LIBEL AND SLANDER — PRIVILEGES — FIFTH CIRCUIT FINDS CREDIT REPORT UNPROTECTED BY GEORGIA PRIVILEGE STATUTE —*Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973).

INTRODUCTION

Credit reports are conditionally privileged publications in every state except Idaho and Georgia.[1] *Hood v. Dun & Bradstreet, Inc.*[2] [*Hood*] reaffirms Georgia's position.

Plaintiff David Pope Hood is an established and reputable building contractor in Atlanta, Georgia. On October 11, 1968, Dun & Bradstreet prepared a credit report concerning Hood which was distributed to eleven subscribers. The defendant's principal business is the investigation and reporting of any business or personal credit rating to subscribers.

Hood's credit report, distributed for the sole use of the subscriber,[3] contained the following statements:

> (3) Public Records reveal suit #248479 filed June 10, 1968, for $103, Wittock Dobbs Inc. vs. subject. Also suit #238558 filed April 3, 1968, Westron Corp. vs. subject.
> (4) Although complete details are not available, working capital appears limited at times with some trade, slowness noted.[4]

Dun & Bradstreet later admitted the falsity of the statements;[5] the evidence indicated that the statements were negligently prepared.[6]

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1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115, at 790 (4th ed. 1971).
2. 486 F.2d 25 (5th Cir. 1973) [hereinafter cited as *Hood*].
3. Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 174 n.2 (N.D.Ga. 1971). The written contract contains this disclaimer:

> This report is furnished by DUN & BRADSTREET, INC. in STRICT CONFIDENCE at your request under your subscription agreement for your exclusive use as a basis for credit, insurance, marketing and other business decisions and for no other purpose. DUN & BRADSTREET, INC. does not guarantee the correctness of this report and shall not be liable for any loss or injury caused by the neglect and/or other act or failure to act on the part of said company and/or its agents in procuring, collecting or communicating any information.

4. *Id.* at 172-74.
5. *Hood* at 27.
6. 335 F. Supp. at 181-82. An employee of Whittock Dobbs informed Dun & Bradstreet that the lawsuit concerned another David Hood. Apparently an investigation was begun but a retraction notice was not issued until the plaintiff's lawyer complained.

The federal district court sitting in diversity held that (1) the credit report was not conditionally privileged by the first amendment of the United States Consititution; (2) that the statements might be libelous by innuendo; (3) that credit reports were conditionally privileged under Georgia law and (4) that the failure to adhere to standard policy was not so negligent as to establish express malice to defeat the privilege.[7] Defendant's motion for summary judgment was granted.

The Fifth Circuit Court of Appeals agreed with the district court's holding concerning the first amendment and libel by innuendo. However, the court reversed and remanded on the grounds that Georgia *does not* extend a conditional privilege to credit agencies and that special damages were alleged sufficiently to defeat a motion for summary judgment.[8] Therefore, the issue of whether the credit report was libelous by innuendo was a jury question.

ARE CREDIT REPORTS CONDITIONALLY PRIVILEGED BY THE CONSTITUTION?

The United States Supreme Court has held that the press has a conditional privilege under the first amendment to maintain debate on public issues,[9] public figures,[10] and matters of a general or public interest.[11]

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7. *Id.* at 177, 178, 183.

8. *Hood* at 25-34.

9. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Justice Brennan stated the basic premise was a

> profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 270.

The Court held that "the Constitution delimits a State's power to award damages for libel in actions brought by *public officials* against critics of their *official* conduct." *Id.* at 283. (emphasis added)

Justice Douglas, concurring, stated that the minimum guarantee of the first amendment was an unconditional right to say what one pleases about public affairs. *Id.* at 297.

10. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

11. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971). Justice Marshall in a persuasive dissent had serious misgivings concerning the general or public interest doctrine. This doctrine was only supported by a plurality of the Court. It has been subsequently rejected by a majority of the Court in Gertz v. Robert Welch, Inc., 42 U.S.L.W. 5123 (U.S., June 25, 1974).

The Supreme Court until recently appeared to be expanding the scope of the first amendment, but the decision of *Pittsburgh Press Co. v. Pittsburg Commission on Human Relations*[12] reaffirmed the distinction between purely commercial speech and non-commercial speech. Editorial comment is conditionally privileged but commercial speech or activity is not privileged.[13] What constitutes purely commercial speech is not entirely clear. In *Pittsburgh Press*, the listing of classified advertising by sex was held to be commercial speech and therefore not protected by the first amendment. However speech is not rendered commercial merely because it relates to an advertisement.[14] If the speech *is* adjudged commercial, the state may regulate it without regard to the first amendment.[15]

Does the first amendment privilege encompass credit reports of mercantile agencies? In *Grove v. Dun & Bradstreet, Inc.*[16] the Third Circuit unequivocally said no: "We cannot accept the theory that the plaintiff's business or credit standing is a matter of 'real public interest.'"[17] The Third Circuit based its decision in *Grove* on three factors: (1) the victim has no access to the *same medium* to correct the error; (2) the confidential nature of these credit reports fall outside the zone of public debate, and (3) unlike editorial comment, the dispute with credit reports is *factual* in nature (not evaluative).[18]

In *Hood*, the district court and the Fifth Circuit agreed with the prevailing trend of authority,[19] holding that credit reports are purely commercial in nature and subject to state control. They reasoned that there is no broad public concern over the financial condition of a single business or person.[20] The credit report disclaimers[21] recognize

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12. ____ U.S. ____, 93 S. Ct. 2553, *rehearing denied* ____ U.S. ____, 94 S. Ct. 30 (1973).

13. *Accord*, Valentine v. Christensen, 316 U.S. 52, 54 (1942), where the Court stated: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."

14. ____ U.S. at ____, 93 S. Ct. at 2558.

15. *Id.*

16. *Id.* 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971).

17. 438 F.2d at 436.

18. *Id.* at 433.

19. Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972); Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972). *See also*, Adey v. United Action for Animals, Inc., 361 F. Supp. 457, 461 n.10 (S.D.N.Y. 1973). There the court recognized that credit reports were not conditionally privileged under the Constitution, but distinguished *Adey* which dealt with newsletters (not credit reports) sent to a large readership with unrestricted access to the information contained therein.

20. *Hood* at 30.

21. Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 174 n.2 (N.D.Ga. 1971); *see* note 3, *supra* in the report might mean $103,000, 355 F.Supp. at 176.

the *confidential* nature of the report. Credit reports deal with issues of fact, not opinion, and with nonpublic figures whose financial affairs concern those people who would *commercially* transact with the subject.

GEORGIA LIBEL AND SLANDER LAW: THE KEY ELEMENTS

The Fifth Circuit, finding no first amendment limitation, then analyzed the key elements of libel by innuendo under Georgia law. The general statutory definition of libel in Georgia is that

> libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of libelous matter is essential to recovery.[22]

If the judge determines that the published statements are ambiguous, under Georgia law resolution of the ambiguity is a jury question. If the jury finds that under the circumstances a defamatory meaning resulted, the statements constitute libel by innuendo.[23] The district court and the Fifth Circuit agreed on the content of Georgia law concerning the issue of libel by innuendo.

The crucial statement charged that Hood had been sued on two occasions. Dun & Bradstreet's investigator/employee after searching the public records discovered two lawsuits filed by two different corporations against a David Hood. These lawsuits involved another David Hood, not the plaintiff. Both federal courts held that the statement was ambiguous; it could result in a defamatory inference being drawn by the subscribers of the report.[24] Thus, the mistaken identity may be found by a jury to constitute libel by innuendo[25] when the circumstances of the innuendo are considered. Also, the $103 sought as damages in the erroneously reported lawsuit could be interpreted to

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22. GA. CODE ANN. § 105-701 (1968).

23. Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218 (5th Cir. 1968). *See* Aiken v. Constitution Pub. Co., 72 Ga. App. 250, 33 S.E.2d 555 (1945), where the court stated that "if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not." *Id.* at ———, 33 S.E.2d at 558; Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

24. *Hood* at 28.

25. *Id.*

mean $103,000 which could injure Hood's ability to obtain credit.[26] In addition, the statement concerning working capital was held to be ambiguous.[27] This statement indicated that a reasonable inference could tend to injure Hood's business (e.g., an inference that working capital and slowness referred to a lackadaisical attitude towards paying bills).

In Georgia the pleader must specifically allege special damages to sustain an action for libel by innuendo.[28] Special damages include loss of customers or business, expenditures to refute the alleged defamatory statement, or loss of "some material temporal advantage" capable of being measured in monetary terms.[29]

The district court did not examine the damage question since its decision was based on another issue. However, the Fifth Circuit did reach this issue. Judge Ingraham held that Hood specifically alleged two grounds of special damages.[30] First, citing a Georgia case,[31] he pointed out that the pecuniary expense to refute or remove the defamatory effect of the credit report from customers' minds constituted special damages. Hood specifically alleged such a loss in terms of the time spent and the persons contacted. Secondly, the plaintiff alleged (without referring specifically to any customers) that his business had decreased since the credit report was published. These two grounds were held to be specific enough to support the cause of action.[32] Reference to each customer lost due to defamatory statements was not necessary.[33] Hood additionally stated

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26. The district court indicated that a jury might find that Dun & Bradstreet typically stated figures in a format where the last three digits were dropped — thus "$103" in the report might mean $103,000, 355 F.Supp. at 176.

27. *Hood* at 28.

28. Mell v. Edge, 68 Ga. App. 314, 22 S.E.2d 738, 739 (1942); *see also* FED. R. CIV. P. 9(g); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 112, at 760, 761 (4th ed. 1971); J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE CASES & MATERIALS, 412 n. 3 (1st ed. 1968):

> Although the normal consequence of failing to plead special damages is being barred from proving them at trial, it is important to note that with regard to a few types of cases the existence of special damages is an integral part of the claim, and the failure to plead them renders the complaint subject to demurrer on motion to dismiss. This is true, for example, in many slander actions, in which the words are not considered actionable *per-se*.

29. Mell v. Edge, 68 Ga. App. 314, 22 S.E.2d 738 at 739 (1942); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 112, at 763 (4th ed. 1971). For the statutory definition of special damages *see*, GA. CODE ANN. § 105-2006 (1968).

30. *Hood* at 33.

31. Bradstreet Co. v. Oswald, 96 Ga. 396, 23 S.E. 423 (1895).

32. *Hood* at 33.

33. Bose Corp. v. Consumers Union of United States, Inc., 57 F.R.D. 528, 530 (D. Mass. 1973).

that financial data derived from his records would substantiate the lost business.

In view of the liberalness of the Federal Rules of Civil Procedure and the authorities cited, Judge Ingraham held that the *pleading* (not the proof) burden had been met.

THE DEFENSE: PRIVILEGED COMMUNICATIONS IN GENERAL

The general Georgia statute defines privileged communications as statements made (1) in the performance of a public duty or (2) in the performance of a legal or moral, private duty or (3) with the good faith intent by the speaker to protect his own interest in a matter where it is concerned.[34] Initially, the definition appears very broad; however, the Georgia courts have established some parameters which closely resemble the first amendment conditional privilege requirements.[35]

The privilege is conditional; it will be lost if the publication is malicious.[36] Actual malice as a condition has been criticized as a meaningless and unsatisfactory term,[37] requiring "slippery proof of a mental state."[38] An early Georgia supreme court case commented:

> To make the defense of privilege complete in an action of libel, good faith, an interest to be upheld, a statement limited to this purpose, a proper occasion and publication in a proper manner and to proper parties only must appear. The absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying on the privilege.[39]

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34. GA. CODE ANN. § 105-709 (1968).

35. Henery v. Collins, 380 U.S. 356 (1965). The federal test is "knowledge that it was false, or with reckless disregard of whether it was false or not," New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). A "bona fide intent" is necessary under Georgia law to claim a privilege, GA. CODE ANN. § 105-709 (1968).

36. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115, at 794 (4th ed. 1971).

37. *Id.* at 795.

38. Grove v. Dun & Bradstreet, Inc., 438 F.2d 433, (3d Cir.), *cert. denied*, 404 U.S. 898, 902 (1971) (Douglas, J., dissenting).

39. Sheftall v. Central of Georgia Ry., 123 Ga. 589, _____, 51 S.E. 646, 468 (1905). For further discussion of these tests *see* Holder Constr. Co. v. Ed Smith & Sons, 124 Ga. App. 89, 182 S.E.2d 919 (1971) to protect speaker's own interest in a matter where it was concerned; Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951), where false and defamatory statements accusing Masters of the crime of larceny were made not only to the proper persons, *i.e.*, the police, but to improper persons, *i.e.*, the plaintiff's neighbors; Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945), where statements by employee were made in performance of a private duty.

Thus, *private* duties can create a *conditional* privilege. In addition, certain *public* duties are *unconditionally* privileged,[40] regardless of one's motives. The credit report on Hood was likely made in good faith. Corporate structures of such an impersonal nature as Dun & Bradstreet rarely have the express malice needed to defeat the privilege. The examination of the public records for pending lawsuits and the subsequent failures to follow standard policies were, at most, merely negligent actions.[41] These factors convinced the district court that Dun & Bradstreet had not acted with "actual malice."[42] The credit report was distributed to "proper persons," on a "proper" occasion and was "properly limited in . . . scope." Therefore, since there was no dispute as to the material facts, summary judgment was granted. The Fifth Circuit did not reach the issue of actual malice, since it found no privilege.

ERIE DOCTRINE AND GEORGIA LAW: ARE CREDIT REPORTS PRIVILEGED?

Next, the Fifth Circuit examined the problem which arose from the landmark case of *Erie Railroad Co. v. Tompkins*[43] [*Erie*] which requires federal district courts in diversity actions to apply the substantive law of the state in which the court sits.

The issue was whether the *current* status of the Georgia state law, as interpreted by its highest court, made credit reports conditionally privileged. The problem is the peculiar and highly uncertain process of ascertaining the content of substantive state law. The Fifth Circuit had to ascertain how the present Georgia supreme court would construe the Georgia privilege statute which states in part:

> Privileged communications: The following are deemed privileged communications:
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> 1. Statements made bona fide in the performance of a public duty.
>
> 2. Similar statements in the performance of a private duty; either legal or moral.

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40. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952), holding testimony at trial absolutely privileged; the only redress being prosecution for perjury.

41. *But see*, Southeastern Newspapers, Inc. v. Walker, 76 Ga. App. 57, 44 S.E.2d 697 (1947), which indicates that express malice may be implied from a failure to publish a retraction.

42. Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 180-83, (N.D.Ga. 1971).

43. 304 U.S. 64 (1938) [hereinafter cited as *Erie*].

3. Statements made with the bona fide intent, on the part of the speaker, to protect his own interest in a matter where it is concerned.[44]

The principal case relied upon by Hood was *Johnson v. Bradstreet*[45] decided in 1886. The Georgia Supreme Court held that a credit report was not conditionally privileged. The decision hinged upon whether credit reports which contained false statements were valid contracts establishing a private, legal or moral duty. The Georgia Supreme Court held that a false report was immoral. Since immoral contracts were void (e.g., constituting no legal duty), the Georgia Supreme Court concluded that credit reports were not conditionally privleged. Immoral contracts created no private duties.

Thirteen years later, the Georgia supreme court in *Western Union Telegraph Co. v. Pritchett*[46] reaffirmed its holding in *Johnson*. The opinion approvingly quoted from *Johnson:* "A contract to pry into and give information concerning the business of another does not create such a public or private duty, legal or moral, as would make a false communication, injurious to another, privileged."[47]

Unfortunately the precise issue of privilege concerning credit reports has not reached the Georgia Supreme Court since the late nineteenth century. However, the two federal courts involved felt that two recent Georgia appellate cases were helpful.

The federal district court cited *Cochran v. Sears, Roebuck & Co.*,[49] to support its finding of a conditional privilege. In *Cochran* a company nurse examined a fellow employee and erroneously diagnosed a case of prickly heat as syphilis. At the time, the patient/employee was having her children cared for by the Child Welfare Department. The plaintiff alleged that either the company nurse or the plaintiff's supervisor caused some "unknown" employee of Sears to inform the Child Welfare Department that the plaintiff had a venereal disease. Later, a welfare department official requested the company nurse to confirm the report; the nurse did so. The plaintiff was denied visitation rights until the "problem was cleared up." The Court of Appeals of Georgia held that since the plaintiff failed to allege that the defen-

44. GA. CODE ANN. § 105-709 (1968).
45. 77 Ga. 172 (1886).
46. 108 Ga. 411, 34 S.E. 216 (1899).
47. *Id.* at ———, 34 S.E. at 216-17.
48. *Id.* at ———, 34 S.E. at 217.
49. 72 Ga. App. 458, 34 S.E.2d 296 (1945) [hereinafter cited as *Cochran*].

dant corporation directed or authorized its employees to utter the slanderous words, under Georgia law, the complaint failed to state a cause of action.[50] However, the court held that even if such authorization occurred, the statements were still privileged;[51] the defendant employees were acting in good faith in the performance of a private duty to protect the corporation's own interest and the interests of the plaintiff and her children.

Cochran is arguably distinguishable from *Hood* since the published statements in *Cochran* were made to the Child Welfare Department without any pecuniary motivation. In *Hood*, the credit information was sold for a fee. The district court in *Hood* emphasized that in *Cochran* the defendant nurse acted properly since she answered the Child Welfare Department's inquiry in good faith relative to the plaintiff's *family* matters. The court stated that the nurse had a legal duty to speak since the Child Welfare Department had a "vital" interest in the physical and moral welfare of the plaintiff's children.[52] In *Hood*, the interest of the third party was distinguishable. Subscribers have no vital interest in the investigatee's welfare, rather the information is for the subscriber's own benefit: a matter of an economic self-interest versus the welfare agency's interest for the benfit of the children. The defendants in both cases knew or had reason to know the nature of the third parties' interests. The interest in *Cochran* was akin to the interest of the police in reporting crimes. The interest in *Hood* merely involved a direct private concern. Consequently the duties to answer differ to the extent that the third party interests differ. The district court in *Hood* found no such distinctions and applied *Cochran* to the credit report situation.

A 1971 case, *Southeast Bankcard Association v. Woodruff*,[53] was not cited or analyzed by the district court, but the Fifth Circuit perceived its importance. This case concerned credit card cancellation bulletins, in which the plaintiff's name was included, which were circulated to members of a credit card association. The bulletin included a disclaimer asserting that the listing of a credit card holder therein did not reflect on the character or credit of the cardholder and the bulletin warned that it was confidential.

Since one could draw the interpretation that the plaintiff was a

50. *Id.* at _____, 34 S.E.2d at 295.
51. *Id.* at _____, 34 S.E.2d at 298-99.
52. Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 180 (N.D.Ga. 1971).
53. 124 Ga. App. 478, 184 S.E.2d 191 (1971).

credit or moral risk, the court concluded that the listing of the plaintiff could constitute libel by innuendo.[54] Thus, "[e]ven though words be innocently or negligently spoken or printed, but not maliciously, if the plaintiff suffers special damage as a result, he may nevertheless recover for such damage."[55]

The conditional privilege issue was not discussed. The court's silence is significant, since it could readily have found a conditional privilege based on a private contractural duty. *Woodruff* is apparently indistinguishable from *Hood*. Both cases involve the credit of the plaintiffs. Both cases had disclaimers within the report which emphasized the confidential nature of the information. Both cases involved publications without malice and concerned libel by innuendo. Neither plaintiff had access to the same medium to remedy the injury. According to the Fifth Circuit, if a Georgia Appellate Court found no private duty and thus no privilege between a credit association and its members, it would probably find that no private duty existed between a mercantile agency and its subscribers.

The federal district court apparently believed that the *Cochran* case indicated an inconsistency of state decisions. The district court felt the *Cochran* rational would be adopted and that the credit report would be granted a conditional privilege. The Fifth Circuit conceded that *Erie* does not require a mere "mechanical" following of state law. The federal court can consider all data that a state court would analyze.[56]

An old state supreme court decision, such as the *Johnson* case, need not be always adhered to. In *Mason v. American Emery Wheel Works*,[57] the First Circuit found unnecessary the district court's reliance on an old (1928) Mississippi Supreme Court case requiring privity of contract to recover in product liability.[58] A more recent case had indicated, by dicta, that the state supreme court would be ready to hold otherwise when the question next arose.[59] Seizing upon this dicta, the First Circuit departed from the 1928 holding in predicting the new Mississippi rule. The situation in *Hood* was different. The Georgia Supreme Court has not, by way of dicta or otherwise, indicated that the precise issue of privilege would be ad-

54. *Id.* at _____, 184 S.E.2d at 193.
55. *Id.*
56. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 239-40 (2d ed. 1970).
57. 241 F.2d 906 (1st Cir. 1957).
58. Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362 (1928).
59. E. I. DuPont DeNemours & Co. v. Ladner, 221 Miss. 378, 73 So.2d 249 (1954).

judicated any differently.

Mr. Justice Stone commented upon adherence to state supreme court decisions in *West v. American Telephone & Telegraph Co.*:[60]

> True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given *clear and persuasive* indication that its pronouncement will be modified, limited, or restricted. . . .[I]t is the duty of the [federal court] in every case to ascertain from all the available data what the state law is and apply it rather than prescribe a different rule, *however superior* it may appear from the viewpoint of "general law". . . . [emphasis added].[61]

Thus, the federal court must ascertain what the state law is, not what it ought to be.[62]

In *Bernhardt v. Polygraphic Co. of America*,[63] a 1956 case in which a 1910 Vermont Supreme Court decision was applied, Justice Douglas stated the considerations involved: there was (1) no later authority from the Vermont courts; (2) no doubts or ambiguities in subsequent rulings and (3) no legislative development that promised to undermine the rule.[64]

The dissent by Judge Ainsworth in *Hood* cited three Fifth Circuit cases dealing with *Erie* problems which support the premise that

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60. 311 U.S. 223 (1940).
61. *Id.* at 236-37.
62. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941).
63. 350 U.S. 198 (1956).
64. *Id.* at 204-05:

> [R]ulings of the supreme court [of a state are] controlling unless it can be said with some assurance that the [state] supreme court will not follow them in the future. The Circuit Courts of Appeals do *not* have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi supreme court had the power to reconsider and overrule its former interpretation, but the court below did not. (citations omitted)

Erie is a flexible doctrine.[65] According to Judge Ainsworth, the flexibility of the *Erie* doctrine should have been exercised in *Hood*, since much of the state decisional law was old, ill reasoned, and contrary to the majority of jurisdictions.[66]

The *Erie* problem was properly handled by the majority opinion in *Hood*. The Georgia Supreme Court has not indicated in any recent cases via dicta or otherwise that it would be willing to overrule its prior holdings. There are no "fractures" or ambiguities in the Georgia Supreme Court cases subsequent to the two early decisions. There are no "clear and persuasive" indications that the Georgia Supreme Court would depart from its previous holdings. One should be reminded that the state law is to be applied without regard to its adequacy or inferiority.[67] In addition, federal courts have declined to follow intermediate state appellate court decisions which conflict with an earlier state supreme court decision where it was unclear whether the state supreme court would change its prior holding.[68]

The district court was heavily influenced by the fact that only Idaho[69] and Georgia have refused to grant a conditional privilege to mercantile agencies in the past. However, since there was no clear dicta by the Georgia Supreme Court, no developing legislation in Georgia, and no cases by the Georgia Supreme Court since the late nineteenth century, the district court searched the Georgia appellate court reporters. That court came up with one case which supposedly supported its "desired" view of the Georgia law; however, *Cochran* is distinguishable.[70] In addition the *Woodruff* case was a more recent decision (by twenty-six years) and it dealt with a

65. Peacock v. Retail Credit Co., 429 F.2d 31 (5th Cir. 1970) (Georgia state law as to the conditional privilege of credit reports was never reached; summary judgment rested on the Georgia statute of limitations); Union Bank & Trust Co. v. First Nat'l Bank, 362 F.2d 311 (5th Cir. 1966) (if there is no state appellate decision on the precise point, the federal court will "divine" what the Georgia court would do); Shelp v. National Sur. Corp., 333 F.2d 431 (5th Cir. 1964) (no obligation under *Erie* when there is persuasive data that the highest court of the state would decide otherwise).

66. *Hood* at 34.

67. West v. American Tel. & Tel. Co., 311 U.S. 223, 236 (1940).

68. *See, e.g.*, Legget v. Commissioner, 329 F.2d 509 (2d Cir. 1964).

69. Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914). The fact that all the other states afforded credit agencies a privilege coupled with the fact that the Idaho case and the Georgia cases are "ancient" steered the Georgia federal district court towards the majority rule. Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 179 (N.D.Ga. 1971).

70. *See* text accompanying notes 53-55, *supra*.

much more analogous situation.[71] The district court apparently was not aware of the almost concurrent *Woodruff* case.[72] Regardless, the two Georgia appellate court cases do not stand together. Evidently, the Fifth Circuit recognized the distinctions and it was not clearly persuaded or adequately assured that the Georgia Supreme Court would depart from its earlier holding.

Two other reasons influenced the Fifth Circuit's decision: (1) the assumed social policy for granting the conditional privilege to credit agencies was fallacious and (2) the explosion of consumer protection law.

SHOULD CREDIT AGENCIES BE GRANTED A CONDITIONAL PRIVILEGE?

The merits and demerits of the conditional privilege are rooted in economics. The Fifth Circuit examined the social benefits *vis a vis* the social costs of granting the privilege. The primary benefit is the dissemination of information essential to intelligent business decisions. The Fifth Circuit noted an early commentator who believed that this benefit outweighed any cost involved.[73] The argument was that the cost of the harm was slight; besides, "A strong argument against the [view that credit reports are full of gossip] is furnished by the general custom of modern wholesale merchants and bankers . . . to become and continue subscribers to mercantile agencies. The shrewdest businessmen of the present day would hardly continue to pay for information which is of no substantial value."[74]

Two counterarguments were implicit in the Fifth Circuit's rationale. The first involves the question of whether dissemination of credit information would be seriously curtailed if the conditional privilege were removed. Economic analysis has demonstrated that the demand for credit reports is inelastic since credit reports are indispensable for credit decisions, and no adequate substitute for the

71. *See* text accompanying notes 56-61, *supra.*

72. *Woodruff* was decided in September of 1971, while *Hood* was decided by the federal district court in December of 1971. It is possible that at that time neither the parties nor the court were aware of the *Woodruff* decision.

73. *Hood* at 31 n.15.

74. Smith, *Conditional Privilege for Mercantile Agencies — Macintosh v. Dun,* 14 COLUM. L. REV. 187, 197 (1914). Smith recognizes the basic test — the balancing of the harm done to credit applicants versus the advantages derived by creditors. Without any real empirical data, he concluded that the benefits far outweighed the harm, and that the cost of litigation would vex the dissemination of this indispensable information. *Id.* at 207.

medium exists."[75] The second argument involves the question of who is the "cheapest" cost avoider. The risk of defamation can be spread by acquiring insurance and increasing the cost of the credit report thus shifting the cost to those persons (creditors) who receive the report's benefits."[76] And, as already noted, this added cost is not so great as to restrict the flow of credit information."[77]

The Fifth Circuit cited as another reason for its decision the recent trend of consumerism indicating that the earlier Georgia cases may be a century ahead of their time. Recent federal legislation"[78] provides that consumers may recover from credit agencies who violate the statute's provisions."[79] The Fifth Circuit argued that since Congress recognized that the credit reporting industry needed regulating, the Georgia Supreme Court would not now alter its prophetic stance."[80]

CONCLUSION

Hood reiterates that credit reports are not conditionally privileged by the first amendment. In addition, Georgia law does not grant a conditional privilege to credit reports. The Fifth Circuit properly concluded after examining all of the pertinent data — the early Georgia Supreme Court decisions, the Georgia appellate court decisions, the economic premises, and the trend toward consumer protection — that Georgia would continue to deny the privilege. This litigation was essentially an *Erie* problem, *i.e.*, what does a federal court do when it is confronted with ancient state decisions? In some cases, the ancient opinions should not be applied. In other cases, such as this one, the

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75. Comment, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1041-42 (1971).

76. *Id.* at 1044-46. Erroneous credit reports are just another example of the risks one undertakes by doing business. Arguably at least, the business should be liable for the risks of negligent defamation, just as it is liable for other negligent acts.

77. *See also* Ullman, *Liability of Credit Bureaus After Credit Reporting Act: The Need for Further Reform*, 17 VILL. L. REV. 44, 50-51 (1971).

78. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681(t) (1971).

79. *Id.* at §§ 1681(n) & 1681(o). *See also* Ullman, *supra* note 77, at 62-64. Ullman states that the legislation did not go far enough, since a credit applicant, who happens to be a merchant is not afforded a remedy for damages. The Fair Credit Reporting Act also provides that in certain rare circumstances the credit bureau must inform the consumer within three days of the date the report was requested that such a request was made, 15 U.S.C. § 1681(d) (1971). *See also* Comment, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 511-13 (1969); Comment, *Consumer Protection: Regulation and Liability of the Credit Reporting Industry*, 47 NOTRE DAME LAW. 1291 (1972).

80. *Hood* at 32.

old state supreme court decision must be adhered to. The problem of ascertaining the current law of a state is a continuing one.

The dissenting opinion in *Hood* stated that the reasons for adhering to the older Georgia cases were unpersuasive. The dissent's view is in the wrong direction. The burden appears to be that there must be positive, persuasive reasons to indicate that the state would change its law. The burden is *not* that there must be positive, persuasive reasons to indicate that the state would *maintain* the status quo. The presumption is not easily rebutted.

The economic reasons against the privilege are strong. The concern for one's right of privacy is great. And the need for further federal and state safeguards continues.[81] At this time Georgia and Idaho, based upon "old-fashioned" decisions, are the distinct minority, but perhaps, in light of federal consumer legislation, the old minority will become the new majority.

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81. Ullman, *supra* at note 77; Comment, *Credit Investigations and the Right to Privacy: Quest for a Remedy, supra* at note 79; Comment, *Protecting the Subjects of Credit Reports, supra* at note 75. All three articles indicate that an investigatee should be able to recover, at a minimum, for negligent credit reporting. Some of these writers argue that strict liability in tort should be applied to defective credit reports. Other solutions proposed are (1) to establish personal information as a property right with all of its due process implications or (2) recognize the right of privacy with all of its due process implications.