inaccurate and arbitrary reporting and to prevent "undue invasion of the individual's right of privacy." S. REP. NO. 517, 91st Cong., 1st Sess. 1 (1969). Further, Congress expressly stated in the FCRA, as enacted, that its purpose was to require agencies to "adopt reasonable procedures" to meet market needs for consumer information that are fair to the consumer "with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b) (1982). Congress cautioned that agencies must "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.* § 1681(a)(4).

For cases interpreting the FCRA's purpose, see, e.g., New Palm Gardens, Inc. v. Bentley, No. 82-1361-MA (D. Mass. Aug. 11, 1983) (LEXIS, Genfed library, Dist file) (the FCRA was adopted for the purpose of bringing some regularity to the reporting industry); *In re* TRW, Inc., 460 F. Supp. 1007, 1009 (D.C. Mich. 1978) ("In passing the F.C.R.A. Congress intended to prevent unreasonable or careless invasions of consumer privacy . . . ."); Ackerley v. Credit Bureau, 385 F. Supp. 658, 659 (D.C. Wyo. 1974) (noting that the Act's purpose "is to protect the reputation of a consumer, for once false rumors are circulated there is not complete vindication"); Porter v. Talbot Perkins Children's Servs., 355 F. Supp. 174, 176 (S.D.N.Y. 1973) (Act's purpose is to protect individuals from inaccurate and arbitrary information in a report that is being used to determine eligibility for credit, insurance, or employment); Rasor v. Retail Credit Co., 87 Wash. 2d 516, 520-21, 554 P.2d 1041, 1045 (1976) (FCRA is

sumer transactions.[42] Recognizing these competing interests, the FCRA strikes a balance between the commercial need for easy access to information and the individual consumer's due process and privacy interests.[43]

Generally, the FCRA regulates the collection, dissemination, and use of *consumer reports*.[44] A consumer report contains information bearing on the consumer's character, general reputation, or credit standing and is collected or used for a purpose specified within the Act.[45] For purposes of imposing additional requirements,[46] the FCRA identifies a special type of consumer report, referred to as an *investigative consumer report*.[47] An investigative consumer report is simply a consumer report procured through personal interviews with the subject's neighbors or associates.[48]

The Act regulates the activities of two parties, *consumer reporting agencies* and *users* of consumer reports.[49] A consumer reporting agency is any person[50] who collects or evaluates consumer information to disseminate in consumer reports

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Congress's response to documented abuses and is designed to protect a consumer's reputation before damage by false rumors or inaccurate information).

42. *See, e.g.,* S. REP. NO. 517, 91st Cong., 1st Sess. 2 (1969) (business community needs to know the facts for sound decision making about consumer transactions).

43. Congressional members and consumer experts expressed the need to balance the business community's informational requirements with consumers' right to know of and correct inaccurate information being disseminated about them. *See, e.g.,* 116 CONG. REC. 36,572 (1970) (statement by Representative Sullivan, the bill's House sponsor); *Hearings on S. 823, supra* note 35, at 13 (statement of Virginia H. Knauer, Special Assistant to the President for Consumer Affairs).

44. For the definition of "consumer report" under the Act, see 15 U.S.C. § 1681a(d) and *supra* note 20. The obligations imposed by the Act generally apply if and only if the report in question is a "consumer report" under the Act. See *infra* notes 54-60 & 64 and accompanying text.

45. *See supra* note 20.

46. *See infra* note 57 and note 60 and accompanying text.

47. For the definition of "investigative consumer report," see 15 U.S.C. § 1681a(e) and *supra* note 18.

48. See *supra* notes 18-20 for a discussion of investigative consumer reports.

49. *See* DIVISION OF CREDIT PRACTICES, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, 5 Consumer Cred. Guide (CCH) ¶ 11,302, at 59,783 (March 1979) [hereinafter FTC, COMPLIANCE].

50. The FCRA broadly defines "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b).

to third parties.[51] Users are persons—typically insurers, creditors, or employers—who purchase consumer information from agencies to use in connection with their transactions with the report's subject.[52]

The FCRA primarily regulates consumer reporting agencies.[53] It requires that agencies maintain reasonable procedures[54] to avoid reporting obsolete information[55] and to assure maximum possible accuracy[56] of consumer reports.[57] Gener-

51. For the definition of a "consumer reporting agency," see 15 U.S.C. § 1681a(f) and *supra* note 5.

52. *See* FTC, COMPLIANCE, *supra* note 49, ¶ 11,306, at 59,820.

53. *See* Hansen v. Morgan, 582 F.2d 1214, 1220 (9th Cir. 1978) (the Act's objectives, as embodied in Congress's statement of purpose, are accomplished principally through the regulation of consumer reporting agencies); D'Angelo v. Wilmington Medical Center, Inc., 515 F. Supp. 1250, 1253 (D. Del. 1981) (the Act is directed at consumer reporting agencies); Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 670 (M.D.N.C. 1978) ("main bulk of FCRA requirements are imposed on consumer reporting agencies"). A cursory examination of the FCRA's structure reveals Congress's principal emphasis. Only two regulatory provisions apply to consumer report users, *see* 15 U.S.C. §§ 1681d, 1681m, whereas ten provisions regulate the reporting industry, *see id.* §§ 1681b, 1681c, 1681e, 1681f, 1681g, 1681h, 1681i, 1681j, 1681k, 1681*l*.

54. The Federal Trade Commission advises that reasonable procedures are those that assure informational integrity and source reliability when information is collected and recorded followed by procedures ensuring accurate reproduction in consumer reports. FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,808. Periodic reevaluations are required to weed out obsolete or misleading information, and adverse data should be confirmed by additional sources. *Id.* at 59,808-09. Procedures to preserve the information's appropriate context and purpose should also be used to avoid misinterpretation when the information is used in alternative contexts for different purposes. *Id.* at 59,809.

55. *See* 15 U.S.C. § 1681c.

56. The primary obstacle faced by an aggrieved consumer is a threshold requirement that the challenged information be clearly inaccurate. *See* Daily, *The Standard of Care in the Credit Industry*, 27 WASH. U.J. URB. & CONTEMP. L. 249, 257 (1984). If the report in question is a true and accurate statement of the facts, judicial assessment of the reasonableness of procedures is foreclosed. *See, e.g.*, Todd v. Associated Credit Bureau Servs., Inc., 451 F. Supp. 447, 449 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1376 (1978), *cert. denied*, 439 U.S. 1068 (1979). The consumer damaged by an incomplete and misleading, though technically accurate, consumer report is generally denied relief. *See, e.g.*, Roseman v. Retail Credit Co., 428 F. Supp. 643, 646 (E.D. Pa. 1977) (where report accurately reflected employer's record that plaintiff had resigned because of "discrepancies in his accounts," plaintiff was denied relief despite his protestations that he had never stated his reason for resigning); Middlebrooks v. Retail Credit Co., 416 F. Supp. 1013, 1015-16 (N.D. Ga. 1976) (where the fact of arrest was accurate, plaintiff was denied recovery for a misleading report that failed to indicate that there was no final disposition of the criminal charge against plaintiff); *see also* Daily, *supra*, at 257-58 (noting that courts uniformly deny recovery to plaintiffs suing consumer reporting agencies for technically accurate but misleading or damaging consumer reports). *But see* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir. 1984) (Congress mandated the

ally, the Act prohibits agencies from disseminating consumer reports for any purpose other than for use in connection with a credit, employment, insurance, licensing, or other business transaction with the report's subject.[58]

The Act places fewer strictures on users of consumer reports. When a user takes adverse action based on an agency's consumer report, it must notify the consumer that adverse action has been taken and disclose the source of the report.[59] Additionally, the statute requires an investigative consumer report user to notify the consumer within three days of its request for the report, disclosing clearly and accurately the type of information that may be collected, and the consumer's right to obtain additional disclosures.[60]

The FCRA also creates significant new rights and remedies for consumers. Upon request and proper identification, the

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standard of "maximum possible accuracy" and technically accurate but misleading information is "neither maximally accurate nor fair to the consumer").

Even if the consumer meets the threshold inaccuracy requirement, however, the agency is not liable if its procedures were reasonable. Hauser v. Equifax, Inc., 602 F.2d 811, 814-815 (8th Cir. 1979). In assessing the reasonableness of the agency's procedures, the jury must decide "what a reasonably prudent person would do under the circumstances." Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509, 513 (5th Cir. 1982); Bryant v. TRW, Inc., 689 F.2d 72, 78 (6th Cir. 1982); *see generally* Comment, *The Functions of Consumer Reporting Agencies Under the Fair Credit Reporting Act:* Bryant v. TRW, Inc., *689 F.2d 72 (6th Cir. 1982),* 59 WASH. L. REV. 401, 407-16 (1984) (analyzing appropriate content of "reasonable procedures" under the FCRA in light of *Bryant*).

57. Another FCRA provision prohibits agencies from reusing adverse information in an investigative consumer report without reverification. 15 U.S.C. § 1681*l*. Agencies also must use strict procedures to ensure that any public record information likely to affect adversely the consumer's ability to obtain employment is complete and up to date and must notify the consumer at the time the information is transmitted in a consumer report to a user. 15 U.S.C. § 1681k.

58. 15 U.S.C. § 1681b(3). Agencies may disseminate consumer reports for other purposes if required by court order, *id.* § 1681b(1), or if given written authorization by the consumer, *id.* § 1681b(2).

59. *Id.* § 1681m(a). Adverse action includes denial of insurance, credit, or employment, or increased charges for insurance or credit. *Id.*

60. *Id.* § 1681d(a)(1). The burden of notifying the individual that a request for an investigative consumer report was made falls solely on the requesting party and an agency has no duty or potential liability under this section. Henry v. Forbes, 433 F. Supp. 5, 10 (D. Minn. 1976).

Under § 1681d(a), no duty of notification attaches unless the report is both a "consumer report" as defined by § 1681a(d), *see supra* note 20, and involves an investigation including personal interviews as required by § 1681a(e), *see supra* note 18.

agency must disclose[61] the nature and substance of virtually all information in the consumer's file.[62] If the consumer disputes the accuracy of any information on file, the agency must reinvestigate.[63] If the dispute persists after reinvestigation, the consumer may submit a personal statement that accompanies any subsequent consumer report containing the disputed information.[64] Most important, the FCRA grants consumers an express private cause of action against agencies or users for negligent[65] or willful[66] noncompliance with any of the FCRA's

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61. For the conditions under which a consumer reporting agency must make disclosures to consumers, see 15 U.S.C. § 1681h.

62. *Id.* Section 1681g requires the agency to disclose the "nature and substance" of all information, except medical information, in an individual's file. The disclosure requirement is not limited to information constituting a consumer report. *See* H. REP. NO. 1587, 91st Cong., 1st Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4411, 4415 (intent is to allow the consumer to examine all filed information excluding sources for investigative information). The House and Senate conferees explicitly stated that a consumer may "examine all the information in his file," although § 1681a(g)'s language precludes the physical handling of the file itself. *Id.*

Under some circumstances, the agency must disclose the sources of information and recent consumer report recipients. *See* 15 U.S.C. § 1681g(a)(2) (consumer has right to disclosure of all of file's informational sources, except when those sources have been used *solely* for preparing an investigative consumer report); *id.* § 1681g(a)(3)(A), (B) (disclosure of recipients required if the consumer report was furnished for employment purposes within two years preceding the request or for any other purpose within six months preceding the request).

63. *Id.* § 1681i(a). *See* FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,814-15 (at a minimum, the agency must recheck the original sources but, preferably, should also contact additional sources). If upon reinvestigation the information is found to be inaccurate or cannot be verified, it must be deleted. 15 U.S.C. § 1681i(a).

An exception to required reinvestigation arises when the agency has a reasonable belief that the request is frivolous. *Id.* The FTC guidelines, however, assert that the agency should presume "that the consumer's complaint is bona fide" absent "clear and convincing evidence to the contrary." FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,814.

64. *See* 15 U.S.C. § 1681i(b), (c) (consumer reporting agency must "clearly note" that the consumer disputes the information and must also furnish the consumer's statement or a "clear and accurate" summary of the statement).

65. *Id.* § 1681o; *see generally* Note, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act*, 47 S. CAL. L. REV. 1070, 1096-1124 (1974) (analyzing the impact and shortcomings of the FCRA's negligent noncompliance remedy). Recoverable damages may include humiliation, mental distress, and all other types of compensatory awards. *See, e.g.*, Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509 (5th Cir. 1982) (upholding $10,000 award for humiliation and mental distress).

66. 15 U.S.C. § 1681n. *See, e.g.*, Carroll v. Exxon Co., U.S.A., 434 F. Supp. 557, 560-61 (E.D. La. 1977) (user willfully violated the Act by neglecting to inform the credit applicant of the agency's name after denial of credit); Collins v. Retail Credit Co., 410 F. Supp. 924, 927, 931-32 (E.D. Mich. 1976) (willful vio-

provisions.[67]

Because a consumer's right to enforce the FCRA's protections depends on finding a *consumer report*,[68] Congress focused considerable attention on the Act's consumer report definition, changing it drastically between the bill's initial introduction in the Senate and its final enactment.[69] Senator Proxmire's origi-

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lation by agency for reporting false accusations of excessive drinking habits and low moral character and refusing to reinvestigate); Millstone v. O'Hanlon Reports, Inc., 383 F. Supp. 269, 274-75 (E.D. Mo. 1974), *aff'd*, 528 F.2d 829 (8th Cir. 1976) (holding that the company's repeated refusals to disclose the report, its knowing inclusion of false information, and its abhorent procedures constituted a willful violation of the FCRA).

67. In addition to civil liability, a user may be held criminally liable for obtaining any information from a consumer reporting agency under false pretenses. 15 U.S.C. § 1681q.

68. Individuals are granted some rights that are independent of whether the information constitutes a consumer report under the Act. *See supra* notes 61-63 and accompanying text.

69. When Senator Proxmire first proposed his credit reporting bill to the Senate in 1968, the scope provision provided:

> The term 'credit report' means any written or oral report, recommendation, or representation as to the credit worthiness, standing, or capacity of any individual, and includes any information which is sought or given for the purpose of serving as the basis for a judgment as to any of the foregoing factors.

114 CONG. REC. 24,904 (1968). When the bill was reintroduced in 1969, Senator Proxmire had modified the definitional provision. *See* S. 823, 91st Cong., 1st Sess., 115 CONG. REC. 2415 (1969). The new definition appeared in two parts. "Credit report" was defined as a "communication of any credit rating, or of any information which is sought or given for the purpose of serving as a basis for a credit rating." *Id.* § 163(c). The bill's definition of "credit rating" expanded the regulated information to include not only credit information but also information on the subject's character or general reputation. *Id.* § 163(b).

The 1969 bill's structure also had been altered. The bill contained a new permissible dissemination provision which served as the forerunner to the current Act's § 1681b (restricting consumer reporting agencies' lawful right to disseminate consumer reports). It stated a two-part requirement. Reporting agencies could furnish the information they collected *only* "(1) to persons with a legitimate business need for the information and who [intended] to use the information in connection with a prospective consumer credit or other transaction with the individual on whom the information [was] furnished; and (2) for the purposes disclosed in the collection of the information." S. 823, 91st Cong., 1st Sess. § 164(f)(1), (2), 115 CONG. REC. 2415 (1969). The provision governing the credit report definition, which dictated the bill's intended scope, was entirely independent of the new provision restricting permissible dissemination of credit reports.

The 1969 bill was then reported to the Senate Committee on Banking and Currency, which vigorously debated the bill's language throughout five days of hearings. *See Hearings on S. 823, supra* note 35, *passim*. The committee fundamentally changed the bill's definitions, which had the effect of broadening its scope. The regulated reports, identified in the 1969 bill as "credit reports," were renamed "consumer reports" to reflect Congress's intent that the Act

nal bill, containing relatively simple definitions,[70] met with vigorous debate during the legislative hearings,[71] and the Senate Committee on Banking and Currency and the reporting industry made numerous compromises before a consensus was reached.[72] When finally reported out of committee, the consumer report definition had been substantially revised; it was both more complex and significantly broader than the original definition.[73]

As enacted, FCRA section 1681a(d) defines "consumer report" as any information communicated by a consumer reporting agency[74] bearing on a consumer's[75] credit capacity, character, or general reputation *"which is used or expected to be used or collected in whole or in part"* for a statutory purpose.[76] The statutory purposes enumerated in section 1681a(d) include establishing eligibility for credit, insurance, or employment, and *"other purposes authorized under section 1681b."*[77]

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regulate more than credit reports. The substance of the consumer report definition also was changed. The 1969 bill essentially covered credit and general character and reputation information used in connection with a consumer transaction for the purpose of serving as the basis of a credit rating. As reported out of committee in 1970 and as finally enacted, the bill covered credit and general character and reputation information *"used or expected to be used or collected"* for insurance, credit, employment, or licensing purposes, or used in connection with a business transaction involving the consumer. 15 U.S.C. § 1681a(d) (emphasis added); *see supra* note 20. Thus, the definition had been broadened to cover information not only used, but also expected to be used or collected for statutory purposes. Moreover, the statutory purposes had been expanded significantly beyond the original credit rating purpose to encompass numerous consumer transactions. Congress not only augmented the purposes enumerated in the Act's definitional section but incorporated § 1681b's purposes as well.

The evolution of the statutory language during the enactment process is an important guide in ascertaining the purpose and intended effect of the bill as passed. *See generally* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.04, at 300-05 (C. Sands rev. 4th ed. 1984) (describing use of the enactment process in statutory construction). The evolution of the FCRA's statutory language, when analyzed in light of the underlying reasons for the changes, is crucial to FCRA interpretation. *See infra* notes 150, 156, 190 & 207 and accompanying text (discussing the reasons that underlie the "used or collected" language, the incorporation provision, and the current permissible dissemination provision).

70. *See supra* note 69.
71. *See Hearings on S. 823, supra* note 35, *passim.*
72. *See infra* notes 154-57 & 189-91 and accompanying text.
73. *See supra* note 69.
74. See *supra* note 5 for the definition of consumer reporting agency.
75. For the Act's definition of "consumer," see *supra* note 16.
76. 15 U.S.C. § 1681a(d) (emphasis added); *see supra* note 20.
77. 15 U.S.C. § 1681a(d) (emphasis added); *see supra* note 20.

The supplemental purposes listed in section 1681b[78] include use of information *"in connection with a business transaction involving the consumer."*[79] Section 1681b, however, is not a definitional section; it is a substantive section that limits a consumer reporting agency's lawful right to disseminate consumer reports.[80]

The consumer report definition's incorporation of a sub-

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78. Section 1681b provides in relevant part:

> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> . . .
>
> (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 . . . 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.

15 U.S.C. § 1681b. Section 1681b's enforcing provision, § 1681e(a), requires agencies to employ "reasonable procedures" to ensure against unauthorized disclosures of consumer reports. *See id.* § 1681e(a).

79. *Id.* § 1681b(3)(E) (emphasis added).

80. According to the FCRA's legislative history, § 1681b was included in the Act to protect the consumer's interest in file confidentiality and personal privacy by restricting the ability of agencies to disseminate reports. *See* 115 CONG. REC. 33,409-10 (1969) (statement of Senator Proxmire reporting the bill to the Senate floor); *id.* at 2415 (1969); 116 CONG. REC. 35,941 (1970). The hearings on the bill confirmed that agencies were indiscriminately distributing highly sensitive information in response to random letters or phone calls, without identifying the requesting party or its intended use. 115 CONG. REC. 33,412 (1969) (statement of Congressman Williams). Under the FCRA, the agency may not release a consumer report unless a legitimate transaction between the requesting party and the report's subject is imminent. Heath v. Credit Bureau, 618 F.2d 693, 696 (10th Cir. 1980).

The Act requires compliance with the permissible dissemination provision, § 1681b, through § 1681e(a). Section 1681e(a) requires agencies to adopt reasonable procedures to ensure that prospective users of consumer reports identify themselves and certify that the information requested will be used only for a statutorily permitted purpose. 15 U.S.C. § 1681e(a); *see* Middlebrooks v. Retail Credit Co., 416 F. Supp. 1013, 1016 (N.D. Ga. 1976) (once the information's relevancy and a permissible purpose are established, judicial inquiry is at an end). The Federal Trade Commission advises that reasonable procedures include using written subscriber agreements that bind consumer report users to comply with the FCRA's restrictions on permissible uses and enforcing stringently identification procedures to avoid unauthorized access through a reporting agency account. *See* FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,807-08. If the agency releases a consumer report absent a permissible pur-

stantive section complicates FCRA interpretation. The FCRA's scope depends first on the interpretation of the "used or collected" language, and second on the extent to which section 1681a(d)'s incorporation provision includes section 1681b's provisions—in particular, its business transaction provision.[81] Courts have followed two distinct approaches for determining whether a report is a consumer report in light of the "used or collected" language. These approaches can be characterized as an actual use test and a collection purpose test. Courts applying the actual use test examine whether the information communicated is in fact used for a statutory purpose.[82] This test

pose under § 1681b, it may be civilly liable for negligent or willful violation of the Act. *See* Boothe v. TRW Credit Data, 523 F. Supp. 631 (S.D.N.Y. 1981).

81. Case law interpreting § 1681a(d)'s incorporation of § 1681b has focused on the extent to which information used "in connection with a business transaction involving the consumer," § 1681b(3)(E), expands the consumer report definition in § 1681a(d), and what activities are "business transactions" for purposes of the consumer report definition. *See* New Palm Gardens, Inc., v. Bentley, No. 82-1361-MA (D. Mass. Aug. 11, 1983) (LEXIS, Genfed library, Dist file) (report used in connection with a government investigation of defendant's nightclub not a consumer report because the investigation was not a business transaction between the officials and the defendant); Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 830-31 (N.D. Ga. 1979) (an insurance claim report is not a consumer report because evaluating an insured's disability claim is not a business transaction between the insured and insurer); Horton v. Pinkerton's Inc., No. H-75-C-17, slip op. at 7 (E.D. Ark. Nov. 19, 1976) (a report used in connection with judicial or quasi-judicial proceedings is not a consumer report because such proceedings are not a business transaction between the parties); Ley v. Boron Oil Co., 419 F. Supp. 1240, 1243 (W.D. Pa. 1976) (report used to investigate letter writer's identity is not a consumer report because a threatened lawsuit is not a business transaction between parties); Daniels v. Retail Credit Co., No. 73-CV-484 (N.D.N.Y. April 28, 1976) (LEXIS, Genfed library, Dist file) (a report used in connection with litigation arising from a contractual dispute is not a consumer report because litigation does not constitute a business transaction between parties); Greenway v. Informational Dynamics, Ltd., 399 F. Supp. 1092, 1095 (D. Ariz. 1974) (a report used in connection with the purchase of goods or services is a consumer report because such transactions constitute business transactions between the parties), *aff'd,* 524 F.2d 1145 (9th Cir. 1975), *cert. dismissed,* 424 U.S. 936 (1976); Beresh v. Retail Credit Co., 358 F. Supp. 260, 261-62 (C.D. Cal. 1973) (an insurance claim report is a consumer report because evaluating a disability claim is a business transaction between the insurer and the insured); Fernandez v. Retail Credit Co., 349 F. Supp. 652, 654-55 (E.D. La. 1972) (report used to evaluate an applicant's eligibility for business insurance is not a consumer report because purchase of an insurance policy for business use is not a business transaction between the buyer and the seller as contemplated by the Act).

82. *See* Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1148 (3d Cir. 1986); Matthews v. Worthen Bank & Trust Co., 741 F.2d 217, 219 (8th Cir. 1984); D'Angelo v. Wilmington Medical Center, 515 F. Supp. 1250, 1254 (D. Del. 1981); *Cochran,* 472 F. Supp. at 830-31; Henry v. Forbes, 433 F. Supp. 5, 8 (D. Minn. 1976); Horton v. Pinkerton's, Inc., No. H-75-C-17, slip op. at 7 (E.D. Ark.

generally relies on Congress's express intention to include or to exclude specific uses of reports from the FCRA's purview.[83] Taking a broader approach, courts that apply the collection purpose test look to the reporting agency's original purpose for collecting the information.[84] If the original collection purpose was within the FCRA's scope, this test classifies subsequent communication of the information as a consumer report, regardless of the information's actual use.[85] The collection purpose test relies on the Act's plain language[86] and structure.[87]

Nov. 19, 1976); *Ley,* 419 F. Supp. at 1242; Gardner v. Investigators, Inc., 413 F. Supp. 780, 781 (M.D. Fla. 1976); Daniels v. Retail Credit Co., No. 73-CV-484 (N.D.N.Y. April 28, 1976); Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 254 (N.D. Ga. 1973); *Fernandez,* 349 F. Supp. at 654; Kiblen v. Pickle, 33 Wash. App. 387, 392, 395, 653 P.2d 1339, 1341, 1342 (1982); McKeel v. Retail Credit Co., No. 53130, slip op. at 5 (4th D. Idaho, March 10, 1975). *See, e.g.,* Note, *The Fair Credit Reporting Act: Are Business Credit Reports Regulated?,* 1971 DUKE L.J. 1229, 1245-46 (informational item can attain consumer report status through its use for a consumer purpose).

83. For example, courts generally exclude reports *used* for business purposes without regard to whether the report contains information originally collected for statutory purposes, because Congress expressly intended to exclude commercial reporting from the Act's purview. *See infra* note 89 and accompanying text.

84. *See Heath,* 618 F.2d at 696; Ippolito v. WNS, Inc., 636 F. Supp. 471, 473 (N.D. Ill. 1986); Russell v. Shelter Fin. Servs., 604 F. Supp. 201, 202 (W.D. Mo. 1984); *Boothe,* 523 F. Supp. at 634; Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 671-72 (M.D.N.C. 1978); Belshaw v. Credit Bureau, 392 F. Supp. 1356 (D. Ariz. 1975); Rasor v. Retail Credit Co., 87 Wash. 2d 516, 522-23, 554 P.2d 1041, 1046 (1976). *See e.g.,* Note, *supra* note 82, at 1246 (the "or collected" language focuses on the agency's intent at the time the information is gathered).

85. *Boothe,* 523 F. Supp. at 634; *see also Heath,* 618 F.2d at 696 (information originally collected for statutory purposes is automatically a consumer report when transmitted); *Rasor,* 87 Wash. 2d at 523, 554 P.2d at 1046 (once information is collected for a statutory purpose, it is a consumer report under the Act, and its character is not changed by its subsequent use for a nonstatutory purpose).

The Federal Trade Commission, charged with enforcement of the FCRA, *see* 15 U.S.C. § 1681s, concurs in this interpretation of the Act. The Commission states that

> [a] reporting agency or requesting party cannot contend that the law does not apply because the report will be used for some purpose *other* than credit, insurance or employment and, therefore, it is not a "consumer report". The law applies because the information was *collected* by the agency for one or more of the permissible purposes . . . .

FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,807.

86. *See Heath,* 618 F.2d at 696 (the "used or collected" language is critical in FCRA analysis and must be given effect to avoid improperly limiting the Act's scope and undermining Congress's intention to protect consumers' privacy); *Ippolito,* 636 F. Supp. at 473 (the consumer report definition's language requires inquiry into the agency's collection motives); *Houghton,* 615 F. Supp. at 304 n.9 (the FCRA's legislative history provides no persuasive reason for deviating from the Act's plain language, which requires inquiry into the agency's

Courts often interpret the "used or collected" language in suits involving a report that contains information about the individual consumer but was obtained for business, as opposed to consumer, purposes.[88] In this context, most courts have applied the actual use test, relying on Congress's intention to exclude commercial reporting from the FCRA's scope,[89] leaving the report unregulated and the consumer unprotected.[90] Several courts, however, have adopted the collection purpose test in the business report context, giving full effect to the Act's plain lan-

original collection purpose); *Rice*, 450 F. Supp. at 672 (restricting the FCRA's scope by focusing only on the report's actual use is contrary to the Act's plain language and undermines consumer protection); *Rasor*, 87 Wash. 2d at 522, 554 P.2d at 1046 (the "used or collected" language, expressing Congress's intent regarding the Act's scope, should be given its ordinary meaning).

87. *See infra* notes 129-33 & 159-62 and accompanying text.

88. *See* Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 253-54 (N.D. Ga. 1973) (a credit report concerning business's principal used in connection with the company's lease application was not a consumer report regulated by the Act because the report was *used* to establish eligibility for commercial rather than consumer credit); Fernandez v. Retail Credit Co., 349 F. Supp. 652, 654-55 (E.D. La. 1972) (report on corporation's president used in connection with the corporation's application for key man insurance was not a consumer report because it was not *used* to determine eligibility for insurance for personal, family, or household purposes).

Agencies collecting and providing information exclusively for use in connection with a consumer's transactions in his or her business capacity are not regulated by the Act, regardless of whether their reports contain information on the individual consumer. *See, e.g.*, Wrigley v. Dun & Bradstreet, Inc., 375 F. Supp. 969, 970-71 (N.D. Ga.) (personal credit reports issued by Dun & Bradstreet to users contractually bound to use the reports in connection with only commercial transactions are not covered by the FCRA), *aff'd*, 500 F.2d 1183 (5th Cir. 1974).

89. The FCRA's scope is clearly limited to consumer reporting and was not intended to cover reports "utilized for business, commercial, or professional purposes." 116 CONG. REC. 36,572 (1970); *see also* S. REP. NO. 517, 91st Cong., 1st Sess. 1 (1969) ("[T]he bill does not cover business credit reports or business insurance reports."); *Hearings on S. 823*, *supra* note 35, at 16-17 (the bill does not cover reports on businesses). This limitation is further manifested in the Act itself, which defines "consumer" as an individual. 15 U.S.C. § 1681a(c).

90. *See* Matthews v. Worthen Bank & Trust Co., 741 F.2d 217, 219 (8th Cir. 1984) (a credit report used solely to evaluate applicant's financial capacity for a commercial lease is exempt from FCRA coverage); *Wrigley*, 375 F. Supp. at 971 (report containing information on the plaintiff's personal finances used in connection with his construction company's application for commercial credit is not a consumer report regulated by the FCRA); *Sizemore*, 360 F. Supp. at 254 (personal credit report issued on business's owner used to evaluate the business's lease application is not a consumer report for purposes of the FCRA); *Fernandez*, 349 F. Supp. at 654-55 (personal credit report obtained on company's president used to evaluate the company's application for insurance is not a consumer report within the Act's scope).

guage and bringing such reports within the FCRA's scope.[91] Courts have followed both the narrow[92] and the broad[93] construction of the "used or collected" language in other contexts as well.

Courts also differ regarding the extent to which section 1681b's business transaction provision, included in the consumer report definition through the incorporation provision,[94] expands the FCRA's transactional scope.[95] Most courts have read the business transaction provision narrowly when the re-

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91. *See* Boothe v. TRW Credit Data, 523 F. Supp. 631, 634 (S.D.N.Y. 1981) (a credit report on the principal of a business obtained by another company to investigate a suspected fraud must be analyzed with reference to the agency's original collection purpose); Rasor v. Retail Credit Co., 87 Wash. 2d 516, 522, 554 P.2d 1041, 1046 (1976) (information originally collected for consumer's insurance application subsequently used in connection with her business's credit application is a consumer report within the Act).

92. *See* Henry v. Forbes, 433 F. Supp. 5, 8-10 (D. Minn. 1976) (report covering financial status and personal background *used* for political purposes is not a consumer report); Horton v. Pinkerton's, Inc., No. H-75-C-17, slip op. at 7 (E.D. Ark. Nov. 19, 1976) (report *used* to defend employer in workman's compensation hearing is not a consumer report embraced by the Act); Ley v. Boron Oil Co., 419 F. Supp. 1240, 1242 (W.D. Pa. 1976) (credit report *used* to investigate letter writer's identity is not a consumer report); Gardner v. Investigators, Inc., 413 F. Supp. 780, 781 (M.D. Fla. 1976) (report *used* in connection with child support litigation is not a consumer report regulated by the FCRA).

93. Heath v. Credit Bureau, 618 F.2d 693 (10th Cir. 1980) (a report covering bankruptcy information allegedly used by plaintiff's union to humiliate and discredit him must be analyzed with reference to the agency's original collection purpose); Ippolito v. WNS, Inc., 636 F. Supp. 471, 473 (N.D. Ill. 1986) (a report containing financial and personal information used in connection with a declaratory judgment action is a consumer report because the information was presumptively *collected* for a statutory purpose and the agency expected use consistent with the Act); Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1359 (D. Ariz. 1975) (a report obtained by a law firm from a consumer reporting agency allegedly used to discredit the plaintiff was a consumer report because it *could* be used for a statutory purpose).

94. *See* 15 U.S.C. 1681a(d)(3).

95. For cases holding that § 1681b's business transaction provision, as incorporated, does not expand the consumer report definition beyond the contours of § 1681a(d), see Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 831 (N.D. Ga. 1979); Fernandez v. Retail Credit Co., 349 F. Supp. 652, 654 (E.D. La. 1972); Kiblen v. Pickle, 33 Wash. App. 387, 395, 653 P.2d 1338, 1342 (1982); McKeel v. Retail Credit Co., Civil No. 53130, slip op. at 5 (4th D. Idaho March 10, 1975).

For cases holding that § 1681b's business transaction provision, as incorporated, does expand the consumer report definition beyond the contours of § 1681a(d), see *Belshaw*, 392 F. Supp. at 1359-60; Greenway v. Information Dynamics, Ltd., 399 F. Supp. 1092, 1095 (D. Ariz. 1974), *aff'd*, 524 F.2d 1145 (9th Cir. 1975), *cert. dismissed*, 424 U.S. 936 (1976); Beresh v. Retail Credit Co., 358 F. Supp. 260, 262 (C.D. Cal. 1973).

port litigated is an insurance claim report,[96] business credit report, or business insurance report,[97] because these types of reports raise conflicts between section 1681a(d)'s consumer report definition and the incorporated section.[98] Section 1681a(d)'s consumer report definition provides that credit and insurance reports fall under the Act only when collected or used in connection with credit or insurance "to be used primarily for personal, family, or household purposes."[99] Section 1681a(d) further provides that only insurance reports collected

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96. Courts have uniformly held that third party insurance claim reports obtained in connection with defense of litigation fall outside the parameters of the consumer report definition. *See* Horton v. Pinkerton's Inc., No. H-75-C-17 (E.D. Ark. Nov. 19, 1976); Daniels v. Retail Credit Co., No. 73-CV-484 (N.D.N.Y. April 28, 1976) (LEXIS, Genfed library, Dist file); McKeel v. Retail Credit Co., Civil No. 53130, slip op. at 5 (4th D. Idaho March 10, 1975).

Courts have split regarding whether first party insurance claim reports, obtained to evaluate an insured's claim for benefits under an existing policy, are encompassed by the business transaction provision. The weight of authority, however, finds that the report is not a consumer report within the FCRA's scope. *See, e.g., Cochran*, 472 F. Supp. at 831 (because the business transaction provision, as incorporated, conforms to the contours of § 1681a(d)'s consumer report definition, claim reports are excluded from the FCRA's scope); *Kiblen*, 33 Wash. App. at 395, 653 P.2d at 1342 (section 1681a(d)'s consumer report definition limits insurance reports to those used to evaluate an applicant's eligibility for insurance, and the business transaction provision cannot expand the consumer report definition to encompass reports used to evaluate claims). *But see* Beresh v. Retail Credit Co., 358 F. Supp. 260 (C.D. Cal. 1973) (section 1681a(d)'s consumer report definition is expanded by the business transaction provision to cover a claim report used to evaluate an insured's claim for benefits under an existing policy).

97. *See, e.g., Fernandez*, 349 F. Supp. at 654 (section 1681a(d)'s consumer report definition is primary and, therefore, the business transaction provision does not bring a report used to determine eligibility for business insurance, rather than insurance for personal or household uses, within the consumer report definition).

98. For example, in *Cochran*, 472 F. Supp. at 831, the court held that a disability claim report was not a consumer report under the FCRA. The court discerned from § 1681a(d)'s consumer report definition that Congress intended to limit the Act's coverage of insurance reports to those prepared for determining eligibility for coverage or fitness for underwriting. *Id.* at 830-31. Complete incorporation of § 1681b's business transaction provision into the consumer report definition, however, would emasculate these limitations. *Id.* The court held that the apparent conflict between §§ 1681a(d) and 1681b is resolved by "recognizing the preeminence of § 1681a and then conforming the breadth of § 1681b to the former's bounds." *Id.* at 831. In the *Cochran* court's view, § 1681b does not expand the consumer report definition beyond the bounds of § 1681a(d), and a claim for disability benefits does not constitute a business transaction between the insurer and the insured under the statute. *Id.* at 831. *See also* Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 COLUM. L. REV. 458, 471 (1976) (arguing that § 1681b only supplements the consumer report definition).

99. 15 U.S.C. § 1681a(d)(1).

or used to determine an applicant's "eligibility" for insurance[100] are within the FCRA's scope.[101] Unlimited incorporation of section 1681b's business transaction provision would render these restrictions meaningless.[102] Several courts, however, have concluded that Congress intended to extend the Act's transactional scope beyond section 1681a(d) and have incorporated completely section 1681b's business transaction provision, thus construing the consumer report definition broadly.[103]

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100. Section 1681a(d)'s consumer report definition, as supplemented by § 1681b, also encompasses insurance reports used for determining a consumer's fitness for underwriting. *See id.* § 1681b(3)(C); *infra* note 119.

101. *See id.* § 1681a(d). Although the "eligibility" language of § 1681a(d) modifies the credit purpose in addition to the insurance purpose, this limitation on the consumer report definition's coverage of credit reports is removed through the incorporation of § 1681b's credit provision. *See id.* § 1681b(3)(A). Reading §§ 1681a(d) and 1681b together, the FCRA covers reports used or collected for determining an applicant's eligibility for credit, or used in reviewing or collecting on the report subject's existing credit account. *See* §§ 1681a(d)(1), 1681b(3)(A).

102. *See Cochran,* 472 F. Supp. at 830-31 (if the business transaction provision is read at its broadest, it encompasses all reports and the enumeration of covered reports in § 1681a(d) would be meaningless). Although § 1681a(d)'s language is not restrictive on its face, it should be read restrictively. *See* FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,803 ("primarily for personal, family, or household purposes" language "serves as a limiting factor" in delineating the Act's scope regarding credit and insurance reports); *infra* note 119 (case law and Federal Trade Commission interpretations support interpreting "eligibility" language as a restriction on the Act's scope regarding insurance reports).

103. *See, e.g.,* Greenway v. Information Dynamics, Ltd, 524 F.2d 1145 (9th Cir. 1976), *aff'g* 399 F. Supp. 1092 (D. Ariz. 1974), *cert. dismissed,* 424 U.S. 936 (1976). In *Greenway,* the Ninth Circuit held that lists of consumers' check cashing histories were consumer reports under the FCRA. *Id.* at 1146. The only purpose arguably applicable to the lists, aside from the business transaction provision, was the "eligibility for credit" purpose. *See supra* note 20. Checks, however, are "tantamount to cash." *Greenway,* 524 F.2d at 1146 (Wright, J., dissenting). The lists disseminated by IDL, therefore, did not factor into a decision of whether to extend credit, but rather were used only to decide whether to transact business with the consumer. *Greenway,* 524 F.2d at 1146; *Greenway,* 399 F. Supp. at 1095. The court thus relied solely on the business transaction provision to expand the consumer report definition beyond § 1681a(d)'s contours. *See also* Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975) (holding that § 1681a(d) is not the sole determinant of the Act's scope, rather it is expanded by § 1681b); Beresh v. Retail Credit Co., 358 F. Supp. 260 (C.D. Cal. 1973) (holding that the business transaction provision extends the Act's scope beyond the contours of § 1681a(d)).

II. *HOUGHTON*'S RESOLUTION OF THE DEFINITIONAL DILEMMA

A. The Court's Analysis

In *Houghton v. New Jersey Manufacturers Insurance Co.*,[104] the Third Circuit announced a narrow interpretation of the FCRA's scope that favors the reporting industry at the expense of consumers. The court first analyzed whether the insurance company had actually used the Equifax report for a purpose enumerated in the consumer report definition that would bring it within the FCRA's scope. Although omitting a direct reference to the "used or collected" language,[105] the court noted that the insurance company requested the report to ascertain the validity of Houghton's personal injury claim, not to evaluate her eligibility for credit, insurance, or employment.[106] In the court's view, the insurance company had not requested the report for a purpose encompassed by section 1681a(d)'s consumer report definition[107] and, therefore, had not requested an investigative consumer report.[108] The court thus implicitly held that the report's *actual use* was the appropriate focus in defining a consumer report.[109] Because under the court's narrow construction of the "used or collected" language no consumer report was involved, the FCRA did not apply and the insurance company was not liable for failing to comply with the Act's notice provisions.[110]

The Third Circuit next employed a *past* actual use analysis to decide whether the insurance company, after having received the Equifax report, could be liable for failing to disclose the re-

104. 795 F.2d 1144 (3d Cir. 1986), *rev'g* 615 F. Supp. 299 (E.D. Pa. 1985).

105. The absence of a direct reference to the "used or collected" language enabled the court to focus solely on the insurance company's actual use of the report without having to expound its reason for ignoring the plain language of the FCRA. Without explaining why the district court's focus on the collection purpose language was incorrect, the appellate court simply asserted that "[o]ur examination of the statute leads to a different interpretation." *Id.* at 1148.

106. *Id.*

107. *Id.*

108. It was undisputed that Equifax had investigated Houghton within the meaning of the investigative consumer report definition. *See supra* note 21. The determinative issue, therefore, was whether the report was a consumer report within the Act.

109. *Houghton*, 795 F.2d at 1148.

110. *Id.* The notice provisions require investigative consumer report users to notify the consumer of the request and disclose the type of information that may be collected. *See* 15 U.S.C. § 1681d(a); *supra* note 60 and accompanying text.

port's contents in response to Houghton's requests.[111] The Third Circuit rejected the district court's position that Equifax's search of existing credit files to prepare the report satisfied the consumer report definition.[112] The court indicated that if the existing credit information actually had been used in the past for a statutory purpose, its reuse in the Equifax report would constitute a consumer report, provided that the insurance company had notice.[113] Because Equifax's report failed to indicate whether the existing credit information previously had been used to establish Houghton's eligibility for credit, insurance, or employment,[114] the court concluded that the report was not an investigative consumer report on its face.[115] Without notice, the insurance company was not legally obligated to comply with the Act's disclosure provisions.[116]

Alternatively, the Third Circuit in *Houghton* analyzed whether the insurance company's actual use of the report fell within the business transaction provision as incorporated into the consumer report definition. In construing the interrelation-

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111. *Houghton,* 795 F.2d at 1148-49.

112. *Id.* at 1149. For the district court's discussion of the issue, see *Houghton,* 615 F. Supp. at 303.

113. *Houghton,* 795 F.2d at 1149. This Comment advocates adopting the collection purpose test for consumer report users only where the user knew or had reason to know of the agency's purpose for collecting the report's information. *See infra* notes 163-77 and accompanying text. The Third Circuit's view, focusing on the information's past actual use combined with notice to the user of the past use, is overly stringent and should be rejected. The court would exclude from the consumer report definition information previously collected and filed for statutory purposes but never used for those purposes before the current request. Moreover, the court's standard for adequate notice is so limited it would enable consumer report users in many instances to circumvent compliance with the FCRA entirely. In practical terms, the court's standard is that the user is adequately notified only when the agency expressly tells the user the report is a consumer report or chronicles the past actual use of the report's information on the face of the report. A user would, therefore, have no obligation to comply with the Act, despite subjective knowledge that a consumer report had been received, unless the agency took some affirmative action to put the user on notice. This Comment rejects this limited standard, substituting one that comports with business customs and common agency procedures. *See infra* notes 164-67 and accompanying text.

114. 795 F.2d at 1149.

115. The Third Circuit held that the phrase "available credit files" failed to give the report sufficient detail to alert the insurance company that a consumer report had in fact been received. *Id.*

116. *Id.* The court left open the issue whether a user would be required under § 1681d(b) to disclose in response to a consumer's request when the user had not requested an investigative consumer report from the agency, but had in fact received a report clearly within the statutory definition of an investigative consumer report. *Id.*

ship of sections 1681a(d) and 1681b[117] the court refused to use section 1681b's business transaction provision to broaden the consumer report definition beyond section 1681a(d)'s contours.[118] The court reasoned that complete incorporation of the business transaction provision would nullify the specificity of sections 1681a(d) and 1681b.[119] Instead, the Third Circuit held

117. *Id.* at 1149-50.

118. *Id.* at 1149.

119. *Id.* Section 1681a(d), as supplemented by § 1681b, appears to limit the Act's scope to insurance reports collected or used to evaluate eligibility for insurance or fitness for underwriting. *Id.* at 1149-50. Using the business transaction provision to extend the Act's coverage to insurance claim reports presents a conflict, which the Third Circuit resolved in favor of § 1681a(d). *Id.* at 1150.

Arguably, first party insurance claim reports, used to evaluate an insured's claim for benefits under an existing policy, *do* fall within the FCRA's scope. The incorporated business transaction provision could cover such claim reports because they are used in the context of a consumer relationship in a transaction similar in substance to the Act's other statutory transactions. *See infra* note 204 and accompanying text. According to this argument, incorporation does not present a conflict with § 1681a(d)'s provisions regarding insurance reports because Congress apparently did not intend the provisions to be definitive and to restrict the Act's scope. Indeed, the FCRA's legislative history suggests that Congress did not detail the insurance purposes—eligibility for coverage and fitness for underwriting—in an attempt to restrict the Act's scope. Rather, Congress ostensibly sought to write a clear, self-enforcing law, *see infra* note 190, and to allay confusion surrounding the Act's scope by clarifying its expansiveness. *See infra* note 150. Congress thus specifically enumerated the primary uses of consumer information for which it wanted to ensure coverage. *See infra* note 207. Yet Congress also included the business transaction provision's expansive language within the consumer report definition to provide flexibility for unanticipated uses. *See infra* notes 189-90 and accompanying text. Claim reporting may be an example of such an unanticipated use. Moreover, in revising the definitional sections, Congress did not use clearly restrictive language, such as "only," to indicate an intention that the enumerated insurance purposes be definitive. Under this analysis, and consistent with the spirit of the Act, *see infra* note 218 and accompanying text, claim reports would be regulated as consumer reports.

The better argument, however, is that the FCRA is inapplicable to first party claim reports. Despite Congress's arguable intent, the language it actually chose restricts the Act's scope to the enumerated types of insurance reports, *see supra* note 102, because statutory language should be read to preserve the substance and effect of the statute's provisions. *See infra* note 159. With the exception of the court in Beresh v. Retail Credit Co., 358 F. Supp. 260 (C.D. Cal. 1973) (*Beresh I*), all courts resolving the issue have concluded that covering claim reports through the business transaction provision conflicts with § 1681a(d)'s limitations and thus claim reports are excluded. *See supra* note 96 and cases cited therein. Moreover, *Beresh I* does not stand for the proposition that a claim report used to evaluate a claim for insurance benefits falls within the business transaction provision. In *Beresh I*, the district court denied the defendant agency's motion for summary judgment, holding that the report was procured "in connection with a business transaction" between the insured and the insurer. *Beresh I*, 358 F. Supp. at 262. After a trial

that the business transaction provision should be limited to

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on the merits, however, the court disposed of the case on other grounds and concluded that it was unnecessary to determine whether claim reports are properly within the FCRA's scope. *See* Beresh v. Retail Credit Co., Inc., No. CV 73-240 AWT, slip op. at 6-7 (C.D. Cal. March 3, 1981). Relying on *Beresh I* to support a construction of the Act's scope to cover claim reports would therefore be misplaced. *See, e.g.,* Cochran v. Metropolitan Life Ins. Co. 472 F. Supp. 827, 830 (N.D. Ga. 1979). Furthermore, because the *Beresh I* court failed to engage in a reasoned analysis of the effect of its holding on the statute's language, it has been routinely criticized. *See Houghton,* 795 F.2d at 1150 (citing *Cochran,* 472 F. Supp. at 832; Daniels v. Retail Credit Co., No. 72 CV-484 (N.D.N.Y. Apr. 28, 1976) (LEXIS, Genfed library, Dist file); Kiblen v. Pickle, 33 Wash. App. 387, 395, 653 P.2d 1338, 1342 (1982).

The Federal Trade Commission's interpretations of the FCRA's scope also exclude claim reports used to evaluate the merits of a claim for benefits. *See* FTC, COMPLIANCE, *supra* note 49, ¶ 11,307, at 59,828-29. The Commission maintains that claim reports are excluded because they are not used to determine an applicant's eligibility for insurance, nor are they used in connection with a business transaction between the insurance company and its insured. *Id.* The Commission has consistently affirmed this interpretation in its opinion letters. *See, e.g.,* Federal Trade Commission, Informal Staff Opinion Letter (July 18, 1978), *reprinted in* R. CLONTZ, FAIR CREDIT REPORTING MANUAL E-86 (1986 cum. supp.).

The FCRA's legislative history also suggests that the current consumer report definition does not apply to reports used to evaluate insurance claims. In 1973, Congress held hearings to address specifically the issue of amending the FCRA to cover claim reporting. *See Hearings on S. 2360, supra* note 30, at 62. These hearings, however, failed to produce legislation. After the 1973 hearings, Congress made three more attempts to amend the FCRA's scope to encompass claim reports, all of which failed. A 1975 Senate proposal would have regulated investigative type reports, including claim reports, without regard to the user's intended actual use of the report, *see* S. 1840, 94th Congress, 1st Sess., 121 CONG. REC. 16,329 (1975). A second proposal, designed in part to enhance consumer protection in the area of insurance reporting, was introduced in 1979 and reported to committee, *see* S. 1928, 96th Congress, 1st Sess., 125 CONG. REC. 29,117 (1979); *Fair Financial Information Practices Act: Hearings on S. 1928 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs,* 96th Cong., 1st Sess., 1324-25, 1330 (1980). The bill would have amended § 1681a(d) to include information used or collected for insurance claim purposes and § 1681b to permit dissemination of information in connection with insurance claims. The bill, however, was apparently never reported out of committee. Following the Senate proposals, the House introduced privacy protection amendments that were referred to committee. *See* H.R. 5559, 96th Congress, 1st Sess., 125 CONG. REC. 28,184 (1979). No individual hearings were held, however, and the bill was never reported out of committee. That Congress did not enact the proposed amendments, indicates that it is not inclined to change the Act's scope. *See, e.g.,* Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935) (rejecting proposed amendments is indicative of congressional intent).

Another argument for bringing claim reports within the FCRA's scope relies solely on § 1681a(d)'s language. The argument suggests that section 1681a(d)'s "eligibility for . . . insurance" language should be read broadly to include a report used to evaluate an insured's eligibility for benefits under an existing policy in addition to initial eligibility for the policy itself. *See Beresh I,*

transactions *related* to those transactions specified in section 1681a(d), the consumer report definition, and section 1681b, the incorporated section.[120] That is, "a consumer relationship must exist between the party requesting the report and the report's subject."[121] Finding that only the insurance company and its insured, Rosenfeld, had a consumer relationship, the court concluded that the Equifax report was not an investigative consumer report under the FCRA.[122] Consequently, the insurance company was not obligated to disclose the report to Houghton.[123]

B. CRITIQUE OF THE COURT'S ANALYSIS

In *Houghton* the Third Circuit interpreted narrowly the FCRA in the context of a suit against a report user. The Third Circuit narrowed the consumer report definition by focusing on the report's actual use, rejecting any inquiry into the agency's original collection purpose.[124] If employed in the context of a suit against a consumer reporting agency,[125] the *Houghton* court's actual use analysis would severely limit the FCRA's scope by narrowing the category of reports covered by the Act. For example, when an agency originally collects information for statutory purposes, the FCRA's express language defines the information as a consumer report.[126] By ignoring the col-

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358 F. Supp. at 262 (argument made by plaintiff). "Eligibility," however, should be interpreted restrictively. *See* FTC, COMPLIANCE, *supra* note 49, ¶ 11,307, at 59,828. The context of the language should be preserved. "Eligibility" modifies the phrase "for . . . insurance for personal, family, or household purposes" which, taken as a whole, speaks only to the initial purchase of insurance. *See Beresh I,* 358 F. Supp. at 262.

120. *Houghton,* 795 F.2d at 1149. The statutory transactions include "credit, insurance eligibility, employment, or licensing." *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1150.

124. *Id.* at 1148. Although the Third Circuit did not proffer an explanation, perhaps it rejected the collection purpose test because of the unfairness inherent in holding the insurance company liable for Equifax's collection purposes. The district court apparently had, in fact, held the insurance company strictly liable. It found that the Equifax report was a consumer report under the collection purpose test. *Houghton,* 615 F. Supp. at 303-04. From this holding and without discussing whether the insurance company had been negligent in its request, the court held that "[a]s a matter of law," the insurance company had violated the Act's notice and disclosure provisions. *Id.* at 305.

125. *Houghton* involved a suit against the report's user only. A suit against Equifax, however, has been filed. *See supra* note 13.

126. The FCRA specifically provides that information "used *or collected*" for a statutory purpose is a consumer report and within the Act's scope. *See* 15

lection purpose language, courts narrow substantially the consumer report definition's scope, excluding from the Act's purview reports Congress expressly intended to cover,[127] and thus deprive consumers of the right to invoke the FCRA's protections.[128]

In particular, the Third Circuit's narrow interpretation in the context of a consumer reporting agency suit would eviscerate the FCRA's express protections against unbridled dissemination of consumer reports.[129] Under the actual use test, an agency could disseminate information collected as a consumer report for nonstatutory purposes, and the report would remain outside the Act's scope.[130] For example, agencies could freely distribute consumer reports at the request of an opposing litigant, a political foe, or a business rival, even when no consumer transaction with the report's subject is contemplated.[131] Section 1681b and its enforcing provision, section 1681e, however, expressly restrict the dissemination of consumer reports to consumer transactions.[132] Thus, exclusive reliance on the actual use test to define consumer reports creates structural inconsistencies within the FCRA by rendering sections 1681b and 1681e(a) unenforceable and therefore meaningless.[133]

The Third Circuit also suggested that section 1681a(d)'s incorporation of section 1681b's business transaction provision does not expand the consumer report definition's transactional scope beyond the contours of section 1681a(d).[134] This narrow

U.S.C. § 1681a(d) (emphasis added); *see infra* notes 147-51 and accompanying text.

127. *See infra* note 149-50 and accompanying text.

128. For a discussion of the Act's protections that attach only to consumer reports, see *supra* notes 54-60 & 64 and accompanying text.

129. *See supra* note 78 (section 1681b provides that consumer reports may be released for the specifically enumerated purposes and "no other").

130. *See infra* notes 159-62 and accompanying text.

131. *See, e.g.,* Henry v. Forbes, 433 F. Supp. 5, 8 (D. Minn. 1976) (because report obtained for use in the context of a political battle was used for a nonstatutory purpose, the consumer reporting agency was free to disseminate information covering plaintiff's personal background, finances, and employment); Ley v. Boron Oil Co., 419 F. Supp. 1240, 1241-42 (W.D. Pa. 1976) (because report covering the plaintiff's financial status, employment, marital status, and other family details was used to ascertain the plaintiff's identity, a nonstatutory purpose, the agency could disseminate the information freely).

132. *See supra* note 78.

133. *See infra* notes 159-62 and accompanying text.

134. *Houghton*, 795 F.2d at 1149. *Accord* Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 831 (N.D. Ga. 1979) (section 1681b as incorporated into the consumer report definition conforms to § 1681a(d)'s parameters and does not expand the consumer report definition).

reading is contrary to the consumer report definition's plain language, which expressly incorporates, without qualification, all of section 1681b's purposes.[135] This restrictive interpretation renders the business transaction provision entirely meaningless.[136]

III. THE FAIR CREDIT REPORTING ACT'S DEFINITIONAL DILEMMA: A NEW METHOD OF ANALYSIS

The FCRA's scope provisions are ambiguous and circular, posing considerable problems of interpretation.[137] Appropriate judicial resolution of the Act's definitional dilemma, therefore, must rely on the statute's legislative history,[138] with deference to its remedial purposes.[139] As a remedial statute, designed to

135. *See* 15 U.S.C. § 1681a(d)(3); *supra* note 77 and accompanying text (text of incorporation provision); *infra* notes 192-94 and accompanying text.

136. The Third Circuit maintained that "a statute should be interpreted so as to give effect to every phrase and not render any part superfluous." *Houghton*, 795 F.2d at 1150. By strictly limiting the business transaction provision to the other transactions enumerated in the statute, however, the court rendered that provision superfluous, violating the very rule of statutory construction it cited in favor of its interpretation. If, for example § 1681b's business transaction provision is limited to the other purposes enumerated in § 1681b, "there was no reason for Congress to have written it into the statute. Furthermore, if Congress did not intend that [the business transaction provision] be broader than the preceding subsections [in § 1681b], it would not have introduced [the provision] with the words '*otherwise* has a legitimate business need' . . . ." *Id.* at 1151-52 (Sloviter, J., concurring).

137. Courts are not alone in their confusion. During the floor debate on the bill's conference report, Congressman Brown stated that, notwithstanding the unanimous support for the legislation, "there 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.'" 116 CONG. REC. 36,575-76 (1970). Congressman Wylie agreed: "It is really unfortunate that we must legislate in a manner [that] leaves so many questions unanswered. . . . Inasmuch as there will probably be no bill on consumer credit reporting this year unless we accept the [proposed bill], I reluctantly recommend acceptance of the report." *Id.* at 36,575. Congressman Brown advised that "[d]espite rules of interpretation . . . *any questions of interpretation [should be resolved] in favor of the intent expressed.*" *Id.* at 36,576 (emphasis added).

138. A well accepted principle of statutory construction states that when a statute's meaning is ambiguous, courts may properly resort to its legislative history. *See, e.g.*, Steiner v. Mitchell, 350 U.S. 247, 254 (1956). *See generally* 2A SUTHERLAND, *supra* note 69, §§ 48.01-.20, at 277-346 (discussing and citing cases on the use of legislative history in statutory construction).

139. The purpose to be accomplished by legislation is a reflection of legislative intent. The primary principle governing statutory construction is to discover, declare, and give effect to the legislature's intent. United States v. Henning, 344 U.S. 66, 71-75 (1952); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). Therefore, to give effect to the remedial purpose of the FCRA is to

create consumer protections in the consumer reporting area, the FCRA is entitled to a liberal construction.[140] Courts therefore should adopt a consumer-oriented approach[141] that expansively interprets the consumer report definition, with limited exceptions.

To fairly effectuate the FCRA's remedial purposes and give credence to the language of the consumer report definition, courts should make two inquiries and should distinguish between user and agency defendants. In all FCRA cases, the first inquiry should be the same: courts should examine the report's actual use. If used for a statutory purpose, the report falls within the consumer report definition. The second inquiry requires courts to distinguish between defendants. When the defendant is a consumer reporting agency, courts should look to the agency's original collection purpose. If the agency originally collected any of the report's information for a statutory purpose, the report is a consumer report with respect to the agency.[142] When the defendant is a report user, however, the

give effect to Congress's intent. *See generally* 2A SUTHERLAND, *supra* note 69, § 45.05, at 20-7 (discussion and collection of case law on the supremacy of legislative intent in statutory construction).

140. It is firmly established that, as a matter of policy, remedial statutes are to be liberally construed. *See* Abbot Laboratories v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 11 (1976); Peyton v. Rowe, 391 U.S. 54, 65 (1968); McBurney v. Carson, 99 U.S. 567, 569 (1878). A liberal construction is one that has the effect of rendering the statute applicable in more situations than would be the case under a narrow construction. *See, e.g.,* Tenney v. Springer, 121 Mich. App. 47, 53 n.1, 328 N.W.2d 566, 569 n.1 (1982).

141. One other commentator has argued in favor of reading the consumer report definition expansively to favor consumers. *See* Note, *The Fair Credit Reporting Act,* 13 SUFFOLK U.L. REV. 63 (1979). That Note's interpretation, however, fails to recognize the limitations that must be imposed on an expansive reading of the FCRA's scope provisions. *See infra* notes 163-77 and accompanying text (collection purpose language only applies to user with notice of agency's collection purposes), and notes 195-98 and accompanying text (when incorporation of § 1681b's business transaction provision conflicts with § 1681a(d)'s consumer report definition, § 1681a(d) controls). Moreover, the Note endorsed the interpretation enunciated in Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975), that a report is a consumer report if it *"could be used"* for a statutory purpose. Note, *supra,* at 93. The *Belshaw* test, however, is overbroad, going beyond the FCRA's language, and thus should be rejected. *See, e.g.,* Henry v. Forbes, 433 F. Supp. 5, 9 n.5 (D. Minn. 1976) (The *Belshaw* court's test "goes beyond the avowed [purpose] of Congress" and "would bring within the [FCRA's scope] any gathering of information about an individual." Courts "cannot read into the statute provisions that do not exist."); Mende v. Dun & Bradstreet, Inc., 670 F.2d 129, 133 (9th Cir. 1982) (noting the *Henry* court's criticisms of the *Belshaw* court's test and declining to follow *Belshaw*).

142. *See infra* notes 147-62 and accompanying text.

collection purpose test is used only to the extent that the user had notice of the agency's original collection motives.[143]

Additionally, courts should read the consumer report definition's incorporation provision expansively. Absent a direct conflict with section 1681a(d)'s restrictive language, section 1681b's business transaction provision should be allowed to expand the transactions encompassed by the consumer report definition. In the case of a conflict, however, section 1681a(d)'s restrictive language should take precedence.

A. THE USER/AGENCY DISTINCTION: APPROPRIATE USE OF THE COLLECTION PURPOSE AND ACTUAL USE TESTS

Current FCRA litigation reflects an unarticulated distinction between agency and user defendants. Although some courts facing agency defendants have been willing to employ the collection purpose test,[144] courts presented with user defendants have almost never done so.[145] In the user context, courts perhaps reject the collection purpose test because of the

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143. *See infra* notes 163-77 and accompanying text.

144. *See* Heath v. Credit Bureau, 618 F.2d 693, 696 (10th Cir. 1980); Ippolito v. WNS, Inc., 636 F. Supp. 471, 473 (N.D. Ill. 1986); Boothe v. TRW Credit Data, 523 F. Supp. 631, 634 (S.D.N.Y. 1981); Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1361 (D. Ariz. 1975); Rasor v. Retail Credit Co., 87 Wash. 2d 516, 522-23, 554 P.2d 1041, 1046 (1976). Other courts, however, refuse to use the collection purpose test in the context of an agency defendant. See Gardner v. Investigators, Inc., 413 F. Supp. 780, 781 (M.D. Fla. 1976); Daniels v. Retail Credit Co., No. 73-CV-484 (N.D.N.Y. April 28, 1976) (LEXIS, Genfed library, Dist file); Horton v. Pinkerton's Inc., No. H-75-C-17 (E.D. La. 1972).

145. *See, e.g.,* Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3d Cir. 1986); Matthews v. Worthen Bank & Trust Co., 741 F.2d 217 (8th Cir. 1984); D'Angelo v. Wilmington Medical Center, 515 F. Supp. 1250 (D. Del. 1981); Ley v. Boron Oil Co., 419 F. Supp. 1240 (W.D. Pa. 1976); Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252 (N.D. Ga. 1973). *But see* Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 671-72 (M.D.N.C. 1978) (where user requested all information in the consumer's file, the credit data was probably collected for a statutory purpose and was thus a consumer report); *Boothe*, 523 F. Supp. at 634 (court must determine agency's original purpose for collecting report's information to decide whether the report was a consumer report with respect to its user).

When presented with agency and user defendants in the same suit, courts have failed to make a distinction between the defendants when analyzing the report's status under the FCRA. Most courts have instead applied the actual use test to both. *See* Cochran v. Metropolitan Ins. Co., 472 F. Supp.. 827, 833 (N.D. Ga. 1979) (the court dismissed the suit against the user and indicated that it would apply the same analysis in deciding the agency's motion); Henry v. Forbes, 433 F. Supp. 5 (D. Minn. 1976); Kiblen v. Pickle, 33 Wash. App. 387, 653 P.2d 1338 (1982). *But see Boothe,* 523 F. Supp. 631, 634 (court decided collection purpose test should be applied to both the user and agency defendant at subsequent trial).

unfairness inherent in holding a user liable for an agency's collection purposes.[146] Those courts rejecting the collection purpose test, however, never proffer an explanation for ignoring the Act's plain language. Because courts fail to recognize the implicit reasons for a distinction, they bypass opportunities to provide a reasoned analysis for treating users and agencies differently. In the future, appropriate FCRA analysis should be based expressly upon the user/agency dichotomy.

When the defendant is a consumer reporting agency, the "used or collected" language should be interpreted expansively[147] by examining *both* the agency's original collection purpose and the report's actual use.[148] The collection purpose language indicates that Congress intended the FCRA's provisions to apply when agencies collect information "in whole or in part" for statutory purposes.[149] Congress carefully chose the "used or collected" language through successive and deliberate revisions of the Act's scope provisions to ensure that the FCRA would achieve its remedial purposes.[150] Moreover, through the

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146. *See, e.g., supra* note 124.

147. *See supra* note 84 and cases cited therein.

148. This broad bifurcated construction is supported by both the legislative history, *see* S. REP. NO. 517, 91st Cong., 1st Sess. 4 (1969) (Section 1681a(d) defines consumer report "as a report on the individual when the information *has been collected or* is to be used" for a statutory purpose.) (emphasis added), and the Federal Trade Commission's interpretation of the FCRA, *see* FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,803 (A consumer report is information communicated, and "it must be either used *or* expected to be used *or* it must have been *collected in whole or in part*" for a permissible purpose.) (emphasis added).

149. *See supra* note 86 and cases cited therein. Where the language of a statutory provision is clear, the words used are considered the final expression of legislative intent. Burns v. Alcaca, 420 U.S. 575, 580-81 (1975); Federal Trade Comm'n v. Manager, Retail Credit Co., 515 F.2d 988, 995 n.14 (D.C. Cir. 1975). Absent evidence that a statute's words or provisions are the result of an obvious mistake, it is an elementary rule of statutory construction that effect must be given to every word or phrase. *See* 2A SUTHERLAND, *supra* note 69, § 46.06.

150. The legislative hearings on the Fair Credit Reporting bill, and the privacy hearings in the immediately preceding years, had uncovered numerous abuses in the reporting industry. *See supra* note 34 and accompanying text. Congress believed, and the legislative hearings on S. 823 confirmed, that the most egregious abuses occurred in the areas of insurance and employment reporting. *See Hearings on S. 823, supra* note 35, at 65. Senator Proxmire intended that his bill cover all forms of consumer reporting, *id.* at 77, and originally believed that his bill's definitions, as expanded in 1969, *see supra* note 69, would encompass insurance and employment reporting in addition to credit reporting. *Hearings on S. 823, supra* note 35, at 65 ("It is my understanding that we included character and general reputation so that we could specifically include insurance reporting and employment."). Numerous wit-

"used or collected" language, Congress created a presumption that *any* information released by a consumer reporting agency is a consumer report.[151] Expansive interpretation of the "used or collected" language, therefore, encourages agency compliance[152] and maximizes consumer rights.[153]

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nesses, however, testified to the inadequacy of the bill's language and suggested that the bill's scope be made more clear. *See, e.g., id.* at 74, 115. In response, the Senate Committee on Banking and Currency reported out a redrafted bill that deliberately broadened the consumer report definition. *See supra* note 69. Given the "hours and days and weeks and months" spent by the Senate Committee and industry representatives formulating the consumer report definition, *Hearings on H.R. 16340, supra* note 39, at 108 (statement of John L. Spafford, President, Associated Credit Bureaus, Inc.), the addition of the "used or collected" language and the incorporation provision cannot be disregarded as mere afterthought. It should be recognized as deliberate action taken to ensure achievement of the Act's remedial goals. *See* Gilbert v. General Electric Co., 347 F. Supp. 1058, 1060 (E.D. Va. 1972) (When a bill's legislative history demonstrates that the language was purposefully added, it "must be given full syntactical weight.").

151. Consumer reporting agencies presumptively collect information for statutory purposes. *See* Heath v. Credit Bureau, 618 F.2d 693, 696 (10th Cir. 1980) ("[I]f at the time the information was collected, the agency expected it to be used for proper purposes, a transmittal of that information would be a consumer report."); Hanson v. Morgan, 582 F.2d 1214, 1218 (9th Cir. 1978) (noting that absent suggestion that agency collected information for nonstatutory purposes, agency in the business of supplying consumer reports must have collected information for statutory purposes). Dissemination of information collected for a statutory purpose constitutes a consumer report regardless of the information's actual use. *See supra* note 85 and accompanying text. Moreover, when an agency disseminates information without knowing the requesting party's intended use, courts may reasonably assume that the agency expected the information to be used for statutory purposes. *Heath*, 618 F.2d at 696, *cited in* Ippolito v. WNS, Inc., 636 F. Supp. 471, 473 (N.D. Ill. 1986). Consumer reporting agencies' collection and dissemination activities, therefore, are presumptively within the confines of the FCRA. To overcome this presumption of the Act's applicability, an agency should bear the burden of presenting evidence sufficient to demonstrate that its activities were outside the FCRA or that it does not qualify as a consumer reporting agency as defined by the Act.

152. If agencies were put on notice that they must comply with the FCRA from the moment information is collected, they would have an incentive to ensure that information they collect is accurate. Agencies would know that they must employ procedures designed to ensure maximum accuracy from the time of the information's collection or face liability for a complaint later. Although a failure to comply at the time of collection would not be detected until the information is actually used and a complaint is brought, agencies should view compliance at the earlier collection date as less costly and more efficient than the alternative of trying to make the information accurate at the time of transmission when months or even years may have passed and the original sources may no longer be available for verification. Agencies, knowing that courts will apply the collection purpose language in determining liability, would find it in their intersts to comply with the Act from the time of collection. The increased likelihood that information transmitted would be accurate would benefit consumers.

Moreover, applying the collection purpose test appropriately gives effect to Congress's intention that regulation commence when agencies *collect* information for statutory purposes. Originally, Congress intended regulation to begin when an agency *disseminated* a consumer report.[154] That scheme would have prohibited agencies from reusing information for a purpose different from their original collection purpose, thereby requiring them to re-collect information with each new request.[155] Eventually recognizing the infeasibility of this prohibition, Congress compromised by permitting reuse in exchange for commencing regulation when information is collected.[156] The collection purpose language was deliberately

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153. *See supra* notes 54-60 & 64 and accompanying text (discussing rights that are only enforceable when the information communicated is a consumer report).

154. The original definitional section proposed by Senator Proxmire activated the statute's regulations when information was "sought or given" for a statutory purpose. *See* 114 CONG. REC. 24,904 (1968); *supra* note 69.

155. *See infra* note 156.

156. The collection purpose language found in the current consumer report definition evolved in part for the following reason. The 1969 Fair Credit Reporting Bill's permissible dissemination provision, S. 823, 91st Cong., 1st Sess. § 164(f), 115 CONG. REC. 2415 (1969), restricted agencies' right to release consumer information to "the purposes disclosed in the collection of the information." *See supra* note 69 (quoting § 164(f)(2)). Senator Proxmire included this restrictive provision as a privacy protection measure to ensure that information initially collected for one purpose could not subsequently be used for a different purpose. *See* 115 CONG. REC. 2415 (1969); *Hearings on S. 823, supra* note 35, at 239.

When the bill was reported to the Senate Committee on Banking and Currency, § 164(f)'s "for the purposes disclosed in the collection of the information" language met with vehement opposition. Every reporting industry representative who testified opposed the provision because it would have precluded reuse of collected information, thereby destroying the whole concept of the reporting industry. *See, e.g., Hearing on S. 823, supra* note 35, at 143 (John L. Spafford, Associated Credit Bureaus, Inc. asserting that § 164(f) would require reinvestigation in every instance, would eliminate the need to accumulate information, and "could literally destroy the credit bureau concept").

Ostensibly recognizing the onerous burden the provision would entail for the industry, the committee redrafted both the permissible dissemination provision and the consumer report definition. The disputed language in the 1969 bill's dissemination provision was deleted from its successor. *See* 15 U.S.C. § 1681b (1982). To counterbalance this change, however, Congress apparently inserted into the redrafted consumer report definition the "used or expected to be used or collected in whole or in part" language. *Compare* § 164(f), *supra* note 69 (1969 bill's version of the permissible dissemination provision) *with* 15 U.S.C. § 1681b (the permissible dissemination provision as reported out of committee and subsequently enacted); *compare* § 163(b), (c), *supra* note 69 (1969 bill's version of the consumer report definition) *with* 15 U.S.C. § 1681a(d) (the consumer report definition as reported out of committee and subsequently enacted). This legislative compromise satisfied both Congress and the reporting

drafted into the FCRA as the result of this compromise.[157] Expansive interpretation of the "used or collected" language, therefore, ensures that agencies are regulated to the extent intended by Congress.[158]

Conversely, ignoring the agency's original collection purpose by exclusively using the actual use test violates rules of statutory construction requiring that the substance and effect of all sections be preserved[159] and that the construction of a remedial statute effectuate the statute's manifest purpose.[160] If

industry: previously collected information can be reused by agencies, *see* 15 U.S.C. § 1681b (no restrictions on reuse), and, in exchange, the Act's regulations and consumer rights are triggered by the collection of information for statutory purposes, not solely by its actual use. *See* S. REP. NO. 517, 91st Cong., 1st Sess. 4 (1969) (the Act applies to reports containing information collected for statutory purposes).

The collection purpose language, intentionally inserted into the consumer report definition, is an important legislative compromise that courts should not ignore. *See, e.g.,* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 468 (1968) (when legislation is the product of opposing views and compromise, courts must analyze the bill's language in light of its legislative history and the bill's overall purposes); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 698-99 (E.D. Va. 1973) (when a bill emerges from vigorous legislative debate, its syntactical history should be accorded substantial weight in its interpretation); *see generally* 2A SUTHERLAND, *supra* note 69, § 48.04, at 302 (legislative debate surrounding the bill's language is important in ascertaining its meaning and effect). *See also infra* note 190 (detailing another purpose behind the legislative compromise involving the "used or collected" language).

157. *See supra* note 156 and accompanying text. The redrafted definitional sections were never presented to the floor of the Senate for an independent vote. Rather, they were part of a wholesale approval of the bill as redrafted by the Senate Committee on Banking and Currency. *See* 115 CONG. REC. 33,404-406 (1969) (redrafted bill reported to the floor of the Senate); *id.* at 33,413 (bill passed as amended by the committee).

158. The "used or collected" language, specifically drafted into the statute as part of a legislative compromise, was intended to broaden the FCRA and to serve in part as a substitute for ongoing regulatory enforcement. Therefore, it must be given full effect to comport with Congress's regulatory intent. *See supra* note 156 and *infra* note 190. Moreover, the Senate report accompanying the bill as reported out of committee suggested an expansive interpretation of the "used or collected" language, and thus evidences the extent of Congress's regulatory intent. *See supra* note 148.

159. *See* Bell v. New Jersey, 461 U.S. 773, 778-89 (1983) (noting the Court's reluctance to interpret a statute in a way that renders any part superfluous); Bowsher v. Merck & Co., 460 U.S. 824, 833 (1983) (the substance and effect of a statute's provisions should be preserved); Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879) (adopting the cannon of construction that a statute should be interpreted to maintain the substance and effect of its provisions).

160. *See, e.g.,* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (judicial construction of remedial legislation should seek to effectute the statute's purposes); Heitler v. United States, 260 U.S. 438, 440 (1923) (remedial statutes

consumers are allowed to maintain suits only when a report is *actually used* for the purposes enumerated, sections 1681b and 1681e(a), which are central to the FCRA's purposes, become meaningless and unenforceable.[161] Information used for nonstatutory purposes would not be a consumer report and thus agencies could provide information to third parties with impunity.[162]

"should be construed liberally to carry out the evident purpose of Congress"); *supra* note 140.

161. *See* Boothe v. TRW Credit Data, 523 F. Supp. 631, 634 (S.D.N.Y. 1981) (sole reliance on the report's actual use defeats the statute's structure by rendering superfluous § 1681b and thus impedes protection of file confidentiality and consumer privacy); Belshaw v. Credit Bureau, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975) (limiting judicial inquiry to the report's actual use precludes enforcement of § 1681b and thus leaves consumers' privacy unprotected and frustrates Congress's remedial goals).

In *Boothe,* the court explained the anomaly:

> Defendants would have this court hold that the release of a consumer report . . . for a purpose not permitted by the Act converts the report into one outside the scope of the Act. Such a holding would render section 1681b, which restricts the release of consumer reports to certain specified circumstances, totally ineffective.

523 F. Supp. at 634. Section 1681b's language presupposes that a report can be defined as a consumer report independent of the report's actual use. *See* 15 U.S.C. § 1681b (an agency can furnish "consumer reports" for the enumerated purposes and no other). When a report's actual use is the sole test of its status under the FCRA, an agency can never violate § 1681b.

Moreover, § 1681e(a), requiring agencies to employ reasonable procedures to comply with § 1681b's restrictions, *see supra* note 80, would also be meaningless and unenforceable. Thus, the narrow construction of the "used or collected" language is inconsistent with the Act's structure and should be rejected. *Cf.* United States v. Turkette, 452 U.S. 576, 582-83 (1981) (statutes should be construed in such a way that avoids internal inconsistencies).

162. The legislative history and the Act's statement of purpose manifest congressional concern for consumer privacy, confidentiality, and the need to end abusive practices by consumer reporting agencies. *See supra* notes 34, 41 & 80 and accompanying text. Courts are bound to give effect to the legislature's expressed intent. *See supra* note 139. Section 1681b mandates that consumer reporting agencies may disseminate consumer reports for the enumerated purposes and *no other.* 15 U.S.C. § 1681b; *see also* Zamora v. Valley Fed. Sav. & Loan Ass'n, 811 F.2d 1368, 1370 (10th Cir. 1987) (agencies can disseminate consumer reports only for one of the enumerated statutory purposes). When courts refuse to apply the collection purpose language to consumer reporting agencies, agencies are free to disseminate highly sensitive information to *anyone* who desires the information. *See supra* note 131 and accompanying text. Such unrestrained dissemination violates legislative intent. *See supra* note 80 and accompanying text. In Henry v. Forbes, 433 F. Supp. 5 (D. Minn. 1976), for example, an attorney obtained a report for political purposes through a client's account with a regulated consumer reporting agency. *Id.* at 6-7. The report contained financial, employment, and personal background data on the plaintiff. *Id.* at 6. The information was presumptively collected by the agency for a statutory purpose, and subsequent transmittal of

Courts, however, should limit their use of the collection purpose test when the defendant is a consumer report *user.* When a user requests a report on the good faith belief that it is not covered by the Act, the user should be able to rely on its limited request.[163] If the agency includes preexisting information originally collected for a statutory purpose, the report's user should not be held liable based on the agency's collection motives unless the user has notice from the agency,[164] the face of the report,[165] or business customs[166] that the report includes

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the information should have constituted a consumer report regulated by the Act. *See supra* note 85 and accompanying text. The court, however, focusing exclusively on actual use, held that the report was not a consumer report within the Act. *Henry,* 433 F. Supp. at 10. The court commented:

> If the [actual use] of the report is not among the enumerated purposes which define "consumer report," any person with access to a reporting agency account may with any motive request personal and credit information about a private individual, cause an investigation to be made without the subject's knowledge, and act on the information—without giving the subject any of the protections against inaccuracy and misuse that are provided in the Act.

Id. at 9-10.

The *Henry* court's interpretation of the FCRA subverts the Act's purpose. *See supra* note 41 and accompanying text (FCRA intended to protect consumer privacy and confidentiality). Under the facts of the *Henry* case, the report contained data originally collected for statutory purposes. In holding that the report as actually used was not a consumer report, the court effectively precluded enforcement of §§ 1681b and 1681e(a), leaving the plaintiff without a remedy although Congress intended to provide one. *See supra* note 80 and accompanying text.

Unfortunately, the *Henry* opinion has been cited with approval. *See* New Palm Gardens v. Bentley, No. 82-1361-MA (D. Mass. Aug. 11, 1983) (LEXIS, Genfed library, Dist file). *But see* Rice v. Montgomery Ward & Co., 450 F. Supp. 668, 672 (M.D.N.C. 1978) (declining to follow the *Henry* court's decision because its restrictive view of the Act's scope is unsupported by the consumer report definition's language).

163. For example, a request for a first party claim report limited to contemporaneously compiled information would be a basis for a good faith belief that the report is not covered by the FCRA. Limiting the request to contemporaneously compiled information avoids the possibility of finding a consumer report under the collection purpose test. Moreover, when an insurer requests a first party claim report to assess the validity of a claim by an insured, the report's actual use is not within the scope of the business transaction provision because of the consumer report definition's limitation to insurance reports for determining eligibility for coverage or fitness for underwriting. *See supra* note 119 and accompanying text. The claim report, therefore, is not a consumer report under the Act. *See* Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 831-32 (N.D. Ga. 1979); *but see* Beresh v. Retail Credit Co., 358 F. Supp. 260, 261 (C.D. Cal. 1973) (the business transaction provision encompasses a first party claim report).

164. Notice from the agency could be either a written or oral affirmation of the report's status as a consumer report.

165. Courts should take a more liberal approach than the Third Circuit

regulated information.[167] The Third Circuit's more stringent notice standard should be rejected.[168]

The collection purpose language, which looks to the agency's subjective intent for collecting information,[169] if applied to users, may result in strict liability when the user is unaware that the report qualifies as a consumer report.[170] Congress, however, expressly rejected a strict liability standard for the FCRA by providing a private cause of action only for

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took in *Houghton* in assessing the presence of notice from the report's face. *See supra* note 113. If the report clearly indicates that preexisting files have been searched, *see supra* note 8, the user has constructive notice that a consumer report has been received because agencies presumptively collect data for statutory purposes. *See supra* note 151 and accompanying text. The only exceptions to this standard of notice should arise when the user knows either that the agency maintains differentiated services, *see infra* note 231, or that the agency does not qualify as a consumer reporting agency. *See supra* note 20 (consumer reporting agency is a requisite element of the consumer report definition).

166. This standard prevents users from circumventing compliance with the FCRA by requesting a report for a purpose outside the Act when standard industry procedure for the type of report requested is to include regulated information. For example, if claim reports regularly contain financial information, which the requesting party should assume will come from preexisting files, *see infra* note 232, the user is charged with knowledge of industry customs and must comply with the Act. To protect consumers adequately, courts must look beyond the simple request to the request's substance.

167. This standard of notice requires that the user "know or have reason to know" of the agency's collection purposes. For a discussion of such a standard of knowledge, see RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1979); *id.* § 19 comment b ("the words 'reason to know' are used both where the actor has a duty to another [to ascertain facts] and where he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know"); *see generally* PROSSER AND KEETON ON THE LAW OF TORTS 182-85 (1984) (discussing the requirement of knowledge in a cause of action for negligence); 58 AM. JUR. 2D *Notice* §§ 3, 6 (1971) (discussing actual and constructive notice).

168. *See supra* note 113 and accompanying text.

169. Heath v. Credit Bureau, 618 F.2d 693, 696 (10th Cir. 1980). *But see* D'Angelo v. Wilmington Medical Center, 515 F. Supp. 1250, 1254 (D. Del. 1981) ("collected" language focuses on the user's expectations and intentions). The *D'Angelo* interpretation of the collection purpose language is plainly incorrect. Users only collect information in the sense that they request it from an agency. If the collection purpose language looks to the user's intent and not the agency's, it adds nothing to the consumer report definition, and Congress need not have written it into the statute. Congress intended the collection purpose language to look to the agency's subjective intent. *See, e.g.,* 114 CONG. REC. 24,902 (1968) (stating that the Fair Credit Reporting Bill requires agencies to maintain procedures "guaranteeing the confidentiality of the information *they collect*" (emphasis added)).

170. *See e.g., supra* note 124 (in *Houghton,* the district court apparently held the insurance company strictly liable).

negligent[171] or willful[172] misconduct. Thus, the collection purpose language should not apply to consumer report users, unless the user knew or had reason to know of the agency's collection purpose.[173]

A close examination of section 1681d also suggests that Congress did not intend literal application of the collection purpose language to user defendants. A user violates section 1681d when it "procures" or "causes" an agency to prepare an investigative consumer report and then fails to notify or disclose as required.[174] This language presupposes knowledge of the type of report requested. An anomalous result is reached if a user is held liable on the basis of a report that is covered by the FCRA solely by virtue of the agency's collection purposes.

Finally, a less than literal interpretation of the "used or collected" language in lawsuits against report users, one that ignores the collection purpose language when notice is absent, does not raise the same structural inconsistencies within the statute as it does with respect to agency defendants.[175] Sections 1681b and 1681e(a) are left intact because they do not apply to users.[176] Moreover, the distinction does not interfere with the remedial effect of the FCRA. The principal mechanism for attaining the legislature's objectives is through the regulation of consumer reporting agencies; users are only secondarily regulated.[177]

This Comment's suggested analysis resolves the gray-area cases, such as those involving an insurance claim report or a business report on an individual consumer, that have proved problematic for courts in the past.[178] If the defendant is a consumer reporting agency or a report user, such reports would

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171. 15 U.S.C. § 1681o.

172. *Id.* § 1681n.

173. *See supra* note 167 and text accompanying notes 164-67.

174. 15 U.S.C. § 1681d; *see supra* note 60 and accompanying text.

175. *See supra* notes 159-62 and accompanying text.

176. 15 U.S.C. § 1681b (restricting consumer reporting agencies' right to lawfully disseminate consumer reports); *id.* § 1681e(a) (requiring consumer reporting agencies to use reasonable procedures to ensure proper use of consumer reports).

177. *See supra* note 53.

178. Case law conflicts on whether reports containing consumer information used in a business context are covered by the FCRA. *See supra* notes 88-91 and accompanying text. Courts also have differed regarding whether § 1681b's business transaction provision can be interpreted to expand the transactional scope of § 1681a(d)'s consumer report definition to encompass reports that are not used for one of § 1681a(d)'s enumerated transactions. *See supra* notes 94-103 and accompanying text.

not come within the FCRA's scope under the actual use test.[179] Application of the collection purpose test, however, may bring these reports within the Act's scope. If the report contains *any* information originally collected for a statutory purpose, it is, with respect to the agency, a consumer report within the FCRA's scope.[180] The identical analysis, modified by the notice

179. The FCRA's consumer report definition expressly applies to insurance reports obtained to establish the subject's eligibility for insurance or fitness for underwriting. *See* 15 U.S.C. §§ 1681a(d), 1681b(3)(C); *supra* notes 20, 78. An insurance claim report obtained to evaluate a first party claim, therefore, must come within the consumer report definition under the business transaction provision if at all. In this situation, the consumer report definition's restrictive language limiting the insurance reports covered must take precedence, not because a claim report is not obtained in connection with a business transaction, but because Congress's express limitations on the Act's scope control. *See supra* notes 98 & 119. Conversely, third party claim reports, generally obtained for litigation purposes, do not conflict with the statute's express limitations. They are sometimes excluded, however, because the requisite consumer transaction between the report's procurer and subject is absent. *See infra* text accompanying notes 224-30.

Similarly, reports used in connection with a business's credit or insurance transactions are not within the consumer report definition under the actual use test. Section 1681a(d) expressly limits the Act's coverage of insurance and credit reports to those obtained in connection with a "personal, family, or household" transaction. *See* Excerpts from FTC Informal Staff Opinion Letter, [1969-1973 Transfer Binder] Consumer Cred. Guide (CCH) ¶ 99,422, at 89,382 (May 18, 1971); FTC, COMPLIANCE, *supra* note 49, ¶ 11,307, at 59,828. Moreover, Congress intended to exclude all forms of commercial reporting from the FCRA. *See supra* note 89 and accompanying text.

180. The Federal Trade Commission advocates this interpretation. *See* Excerpts from FTC Informal Staff Opinion Letter, [1969-1973 Transfer Binder] Consumer Cred. Guide (CCH) ¶ 99,424, at 89,384 (May 19, 1971) ("[I]f the information was originally collected for consumer purposes and then was subsequently used in a business credit or business insurance report, then such a report would become a consumer report as defined in the Act."); FTC, COMPLIANCE, *supra* note 49, ¶ 11,305, at 59,828 (when an agency uses file information originally collected for statutory purposes in a claim report, the report becomes a regulated consumer report). The FTC further argues that it is improper for the agency to use consumer report information in insurance claim reports or in business reports because these uses constitute improper dissemination purposes under § 1681b. This Comment endorses that view with respect to first party insurance claim reports, *see supra* note 119 and text *infra* accompanying notes 199-203 (reports used to evaluate first party insurance claims do not fall within § 1681b's business transaction provision and thus it would be improper to disseminate regulated consumer report information for such claim reporting purposes). The better view, however, is to allow dissemination of consumer report information for business purposes at the cost of compliance with the Act. *See generally* Note, *supra* note 82, at 1249-51 (arguing that agencies should be allowed to disseminate consumer reports for commercial purposes if they comply with the Act because the FTC's more limited interpretation is anomalous in light of the collection purpose language, the business transaction provision's plain language authorizes dissemination for

requirement, applies to a user defendant.[181] Courts should not be troubled by the incongruent results yielded under the collection purpose and actual use tests. By its language, Congress formulated two conceptually distinct and independent tests for consumer report status, and the report need only qualify under one to bring it within the Act's scope.[182]

B. Reconciling Sections 1681a(d) and 1681b: Defining the FCRA's Transactional Scope

A further definitional problem, arising under the FCRA in connection with the actual use test,[183] involves the appropriate interpretation of the consumer report definition's incorporation

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business transactions with the individual, and the FTC's limited construction does not enhance the FCRA regulatory scheme). The FCRA was not intended to restrict the flow of information to the business community. *See infra* note 203 and accompanying text. Moreover, disallowing dissemination ignores the problem of a sole proprietorship—information on the individual is virtually indistinguishable from information on the business. Refusing to permit lawful dissemination of information concerning the business's principal could seriously impede the business's access to credit and insurance inasmuch as lenders and insurers demand information to evaluate risks. Congress expressly addressed this issue and only acknowledged the difficulty of distinguishing reports on the principal as an individual, and therefore within the Act, from those on the sole proprietorship, and therefore not within the Act. *See Hearings on S. 823, supra* note 35, at 16-17. Congress expressed no intention to restrict dissemination of information in the business report context. *Id.* Finally, transmitting information in connection with a business credit or business insurance transaction falls within the literal language of the business transaction provision and, therefore, should be treated as a permissible dissemination purpose.

181. The report would not be a consumer report with respect to the user unless the user had notice of a statutory collection purpose.

182. *See supra* note 148 and accompanying text. Congress's use of the disjunctive word "or" separating the "used" and "collected" language, *see supra* note 20, indicates that the actual use test and the collection purpose test are independent of each other. *See, e.g.,* United States v. O'Driscoll, 761 F.2d 589, 597 (10th Cir. 1985) ("or" is presumed disjunctive absent clear legislative intent to the contrary), *cert. denied,* 106 S. Ct. 1207 (1986).

183. The incorporation issue focuses on the incorporation of the business transaction provision. *See supra* note 81. This issue does not arise in connection with the collection purpose test because the collection purpose language in the consumer report definition does not modify the business transaction provision. Consumer reporting agencies are in the business of collecting information for specific and potential requests in connection with consumers' general credit, employment, or insurance transactions, without knowing if, when, or by whom the information will eventually be requested and used in connection with a specific business transaction. Agencies thus generally collect consumer information for the enumerated consumer transaction purposes. Any use in connection with a consumer's specific "business" transaction is purely incidental.

of section 1681b. A liberal construction of the incorporation provision[184] would bring information used "in connection with a business transaction involving the consumer"[185] within the consumer report definition, with limited exceptions.

A broad interpretation of the incorporation provision comports with Congress's intent that section 1681a(d) not be the sole determinant of the FCRA's transactional scope.[186] Reading sections 1681a(d) and 1681b together, as the incorporation provision requires, courts should recognize that section 1681b's business transaction provision expands the consumer report definition beyond the contours of section 1681a(d).[187] The FCRA's legislative history demonstrates that Congress added the incorporation provision as part of a deliberate revision of the consumer report definition to broaden the Act's scope to ensure that the FCRA would achieve its intended remedial effect.[188]

The intentional broadening of the FCRA also reflects Congress's attempt to ensure the Act's continued vitality in the face of unanticipated circumstances. Under pressure from the reporting industry, Congress refused to grant substantive enforcement power of the FCRA to a federal agency.[189] To counterbalance this concession, Congress broadened the consumer report definition through incorporation of the business transaction provision.[190] This compromise was Congress's attempt to expand the Act's scope to ensure sufficient flexibility

184. 15 U.S.C. § 1681a(d)(3).

185. *Id.* § 1681b(3)(E).

186. The plain language of the incorporation provision evidences Congress's intention that the Act's scope extend beyond the limits of § 1681a(d). *See supra* note 77 and accompanying text.

187. *See supra* note 95 and cases cited therein. *But see* Note, *supra* note 98, at 471 (arguing that § 1681b only supplements § 1681a(d)'s consumer report definition and does not independently expand the Act's transactional scope).

188. *See supra* note 150.

189. *See infra* note 190.

190. Congress originally intended to vest the Federal Reserve Board with the power to promulgate regulations to be enforced by the Federal Trade Commission. *See* 114 CONG. REC. 24,904 (1968); *Hearings on S. 823, supra* note 35, at 30. During the hearings on S. 823, however, the FTC argued that promulgation and enforcement power should be vested solely in the Commission. *Id.* "[T]he argument was made that the FTC needed the power to promulgate regulations in order to have the necessary flexibility to enable it to provide proper enforcement." *Hearings on H.R. 16340, supra* note 39, at 114 (statement of John L. Spafford, President Associated Credit Bureaus, Inc., recapping the debate on regulatory power during the hearings on S. 823). The power to issue and enforce substantive regulations was viewed as an integral factor to the overall success and versatility of the legislation. *See Hearings on*

to provide consumers with continuing protection in the absence of ongoing regulatory enforcement.[191] The incorporation provision, as an integral part of that compromise, should be given full effect.

Moreover, failure to allow section 1681b's business transaction provision to expand the consumer report definition violates the rule of statutory construction requiring that the substance and effect of a statute's provisions be preserved.[192] The mandate of the incorporation provision is clear. The consumer report definition expressly incorporates, without limitation, all "*other* purposes" enumerated in section 1681b.[193] When a statute's language is clear on its face, courts should avoid an alternative construction.[194]

S. 823, *supra* note 35, at 30 (statement of Paul Dixon, Chairman, Federal Trade Commission).

The reporting industry, however, was strongly opposed to giving substantive enforcement power to any federal agency. *See, e.g.*, *Hearings on H.R. 16340*, *supra* note 39, at 114-15 (statement of John L. Spafford, President, Associated Credit Bureaus, Inc. recapping industry position in the hearings on S. 823). The industry argued that the FTC could effectively enforce the Act without rulemaking power and that the confusion in interpretation and enforcement that attends profuse regulatory schemes should be avoided. *Id.* The industry preferred a clearly written, self-enforcing law. *Id.* at 452.

Responding to industry opposition, the Senate Committee on Banking and Currency substantially redrafted all of the FCRA's provisions. *Compare Hearings on S. 823*, *supra* note 35, at 4-9 (original bill reported to committee) *with* 115 CONG. REC. 33,404-06 (1969) (bill as reported out of committee). Significantly, Congress eliminated the Federal Reserve Board's role and refused to expand the FTC's role beyond administrative enforcement. The FTC's power extends only to issuing procedural rules and enforcing general compliance. *See* 15 U.S.C. § 1681s.

In exchange, Congress deliberately expanded the Act's scope by drafting the "used or collected" language and the incorporation provision into the consumer report definition. *See supra* note 69. These broadening provisions are substitutes for the flexibility and adaptability rulemaking power would have provided. At the joint conference on S. 823, the House conferees offered an amendment to the bill to vest the FTC with rulemaking power. *See* 116 CONG. REC. 36,571 (1970). The Senate conferees adamantly resisted the amendment. *Id.* Both the Senate and the House conferees, however, agreed that the omission would not be "fatal to the effectiveness" of the FCRA's ability "to meet changing circumstances as they develop." *Id.* The FCRA's effectiveness, therefore, requires judicial enforcement of these provisions. *Cf. supra* note 156 (citing authority supporting proposition that courts should analyze compromise legislation in light of legislative history and overall purpose).

191. *See supra* note 190.

192. *See supra* note 159 and cases cited therein.

193. 15 U.S.C. § 1681a(d)(3) (emphasis added).

194. *See* Houghton v. New Jersey Mfrs. Ins. Co., 615 F. Supp. 299, 305 n.11 (E.D. Pa. 1985) (citing United States v. Turkette, 452 U.S. 576, 585-87 (1981) and Rubin v. United States, 449 U.S. 424, 430 (1981)), *rev'd*, 795 F.2d 1144 (3d

Unlimited incorporation of the business transaction provision, however, raises conflicts with section 1681a(d)'s consumer report definition and ignores distinct limitations on the FCRA's scope. When incongruities between the restrictive language of section 1681a(d) and the expansive language of section 1681b's business transaction provision arise, section 1681a(d) should control as the primary definitional section.[195] Limiting complete incorporation in this way maintains the Act's structure by preserving the specificity of section 1681a(d).[196] Furthermore, limited incorporation respects the limitations on the FCRA's scope by not extending the Act to cover reports used for business credit, business insurance, or insurance claims,[197] unless they contain information originally collected for consumer purposes.[198]

When delineating the type of transactions encompassed by the business transaction provision, courts should remain cognizant of the provision's dual functions. Its primary function is the role it plays within section 1681b, expanding the circumstances under which an agency may lawfully disseminate consumer reports.[199] Secondarily, section 1681a(d) incorporates the business transaction provision into the consumer report definition.[200] Construction for one function should not be separated from construction for the other function.[201] Thus, a narrow in-

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Cir. 1986); *see also* 2A SUTHERLAND, *supra* note 69, § 46.01, at 73-80 (citing cases on the plain meaning rule).

195. *See* Cochran v. Metropolitan Life Ins., 472 F. Supp. 827, 831 (N.D. Ga. 1979) (conflicts in language between § 1681a(d) and § 1681b are resolved in favor of § 1681a(d)); Fernandez v. Retail Credit Co., 349 F. Supp. 652, 654 (E.D. La. 1972) (section 1681a(d) is primary definitional section); Note, *supra* note 98, at 471 (same); *see generally* Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944) (a specific statutory provision prevails over a more general one).

196. Section 1681b's intended function of expanding the consumer report definition is preserved and limited only in the few instances necessary to preserve the specificity of § 1681a(d). This interpretation of the statute is superior to the *Houghton* court's interpretation because it maintains the integrity of both § 1681a(d) and § 1681b's business transaction provision. The Third Circuit's interpretation renders superfluous the business transaction provision. *See supra* notes 134-36 and accompanying text.

197. *See supra* note 119 (first party insurance claim reports typically excluded from the FCRA's scope); *see supra* note 89 (business reporting is expressly excluded from the Act's scope).

198. *See supra* notes 180-81 and accompanying text.

199. *See* 15 U.S.C. § 1681b.

200. *Id.* § 1681a(d)(3); *see supra* note 20.

201. Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1151 (3d Cir. 1986) (Sloviter, J., concurring).

terpretation in the context of defining a consumer report should be rejected to avoid unnecessarily restricting the permissible distribution of consumer reports,[202] a result not intended by Congress.[203] The business transaction provision's scope with respect to either of its functions should be coextensive with the other.

Recognizing its intended functions, the business transaction provision should be read to cover reports made in connection with transactions that are *similar* to the other types of transactions enumerated in sections 1681a(d) and 1681b.[204] The provision should not be limited, as the *Houghton* court proposed, to only those transactions which *relate* to the enumerated transac-

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202. This argument presumes a report that qualifies as a consumer report under the collection purpose test. A report that fails to meet the collection purpose test can be disseminated for any purpose because of the circularity of the actual use definition. *Cf. supra* notes 129-33 & 159-62 and accompanying text (arguing that rejection of the collection purpose test renders §§ 1681b and 1681e(a) meaningless).

203. Congress acknowledged the business community's need to have available the type of information supplied by the reporting industry to make informed decisions. *See* S. REP. NO. 517, 91st Cong., 1st Sess. 2 (1969); *see also supra* note 42. Senator Proxmire stated that the bill was not intended to inhibit reporting operations or impede the reporting industry's growth. *See Hearings on S. 823, supra* note 35, at 71. Section 1681b's business transaction provision was intended to permit continued wide-spread dissemination of consumer information, provided a legitimate business need in connection with an impending consumer transaction could be shown. *See, e.g.,* 116 CONG. REC. 36,572 (1970) (the FCRA sanctions the "free flow of information about a consumer").

204. Under the *ejusdem generis* doctrine of statutory construction, when general words follow a designation of specific items, the meaning of the general words is construed to include only those objects of a *similar* character, class, kind, or nature as the objects previously enumerated. *Houghton,* 795 F.2d at 1150; *see generally* Caminetti v. United States, 242 U.S. 470, 476-77 (1917); United States v. Salen, 235 U.S. 237, 249 (1914); 2A SUTHERLAND, *supra* note 69, § 47.17, at 166-77 (discussing the use of the *ejusdem generis* doctrine and citing supporting case law). Accordingly, the business transaction provision should be read to cover reports made in conjunction with transactions *similar* to the statutorily enumerated credit, insurance, employment, and licensing transactions. Each of these enumerated transactions involves a consumer relationship characterized by an arm's length transaction between parties. *See infra* notes 220-21 and accompanying text. The business transaction provision should thus be construed to cover similar transactions involving a consumer relationship. Indeed, both the FTC and the *Houghton* court have recognized that the business transaction provision contemplates transactions characterized by a consumer relationship. *See* Excerpts from FTC Informal Staff Opinion Letter, [1969-1973 Transfer Binder] Consumer Cred. Guide (CCH) ¶ 99,423, at 89,384 (May 18, 1971) (the business transaction provision "contemplates arms length dealings" between the report's procurer and the consumer); *see also Houghton,* 795 F.2d at 1149 (business transaction provision requires a consumer relationship).

tions.[205] Congress introduced the business transaction provision with the words "*otherwise* has a . . .,"[206] indicating that the provision was intended to be broader than the preceding subsections.[207] Requiring a direct relationship renders the business transaction provision superfluous,[208] improperly limiting both

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205. In *Houghton*, the Third Circuit's focus on a consumer relationship to interpret the business transaction provision, *Houghton*, 795 F.2d at 1149, was appropriate. *See supra* note 204. Its holding that the provision only encompasses those transactions "related" to the other statutory transactions, *id.*, however, was misplaced. The Third Circuit cited and claimed to adopt the reasoning of Cochran v. Mertropolitan Life Ins. Co., 472 F. Supp. 827 (N.D. Ga. 1979). *Houghton*, 795 F.2d at 1149-50. The *Cochran* court, however, approved a similarity test. *See* 474 F. Supp. at 831 n.3. "Similar" is not interchangeable with "related." The latter contemplates a much closer nexus than the former. *Compare* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1916 (1965) (definition of "related") *with id.* at 2120 (definition of "similar").

206. 15 U.S.C. § 1681b(3)(E) ("otherwise has a legitimate business need for information in connection with a business transaction involving the consumer").

207. When Senator Proxmire introduced the 1969 version of the Fair Credit Reporting Bill, he asserted that § 164(f), enumerating the permissible dissemination purposes for regulated reports, permitted distribution "for the purpose of granting credit, providing insurance, or for employment or personnel purposes *or for other business purposes*." 115 CONG. REC. 2414 (1969) (emphasis added). These purposes were intended to be covered by § 164(f)'s language allowing release "to persons with a legitimate business need for the information and who intend to use the information in connection with a prospective consumer . . . transaction." *Id.* at 2415. At the subsequent hearings before the Senate Committee on Banking and Currency, witnesses emphasized the need to clarify the bill's language and scope. *See Hearings on S. 823, supra* note 35, at 149. *See also id.* at 163 (Congressman McIntyre stating that "the bill is deficient in a lack of definition"). In response, the committee redrafted the provision, this time clearly enumerating the purposes covered: credit, employment, insurance, licensing, and other business transactions. *See* 15 U.S.C. § 1681b (1982). To comport with Congressional intent, therefore, the business transaction provision must be interpreted as encompassing transactions other than those listed in the preceding subsections. The committee's conference report, summarizing the Act as redrafted, supports the foregoing interpretation. S. REP. NO. 517, 91st Cong., 1st Sess. 5 (1969) (§ 1681b permits dissemination of consumer reports for "*five* purposes," credit, insurance, employment, licensing, or "other legitimate business need involving a business transaction with the consumer." (emphasis added)).

Moreover, the ordinary meaning of "otherwise" suggests the business transaction provision should be construed broadly to include transactions other than those enumerated. The ordinary meaning of "otherwise" is "in different circumstances." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1965). Read this way, the business transaction provision covers transactions in circumstances different from the credit, insurance, employment, and licensing contexts. Statutory words should be given their ordinary meaning absent persuasive reasons to the contrary. *See supra* note 149.

208. *See supra* note 136. Requiring a direct relationship ignores the business transaction provision's expansive language and limits its coverage to the previously enumerated transactions. The narrow construction of the business

the scope of the consumer report definition[209] and the scope of permissible dissemination.[210]

To illustrate, suppose a consumer applies to rent an apartment. To assess the rental risk, the landlord asks a consumer reporting agency to report on the individual's rental history.[211] The agency contacted does not have the individual on file and thus compiles the report contemporaneously.[212] The agency prepares a report that contains false, derogatory personal information obtained through interviews with former landlords. The landlord rejects the consumer's application on the basis of the report. The consumer seeks to rent in other buildings but is repeatedly refused because of the same report. If the consumer suspects that a negative report is the problem and can determine the agency's identity, she is free to go to the agency, cause a reinvestigation, and file a statement of dispute.[213] She will be unable, however, to require dissemination of her statement,[214] to sue the landlord for failure to notify and disclose,[215]

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transaction provision must be rejected to preserve its effect. *Cf. supra* note 159 (the substance and effect of a statute's provisions should be preserved).

209. Congress intended the business transaction provision to expand the consumer report definition. *See supra* note 187-88 & 207 and accompanying text.

210. *See supra* note 203 and text accompanying notes 202-03.

211. That a landlord would request a report on a prospective tenant is not unlikely. In fact, most full service agencies specifically list tenant-reporting as a distinct service. *See Hearings on S. 2360, supra* note 30, at 703-04.

The content of a tenant report would vary with the user's request. "Sometimes a tenant report is nothing more than a consumer credit report, sold to a landlord. Often, however, it includes information gained from previous landlords." *Id.* at 704. A typical rental report sold by a Chicago agency "includes family status, employment verification, trade clearances, character investigations, previous rental history, and court record review." *Id.*

212. The report, therefore, could not satisfy the consumer report definition under the collection purpose test because the agency did not access preexisting information already on file.

213. *See* 15 U.S.C. §§ 1681g, 1681i; *supra* notes 62-64 and accompanying text. The consumer may avail herself of these provisions regardless of whether a consumer report as defined by the statute is involved.

Under § 1681i, the consumer is entitled to have the information deleted if reinvestigation proves that the information is false or unverifiable. 15 U.S.C. § 1681i(a). In this case, however, the false, derogatory information is not factual in nature but rather is hearsay. Thus, unless the former landlords are willing to retract their statements, the consumer's only remedy is to file a statement of dispute setting forth her version of the facts. *See id.* § 1681i(b).

214. The agency may disseminate with impunity the false information without the consumer's statement of dispute when the communication of the information does not qualify as a consumer report. *Id.* § 1681i(c).

215. The obligation to notify and disclose attaches only if a consumer report is involved. *Id.* § 1681d(a)(1); *see supra* note 60.

or to sue the agency for shoddy procedures,[216] unless she can bring the report within the FCRA's scope.

The hypothetical represents a type of situation Congress intended to cover.[217] Congress sought to protect individuals from being denied consumer benefits on the basis of erroneous information.[218] Under the Third Circuit's narrow interpretation of consumer report, however, the FCRA would not protect this consumer because the rental transaction is not *related* to credit, insurance, employment, or licensing.[219] Under this Comment's proposed interpretation of the Act, however, the report is covered by the business transaction provision because a rental transaction is *similar* to the other statutory transactions. Similarity comprehends like characteristics, substance, and

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216. If no consumer report is involved, the consumer has no right to challenge the reasonableness of the agency's procedures. *Id.* § 1681e(b).

217. The Federal Trade Commission advocates an interpretation of the Act's scope that would protect an individual like the hypothetical consumer:

> One of the key aspects of the definition of "consumer report" is the purpose for which the report is sought. The legislative history indicates that the Act was intended to apply to reports which were obtained in connection with a benefit sought by an individual for personal, family or household use.

Excerpts from FTC Informal Staff Opinion Letter, [1969-1973 Transfer Binder] Consumer Cred. Guide (CCH) ¶ 99,422, at 89,381 (May 18, 1971). Courts should defer to an administrative interpretation of a statute announced by the agency charged with its enforcement. *See, e.g.,* NLRB v. Boeing Co., 412 U.S. 67, 75 (1973). The hypothetical falls under the FTC's interpretation. A consumer applying to rent an apartment is seeking a benefit for personal or family use. Indeed, Congress appears to have anticipated the rental context for consumer reports. The hearings held by the Senate Committee on Banking and Currency revealed that, by the reporting industry's own admission, credit and personal reports are often obtained in connection with rental decisions. *Hearings S. 823, supra* note 35, at 91 (statement of Alan F. Westin, Professor, Columbia University, citing a study compiled and released by the reporting industry discussing the uses and growth of reporting services).

218. *Hearings on S. 823, supra* note 35, *passim*; *see also* 115 CONG. REC. 33,413 (1969) (every consumer is entitled to the benefit of accurate information when applying for consumer benefits); *Hearings on S. 2360, supra* note 30, at 62 (statement by Senator Proxmire indicating that the Act is intended to apply when there is the possibility that an individual will be denied consumer benefits on the basis of erroneous information).

219. *See supra* notes 120-21 and accompanying text. A "related" transaction, in the sense contemplated by the Third Circuit would be one that flows directly from a credit, insurance, employment or licensing transaction. Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149 (3d Cir. 1986); *see also id.* at 1151 (Sloviter, J., concurring) (interpreting the majority's construction of the business transaction provision as strictly limited to the foregoing transactions enumerated in §§ 1681a(d) and 1681b).

structure.[220] A rental transaction, like the other statutory transactions, is characterized by a consumer relationship involving an exchange—money for the right to possess—that benefits both parties.[221] Moreover, the proposed approach permits the business transaction provision to expand the FCRA's transactional scope beyond section 1681a(d)'s contours.[222] Because section 1681a(d)'s consumer report definition does not expressly cover rental transactions, no conflict between sections is presented and, therefore, the hypothetical report would fall under the Act.[223]

C. REEVALUATION OF THE *HOUGHTON* DECISION

The issue presented by the *Houghton* case was whether a report obtained by an insurer for the purpose of defending personal injury litigation against its insured was a consumer report regulated by the FCRA.[224] The Third Circuit held it was not.[225] Application of this Comment's proposal, however, should yield a contrary conclusion.

Under this Comment's formulation of the actual use test, Equifax's report does not qualify as a FCRA consumer report.[226] Because the report was not used in connection with one

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220. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2120 (1965); *supra* note 204.

221. The transactions covered by the statute involve a consumer relationship that entails a mutual exchange of money, services, or some other benefit that each party to the transaction finds desirable. *See* 116 CONG. REC. 33,413 (1969). When a consumer applies for credit, insurance, or employment, for example, the creditor wants to sell or lend, the insurer to insure, and the employer to hire, just as the consumer wants to buy or borrow, to be insured, or to sell services as an employee. *Id.* The consumer report is obtained in connection with an arms length transaction between parties who both stand to benefit from the transaction if consummated.

222. *See supra* notes 186-210 and accomanying text.

223. *See supra* notes 195-98 and accompanying text (use of § 1681b's business transaction provision to expand § 1681a(d)'s consumer report definition is limited only when a conflict with § 1681a(d)'s language is presented).

224. *See supra* notes 4 & 21 and accompanying text.

225. *See supra* notes 24-26 and accompanying text.

226. The Third Circuit's actual use analysis reached the same conclusion by the wrong reasoning. The court characterized the Equifax report as a report obtained primarily for insurance purposes. Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149-50 (3d Cir. 1986) (court relied on precedent that had construed the business transaction provision with respect to reports "pertaining to insurance"). In the court's view, a report obtained to evaluate an insurance claim raises a conflict between §§ 1681a(d) and 1681b that should be resolved in favor of § 1681a(d). *See supra* note 119. Based on this analysis, the court excluded the Equifax report from the FCRA's scope. *Houghton*, 795 F.2d at 1150. For this interpretation, the court relied exclusively on Cochran v.

of the statute's specifically enumerated purposes,[227] its status under the actual use test depends on whether it was used "in connection with a business transaction involving the consumer."[228] The Equifax report was not used in connection with a business transaction *similar* to the statute's other transactions. The *Houghton* litigation involved a purely adversarial relationship between parties seeking conflicting resolutions of a common problem. Other statutory transactions, conversely, involve a consumer relationship entailing an exchange of money or services that potentially benefits both parties.[229] The business transaction provision, therefore, does not extend the Act's

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Metropolitan Life Ins. Co., 472 F. Supp. 827 (N.D. Ga. 1979). *Houghton,* 795 F.2d at 1150. For a discussion of *Cochran,* see *supra* note 98. The *Cochran* opinion, however, is factually inapposite. *Cochran* involved a first party claim report used to evaluate an insured's claim for disability benefits under an existing policy, *see supra* note 98; whereas *Houghton* involved a third party claim report used for litigation purposes.

The Third Circuit failed to recognize the conceptual distinction between the pertinent transaction involved in first party insurance claims and third party insurance claims. In the context of a first party claim, a report is obtained by an insurance company on its insured to evaluate a claim for benefits under an existing policy. The transaction in this context is a contractual claim by the insured for benefits from the insurer and presents a direct conflict with the statute's apparent limitation of consumer reports for insurance transactions. *See supra* note 119. Reports obtained in connection with first party insurance claims, therefore, fall outside the business transaction provision. *See supra* note 119. In the context of a third party insurance claim, a report is obtained by an insurance company to defend litigation brought against the company's insured. In this context, the transaction between the third party and the insurance company is not the evaluation of a claim for benefits under a policy. Rather, the transaction is the litigation, negotiation, or settlement of the legal claim itself. Litigation is not covered anywhere else in the statute and therefore raises no conflict between §§ 1681a(d) and 1681b.

The Equifax report was not a report used primarily for insurance purposes, but rather a third party claim report used for litigation purposes. The Third Circuit's mischaracterization of the report led it to perceive a conflict between §§ 1681a(d) and 1681b. *See supra* note 119. This misperception precipitated the court's unnecessary and narrow interpretation of the consumer report definition's transactional scope. *See supra* note 117-22 and accompanying text. In the future, courts must critically evaluate the transaction underlying the report's use by looking to the relationship between the report's procurer and subject because the FCRA's applicability may turn on the court's characterization of the underlying transaction. *Compare supra* note 119, (claim report used to evaluate an insured's claim for benefits under an existing policy is typically excluded from the Act's scope) *with infra* note 230 (claim report on a third party used to evaluate a legal claim against the insurance company's insured, or a report obtained on the insured herself to defend that litigation, may fall within the Act's scope).

227. *See supra* note 77 and accompanying text.

228. 15 U.S.C. § 1681b(3)(E).

229. *See supra* note 221.

transactional scope to cover Equifax's report used to defend third party litigation because an underlying consumer relationship between the report's user and subject was absent.[230]

230. When the parties' connection is limited to the lawsuit, then a consumer relationship is absent and a report used in connection with the litigation is not a consumer report. This is not to say that a report obtained in connection with litigation is never covered. This Comment's approach classifies reports used in connection with litigation as consumer reports in at least two contexts. First, when a consumer relationship between parties gives rise to a dispute that culminates in litigation, this Comment's interpretation of the consumer report definition classifies a report obtained by one party or her insurer on the third party to defend the litigation as one used "in connection with a business transaction involving the consumer." At least one court, faced with a report used in connection with litigation that arose out of a contractual dispute between the report's procurer and subject, has decided the report's status incorrectly. In Daniels v. Retail Credit Co., No. 72-CV-484 (N.D.N.Y. April 18, 1976) (LEXIS, Genfed library, Dist file), the plaintiff sued his architects and contractor after a dispute arose during the construction of the plaintiff's new home. CNA Insurance Company, who was required to defend the architects under a professional liability policy, requested a report containing financial and character information on the plaintiff. In a subsequent suit against the consumer reporting agency, the district court held that the report was not covered by the consumer report definition's business transaction provision because, in the court's view, litigation did not constitute a business transaction within the meaning of the Act. *Id.*

The *Daniels* court sought to justify its holding of no consumer report by focusing on the absence of a direct relationship between Daniels and CNA, the report's procurer. The court maintained that the case presented a "three party situation"—Daniels sued his architects and the architects' insurer in turn requested the report on Daniels—distinguishable from a two-party situation characterized by a consumer relationship. *Id.* The court found it necessary to distinguish Beresh v. Retail Credit Co., 358 F. Supp. 260, 261 (C.D. Ca. 1973), which held that a report requested by an insurer on its insured was encompassed by the business transaction provision and thus fell within the consumer report definition. *See supra* note 119. The court apparently believed that had Daniels's architects requested the report instead of the architects' insurer, the report would have been covered by the business transaction provision. The court's distinction, however, is dubious in light of the identity of interest between an insurer and its insured. The court thus erred in elevating the form of CNA and Daniels's relationship over its substance.

Moreover, the court failed to analyze critically the transaction underlying the litigation. The pertinent transaction in *Daniels* was plaintiff Daniels's contract to purchase the services of the architects and contractor. That transaction, like the FCRA's other statutory transactions, was characterized by a consumer relationship involving an exchange of money for services that the parties found mutually beneficial. *See supra* note 221 and accompanying text. Under this Comment's construction of the business transaction provision, therefore, the report was a consumer report because it was used to defend litigation that resulted from a transaction between the parties that is similar to the other statutory transactions. *See supra* notes 204-10 and accompanying text.

The second context in which this Comment's approach would cover a report used in connection with litigation occurs where an insurer obtains a re-

The Equifax report would have been a consumer report, however, under the collection purpose test. The collection purpose language should have been applied to the insurance company because it had reason to know that it was securing a consumer report.[231] The insurance company *requested* financial

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port on its insured primarily for the purpose of defending the insured in litigation. For example, in *Houghton,* if the insurance company had obtained a report on its insured, Rosenfeld, to defend against Houghton's suit, the report would have constituted a consumer report and the insurance company would have been obligated to comply with the Act with respect to Rosenfeld. The actual use of the report would have brought it within the statutory definition of consumer report because the report would have been used in connection with the company's contractual duty to defend its insured. The right to a defense is part of the consumer benefits purchased with the policy, and thus the company would have obtained a report in connection with a business transaction involving its insured. *See Hearings on S. 823, supra* note 35, at 299, 313-18 (Mr. Melvin L. Stark, representing the American Insurance Association, indicated that the consumer's defensibility in litigation is a factor which insurance companies deem highly relevant in deciding whether to write a policy. From the insurance industry's perspective, therefore, litigation is very much a part of their business.). Moreover, covering the hypothetical report under § 1681b's business transaction provision would not conflict with § 1681a(d)'s consumer report definition's limited coverage of reports for insurance purposes, because the report would be used primarily for litigation purposes, not insurance purposes. Absent a direct conflict with § 1681a(d), the Act can be expanded by § 1681b's business transaction provision to cover this hypothetical report. *See supra* notes 183-98 and accompanying text.

231. *See supra* note 173 and accompanying text. This assumes that the insurance company failed to prove that Equifax differentiated their regulated and nonregulated services. In fact, Equifax argued in its amicus brief that its report to the insurance company was not a consumer report under the FCRA, because it maintained differentiated services. *See* Brief For Amicus Curiae, Equifax Services, Inc. at 5-8, Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3rd Cir. 1986) (No. 85-1601). Equifax claimed that its consumer reporting division remained separate from and inaccessable to its claim division. *Id.* If the insurance company could prove knowledge of Equifax's alleged business practices, the insurance company could not be held to assume that a request for general financial information would be filled by accessing existing files originally collected for statutory purposes. *See infra* notes 232-33 and accompanying text (structure of industry requires assumption that regulated information will be received when financial information is requested). Thus, the collection purpose test would not apply, and the report would not be a consumer report with respect to the insurance company.

The result may differ, however, if Equifax were the defendant. Equifax would have to prove that the integrity of its separate files had been preserved. In a suit brought by the FTC against Equifax, the administrative judge found that Equifax in fact used its file information interchangeably and thus was using consumer report information in its claim reports. *See In re* Equifax Inc., 96 F.T.C. 844, 990 (1980), *rev'd in part,* 678 F.2d 1047 (11th Cir. 1982). In regard to the Houghton report, Equifax's investigator lacked "a present recollection of either the confidential source or the 'credit files' referred to" but further claimed that "credit files" could only mean public record financial information. Brief for Amicus Curiae, Equifax Services, Inc., at 8, Houghton v.

information which it should have assumed would be provided from preexisting files,[232] presumptively collected for statutory purposes.[233] Without having requested that Equifax compile the credit data contemporaneously with the request,[234] the insurance company should have known it would receive a con-

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New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3rd Cir. 1986) (No. 85-1601); *see supra* note 8 (quoting the claim report's reference to files searched). Although Equifax subsequently instructed its investigators to maintain file integrity, *Equifax*, 96 F.T.C. at 990-91, its prior practice casts doubt on the respectability of Equifax's differentiated structure. Moreover, the substantial inadequacies in Equifax's overall procedures revealed by the FTC investigation, cast further doubt, making the information's source an issue for trial. *See id.* at 1112-14 (ordering Equifax to cease and desist from disseminating consumer reports for unauthorized purposes; using quotas, awards, punishments, or other competitive pressures to encourage employees to produce a specified number or proportion of adverse reports; misrepresenting to the consumer his right to obtain disclosure or failing to disclose; and refusing to reinvestigate legitimately disputed items).

232. When requesting general financial information on a consumer, the requesting party should assume that the information will come from preexisting files. The number of individuals on file with agencies across the country is staggering. *See supra* note 40. The industry's scope is further enhanced by agencies' interconnected computerized systems that guarantee the availability of vast amounts of information quickly and efficiently to report users anywhere in the country. *See Hearings on S. 823, supra* note 35, at 146, 148 (Associated Credit Bureaus, Inc., whose member agencies dominate the industry, has an interbureau information exchange system available to all subscribing members); *Privacy Hearings, supra* note 32, at 68, 74 (H. C. Jordan, President of Credit Data Corp., testifying that consumer information is available within two minutes to the requesting party from anywhere in the country). Moreover, the industry objective is to maximize profitability by decreasing the cost of producing information, which is achieved through repeated use. The entire concept of the reporting industry, therefore, is based on collecting information to be reused in subsequent reports as many times as possible. *Hearings on S. 823, supra* note 35, at 149-50.

Equifax is no exception to this general rule. Formerly known as Retail Credit Co., Equifax is the largest consumer reporting agency in the United States, maintaining approximately 300 branch offices and 1,500 other offices located in every state. *Equifax*, 96 F.T.C. at 845-46 (citing FTC's complaint). "Through its nationwide network of offices, [Equifax] has the capacity to provide information on 98 percent of the population of the United States." *Id.* at 846.

233. *See supra* note 151.

234. Such a request would have avoided a search of preexisting data and consumer report status under the collection purpose test. The insurance company also argued that the record only indicated that "available credit files" had been searched, which was too vague to decide whether the search had covered Houghton's files, or only general credit files on others, in which no information on Houghton had been found. Brief of Appellant at 33, Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144 (3rd Cir. 1986) (No. 85-1601). The insurance company, however, *requested* financial information *on Houghton* and, therefore, it should have assumed that a search of Equifax's preexisting files collected for statutory purposes would be made. *See supra* note 151.

sumer report.[235] Because the company also requested information that could only be collected through an investigation within the meaning of the FCRA's investigative consumer report definition,[236] the insurance company should have been liable for failing to notify Houghton when the report was requested, as required by section 1681d.[237]

This Comment's approach also raises new theories of liability in the *Houghton* case. Because the business transaction provision's dual functions—defining a consumer report and delineating permissible dissemination—are defined coterminously,[238] litigation absent a consumer relationship is not a permissible dissemination purpose.[239] Assuming that a subscriber agreement bound the insurance company to authorized uses only, the company improperly accessed its Equifax account, thus obtaining the consumer report under false pretenses in violation of the Act.[240] Alternatively, if the subscriber agreement did not bind the insurance company to authorized uses or if there was no subscriber agreement, Equifax violated sections 1681b and 1681e by not using reasonable procedures to ensure the release and use of consumer reports for authorized purposes only.[241]

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235. The insurance company, an entity dealing with consumer reporting agencies on a regular basis, should be charged with knowledge of agency procedures. The consumer report definition was fulfilled by the company's request for financial data on Houghton, because the insurance company should have assumed that the data would be supplied from preexisting files. *See supra* note 232.

236. *See supra* note 21.

237. 15 U.S.C. § 1681d.

238. *See supra* text accompanying notes 199-203.

239. *See supra* text accompanying notes 226-30.

240. *See* 15 U.S.C. § 1681q; *see* Boothe v. TRW Credit Data, 557 F. Supp. 66, 70-71 (S.D.N.Y. 1982) (holding user liable for willfully obtaining information under false pretenses in violation of § 1681q where the user obtained a report for nonstatutory purpose, violating its subscriber agreement in which the user certified that it would use the agency's reports for credit transactions only); Hansen v. Morgan, 582 F.2d 1214, 1219-20 (9th Cir. 1978) (holding that when a user obtains a consumer report under a subscriber's agreement that binds the user to permissible uses only, failure to disclose its impermissible purpose can constitute a violation of § 1681q); *cf.* Russell v. Shelter Fin. Servs., 604 F. Supp. 201, 203 (W.D. Mo. 1984) (holding that when a user requests a consumer report for a nonstatutory purpose it has "willfully violated the FCRA as a matter of law"). A violation of § 1681q, a criminal provision, "forms the basis of civil liability under either § 1681n or § 1681o," and thus the consumer has a cause of action against the report's user. *See Hansen,* 582 F.2d at 1219.

241. Because the intended use of the report was clearly disclosed to Equifax in the insurance company's request, *see supra* note 4, a court should find subsequent release to be a clear violation of § 1681b and § 1681e(a). *See*

CONCLUSION

Through the FCRA, Congress enunciated a comprehensive public policy in the area of consumer reporting. Congress endeavored to strike an equitable balance between consumers' interests in accuracy, privacy, and confidentiality and the need for the valuable services afforded by the consumer reporting industry. Although the Act offers consumers the potential for substantial protections from the burgeoning, often overly intrusive consumer reporting industry, this potential has gone unrealized. Judicial interpretations of the FCRA's scope have short-changed consumers and rendered the Act impotent to achieve Congress's objectives.

This Comment's proposed analysis resolves existing judicial confusion and provides a consistent interpretation of the FCRA, yet maintains the integrity of the Act's language and structure. Courts should employ *both* the actual use and collection purpose tests in *every* FCRA case, modified as suggested when the defendant is a report user. This Comment provides a new approach to effectuate Congress's goals and to revive the long overdue consumer protections the FCRA intended to provide in the consumer reporting area.

Mary A. Bernard

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supra note 80 and accompanying text (FTC's guidelines for reasonable procedures to ensure authorized use only).