UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CONSUMER DATA INDUSTRY ASSOCIATION,	)	
Plaintiff,	)	
v.	)	
	)	**1:19-cv-00438-GZS**
AARON M. FREY, et al.,	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW

COMES NOW, Plaintiff Consumer Data Industry Association ("CDIA") and pursuant to this Court's Procedural Order dated January 6, 2020, and in accordance with District of Maine Local Rule 56, submits its Motion for Judgment on the Record with Incorporated Memorandum of Law presented to this Court pursuant to District of Maine Local Rule 56(b), per Procedural Order dated January 6, 2020.

INTRODUCTION

The issue in this case is a pure question of law: whether two recently enacted Maine laws are preempted by the Fair Credit Reporting Act ("FCRA").[1] This Court should answer the question in the affirmative and enter judgment in favor of CDIA.

In enacting the FCRA, Congress established a national credit reporting system to assure the accuracy, integrity and reliability of the consumer report information that is essential to meet the "needs of commerce" and to promote the "efficiency of the banking system."[2] To ensure the

[1] 15 U.S.C. §§ 1681 *et seq*.
[2] 15 U.S.C. § 1681 (Congressional findings and statement of purpose).

uniformity of the credit reporting system, Congress provided for express federal preemption of state laws that interfere with that system.

Two newly enacted Maine laws, L.D. 110, An Act Regarding Credit Ratings Related to Overdue Medical Expenses (the "Medical Bill Act"), and Section 1 of L.D. 748, An Act to Provide Relief to Survivors of Economic Abuse (the "Economic Abuse Act"), (together, "Maine's Laws") are preempted under the principles of subject matter preemption because they attempt to regulate the content of consumer reports in violation of FCRA Section 1681t(b)(1)(E). The Economic Abuse Act is also preempted under the conduct preemption provision of the FCRA because it attempts to regulate conduct of consumer reporting agencies ("CRAs") related to the handling of identity theft reports from consumers in violation of FCRA Section 1681t(b)(5)(C).

PROCEDURAL POSTURE AND STANDARD OF REVIEW

The parties are before this Court on cross-motions for judgment on the agreed-upon record and facts as they both recognize that the issue presented is a pure legal question. The parties submitted a Joint Stipulation of the Record ("Record" or "R") and a Joint Stipulation of Facts ("Facts" or "JSOF") on January 17, 2020 (Document Numbers 13 and 14, respectively) consistent with Local Rule 56(b). Under Federal Rule of Civil Procedure 56, a party is entitled to judgment if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); s*ee also Chadwick-BaRoss, Inc. v. T. Buck Const., Inc.*, 627 A.2d 532, 534 (Me. 1993) (citing *Lewiston Bottled Gas Co. v. Key Bank of Maine,* 601 A.2d 91, 93 (Me.1992) (holding Superior Court properly granted summary judgment where the parties differed as to the legal conclusions to be drawn from the facts but neither party contended that there was any serious dispute as to the relevant facts). Based on the Record and the Facts, CDIA seeks a declaratory judgment pursuant to Federal Rule of Civil

Procedure 57 and the Declaratory Judgments Act, 28 U.S.C. §§ 2201(a) and 2202, that the Medical Bill Act and the Economic Abuse Act are preempted by the FCRA. Such a declaration would resolve the controversy existing between the parties and provide certainty regarding the legal rights and obligations of the parties related to accurate and uniform reporting of consumer accounts.

ARGUMENT

I. CDIA has Standing to Bring this Case on Behalf of its Members.[3]

CDIA is an international trade association, founded in 1906, and headquartered in Washington, DC. It is the largest trade association of its kind in the world. CDIA's membership includes more than 200 consumer credit reporting agencies and other specialized CRAs operating in the United States and throughout the world. Its members include the three nationwide CRAs, Equifax, Experian and Trans Union, as well as other CRAs that furnish information concerning Maine consumers to consumer report users that have "permissible purposes" under the FCRA to receive such information. 15 U.S.C. §1681b. JSOF ¶ 1.

As an association, CDIA has standing to raise these claims on behalf of its member CRAs. An association has standing to pursue claims as a representative of its members if: (a) its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the organization's purpose; and (c) neither the claim nor the relief requested requires the participation of individual members of the association in the lawsuit. *Ass'n of Am. Phys. & Surgeons, Inc. v. Tex. Med. Bd.,* 627 F.3d 547, 550 (5th Cir. 2010) *citing Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). As set forth more fully below, each of the

[3] Defendants have pled two affirmative defenses in their Answer that are addressed herein. First, that CDIA lacks standing to proceed in this case on behalf of its members; second that "[t]his matter is not ripe or is not otherwise not justiciable." R. 2, Answer, Affirmative Defense Numbers 3 & 4). As those defenses have not been articulated in detail, CDIA reserves the right to respond to them more fully in its response brief.

members affected by Maine's Laws would have standing to bring a challenge. Further, the issues presented are pure issues of law that apply equally to all affected members. This suit does not involve any contested facts requiring the participation of individual members; thus, CDIA may pursue the claims on their behalf.

With respect to standing, the affected CDIA members have Article III standing when faced with a newly enacted law or regulation that will affect the operation of their businesses. In *Virginia v. American Booksellers Ass'n, Inc.*, the Supreme Court made clear that plaintiff must establish "as an irreducible minimum an injury in fact; that is there must be some 'threatened or actual injury resulting from the putatively illegal action . . . "484 U.S. 383, 394 (1988) citing *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (internal citations omitted). "**That requirement is met [where] the law is aimed directly at [the] plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution**." *Id*. (emphasis added). In particular, the Court noted that the fact the suit was brought prior to an enforcement action did not mean the plaintiffs lacked standing; noting "[the] State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." *Id*. at 643.

These principles were reaffirmed in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159 (2014). In *Driehaus*, petitioners were activists who intended to publish statements challenging potential political candidates in future elections but feared administrative and/or criminal action pursuant to Ohio's "false statement laws." *Id*. The group sought a declaratory judgment order invalidating the laws. The defendants argued the group lacked standing to pursue the challenge as

no claim was pending alleging noncompliance and for a lack of ripeness. The Supreme Court found that the petitioners articulated both standing and ripeness:

> One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law . . . ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights") . . . "Where threated action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat . . . "

Driehaus, 573 U.S. 149, 158-159 (2014) (internal citations omitted). Notably, with respect to ripeness, the Supreme Court found that the petitioners had established Article III injury, that the question was "purely legal, and [would] not be clarified by further factual development" and that "denying prompt judicial review would impose substantial hardship on petitioners, forcing them to choose between refraining from [lawful conduct] on the one hand, or engaging in [that conduct] and risk costly [administrative enforcement] and criminal prosecution on the other." *Id*. at 167-168.

It is undisputed that: (1) CDIA members may provide consumer reports containing medical information on consumers to the extent such information is in the consumer's file and as permitted by the FCRA. JSOF¶ 2; (2) CDIA's members would be required to remove medical information from consumer reports in order to comply with 10 M.R.S. § 1310-H(4). JSOF ¶3; (3) CDIA's members will be required to have procedures in place to "reinvestigate [a] debt and determine whether the debt is the result of economic abuse" in order to comply with 10 M.R.S. § 1310-H(2-A) and, depending on the outcome of this action, the members' current procedures may have to be revised. JSOF ¶4; (4) CDIA's members would be required to remove from a report debt that resulted from economic abuse after such reinvestigation. JSOF ¶ 5; (5) Defendants have authority to investigate suspected non-compliance with the Maine Laws. JSOF ¶7, R. 2, Answer, para. 2,

3; (6) CDIA members would be subject to administrative enforcement, which could result in damages and penalties, as well as civil suits for actual, statutory, and punitive damages by consumers. JSOF ¶6. *See also* 10 M.R.S.A § 1310-A, C, and D. As with *Dreihaus,* therefore, CDIA members are forced to choose between refraining from lawful conduct (the reporting of accurate information that the FCRA permits) or engaging in that conduct and risking administrative enforcement or other liability. This Court should find CDIA has established standing and that the matter is ripe for adjudication.

II. Maine's Medical Bill Act and Economic Abuse Act.

Maine's newly enacted laws related to credit reporting arise out of a worthwhile intention to assist Maine residents who have accrued burdensome medical debt and/or who have been the victims of economic abuse. Unfortunately, the legislature has attempted to provide this assistance by limiting the information that a CRA may include on a consumer report in contravention of federal law and the strong public policy in favor of a nationwide credit reporting system.

In particular, the Medical Bill Act expressly provides as follows:

> **Reporting of medical expenses on a consumer report.** Notwithstanding any provision of federal law, a consumer reporting agency shall comply with the following provisions with respect to the reporting of medical expenses on a consumer report.
>
> **A.** A consumer reporting agency may not report debt from medical expenses on a consumer's consumer report when the date of the first delinquency on the debt is less than 180 days prior to the date that the debt is reported.
>
> **B.** Upon the receipt of reasonable evidence from the consumer, creditor or debt collector that a debt from medical expenses has been settled in full or paid in full, a consumer reporting agency:
>
> **(1)** May not report that debt from medical expenses; and
>
> **(2)** Shall remove or suppress the report of that debt from medical expenses on the consumer's consumer report.

> **C.** As long as the consumer is making regular, scheduled periodic payments toward the debt from medical expenses reported to the consumer reporting agency as agreed upon by the consumer and medical provider, the consumer reporting agency shall report that debt from medical expenses on the consumer's consumer report in the same manner as debt related to a consumer credit transaction is reported.

10 M.R.S.A. §1310-H(4).

Thus, in short, the Medical Bill Act: (i) prohibits CRAs from reporting any medical account information in a credit report until the debt is more than 180 days old; (ii) requires CRAs to remove medical debts upon proof presented that the debt has been paid in full or settled (as opposed to allowing the CRA to continue to report the debt but marking it as "paid in full"); and (iii) so long as the consumer is making "periodic payments [an undefined term] in the statute as agreed upon by the consumer and the medical provider," the CRA must include the debt on subsequent reports.

Under the Economic Abuse Act, a CRA must investigate claims of "economic abuse"[4] and remove "any reference to" debts or portions of debts determined to be the result of "economic abuse" 10 M.R.S.A. §1310-H(2-A). Specifically, the Economic Abuse Act provides, in relevant part:

> Except as prohibited by federal law, if a consumer provides documentation to the consumer reporting agency as set forth in Title 14, section 6001, subsection 6, paragraph H that the debt or any portion of the debt is the result of economic abuse as defined in Title 19-A, section 4002, subsection 3-B, the consumer reporting agency shall reinvestigate the debt. If after the investigation it is determined that the debt is the result of economic abuse, the consumer reporting agency shall remove any reference to the debt or any portion of the debt determined to be the result of economic abuse from the consumer's credit report.

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[4] The law defines "economic abuse" broadly as:

> causing or attempting to cause an individual to be financially dependent by maintaining control over the individual's financial resources, including, but not limited to, unauthorized or coerced use of credit or property, withholding access to money or credit cards, forbidding attendance at school or employment, stealing from or defrauding of money or assets, exploiting the individual's resources for personal gain of the defendant or withholding physical resources such as food, clothing, necessary medications or shelter.

19-A M.R.S.A. § 4002(3-B).

10 M.R.S.A. § 1310-H(2-A).

Accordingly, under the Economic Abuse Act, a consumer may provide documentation in support of a claim that she has been the victim of "economic abuse" to the CRA, and the CRA is required to conduct a reinvestigation of the truth of the consumer's claim – i.e. to determine whether the consumer has suffered "economic abuse." The information a consumer may rely on is *not* limited to a court order or finding of actual economic abuse; even mere allegations of unlawful conduct are sufficient.[5] The CRA is expected to independently investigate the facts surrounding the allegation of abuse, and in the event the CRA answers the claim in the affirmative, the CRA is prohibited from reporting that account information in future reports related to the alleged victim. *Id*.

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[5] The information a consumer may present to the CRA in support of a claim of economic abuse includes the following non-exhaustive list of materials:

(i) A statement signed by a Maine-based sexual assault counselor; various advocates; health care provider; mental health care provider: or law enforcement officer;

(ii) Complaints seeking protection from alleged abuse or harassment;

(iii) Temporary or final orders of protection;

(iv) Police reports prepared in response to an investigation of an incident of domestic violence, sexual assault or stalking; and

(v) Criminal complaints, indictments or convictions for a domestic violence, sexual assault or stalking charge.

14 M.R.S.A. § 6001(6)(H). Note the revisions to the Economic Abuse Act related to credit reporting ignore the procedure the state has adopted to adjudicate claims of economic abuse – which adjudications are to be conducted by the judiciary. In particular, a person claiming to be the victim of economic abuse must file a complaint with the court under penalty of perjury. 14 M.R.S.A. § 4005(1) and (5). The defendant is served with process, and the case proceeds. If the court finds that the person is the victim of economic abuse, the court has the power to impose a number of remedies, including "ordering payment of monetary relief to the plaintiff for losses suffered as a result of the defendant's conduct; and "entering any other orders determined necessary or appropriate in the discretion of the court." 14 M.R.S.A. § 4007(K) and (M), respectively.

The Economic Abuse Act therefore imposes two new requirements on CRAs. The first is to adjudicate a consumer's claim that a debt or portion of a debt results from "economic abuse" through review of evidence presented in support of that claim. The second is to exclude or include such information from or on future reports based on such adjudication – i.e., another attempt to impermissibly regulate the content of consumer reports.

III. The Fair Credit Reporting Act and Federal Preemption.

The FCRA reflects a careful congressional balancing of the "needs of commerce" and the "efficiency of the banking system" with the need to protect the privacy interests of consumers related to the information about them provided by CRAs. *See* 15 U.S.C. § 1681.[6] Each year, CDIA member CRAs furnish more than 1.5 billion consumer reports to such users, including creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies, all of which use this information to make important risk-based decisions not only with regard to the extension of credit, but also in hiring potential employees, evaluating the backgrounds of potential tenants, as well as to provide information to law enforcement to locate individuals suspected of criminal activity. *See TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001); *Sarver v. Experian Info. Sols*., 390 F.3d 969, 972 (7th Cir. 2004). The information in consumer reports contributes to the soundness, safety, and efficiency of the insurance, banking, finance, retail credit, housing, and law enforcement systems in the United States. To assure the continued balance of all of these interests, Congress chose to preempt numerous state laws that might be disruptive. 15 U.S.C. § 1681t(b)(i)(e).

[6] The FCRA regulates the practices of the three principal groups involved in the credit reporting system: (1) consumer reporting agencies, often referred to as "credit bureaus"; (2) furnishers of consumer report information to the CRAs (such as lenders that have accounts with consumers); and (3) users of consumer reports. CRAs collect and compile consumer information, supplied by furnishers, into consumer reports and provide them to authorized users.

The FCRA provides for multiple forms of preemption of state law under 15 U.S.C. § 1681t. First, FCRA § 1681t(a) preempts any state law that is "*inconsistent with any provision*" of the FCRA. This "conflict preemption" rule codifies the longstanding approach to conflict preemption taken by the courts, in which state law is preempted when there is outright or actual conflict between federal and state law, or where compliance with both federal and state law is impossible. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

With respect to state laws attempting to regulate the contents of consumer reports, however, Congress provided for a broader form of preemption. FCRA § 1681t(b)(1) expressly provides that "no requirement or prohibition may be imposed by any state *with respect to any subject matter"* specified in the enumerated subsections of FCRA § 1681t(b)(1). This is referred to as the FCRA's "subject matter preemption." Relevant here, the FCRA mandates that:

> No requirement or prohibition may be imposed under the laws of <u>any</u> State
> (1) with respect to <u>any subject matter</u> regulated under . . .
> (E) section 1681c of this title, <u>relating to information contained in consumer reports,</u> except that this subparagraph shall not apply to any State law in effect on September 30, 1996[.]

15 U.S.C. § 1681t(b)(1)(E) (emphasis added).

Finally, the FCRA also provides for "conduct preemption" related to specific actions CRAs and other participants in the credit reporting system are required to take. In particular, the FCRA states:

> No requirement or prohibition may be imposed under the laws of <u>any</u> State . . .
>
> (5) <u>with respect to the conduct required by</u> the specific provisions of – . . .
>
> (B) section 605A;
> (C) section 605B . . .

15 U.S.C. § 1681t(b)(5)(C) (emphasis added). As discussed more fully below, the Medical Bill Act and the Economic Abuse Act are both preempted by the FCRA under subject matter preemption and, with respect to the Economic Abuse Act, conduct preemption.

IV. The Medical Bill Act and the Economic Abuse Act Are Preempted by the FCRA, and this Court Should Declare that both the Medical Bill Act and the Economic Abuse Act Are Preempted and Unenforceable.

As noted above, the FCRA provides for preemption of the subject matter regulated under 1681c (Section 605), which governs the content of consumer reports. This form of preemption is broad and explicit, the result of which has been preemption of state laws that attempt to regulate that which the FCRA expressly regulates. In a case directly on point, the District Court in Colorado held that a Colorado law that attempted to prevent CRAs from including certain negative information (i.e. criminal records) about consumers in consumer reports was expressly preempted by the FCRA. *Simon v. DirecTV, Inc.*, No. 09CV00852PABKLM, 2010 WL 1452853, at *3-4 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, No. 09CV00852PABKLM, 2010 WL 1452854 (D. Colo. Apr. 12, 2010).

In *Simon*, the court held that Section 1681(b)(1) preempted Colorado law because "records of convictions of crime which antedate the report by more than seven years" may be disclosed under FCRA § 1681c(a)(5). *Id*. at *4. FCRA § 1681c(a)(2) expressly provides that criminal records that do not result in a conviction are subject to a seven year reporting period, and 1681c(a)(5) provides that "any other adverse item of information, other than records of conviction of crimes" must be removed from reports if older than seven years. Thus, all conviction records – regardless of age and any other criminal records less than seven years old may be included by the CRA in a consumer report. The District Court held the Colorado law limiting the reporting of conviction records to seven years was preempted because Colorado's prohibition and FCRA

§ 1681c(a)(5) "concern[ed] the same subject matter," namely, "the type of information that can be legally disclosed in consumer reports." *Id*. at *4.

Applying subject matter preemption, courts have ruled that other state laws are expressly preempted by §1681t(b)(1). In a prior case against the Attorney General of Minnesota, CDIA argued successfully that Minnesota's law prohibiting the sale of a mortgage trigger list was preempted by § 1681t(b)(1)(A), which preempts state laws that attempt to regulate reports used for prescreening (the extension of firm offers of credit to consumers). *CDIA v. Swanson*, 2007 WL 2219389 (D. Minn. 2007).

In a hearing for interim relief, the court agreed and held that CDIA had a "very strong likelihood of prevailing on the merits" of its subject matter preemption argument because:

> The preemptive reach of the FCRA is both broad and explicit: Section 1681t(b)(1)(A) preempts any state law that imposes a prohibition or requirement with respect to "any *subject matter regulated by*" § 1681b(c).

Id. at * 4. Because the "subject matter" regulated by the state law was "unquestionably regulated" by the FCRA, the court held that neither "Minnesota nor any other state may prohibit or regulate" what the FCRA permits. *Id*. at *4. As the court observed:

> It appears that Congress and the Minnesota legislature have different views about how to best regulate the activity of credit bureaus. By virtue of the Supremacy Clause of the United States Constitution, U.S. Const. Art. IV, cl. 2, and the FCRA's express-preemption provision, 15 U.S.C. § 1681t, Congress's views on the subject must prevail.

Id. at *9.

Subject matter preemption pursuant to § 1681t(b)(1) has also been applied to prohibit the prosecution of various claims under state law, where the subject matter of the claim is regulated by the FCRA. Referring to subject matter preemption as an "absolute immunity provision," the Middle District of Alabama dismissed a plaintiff's lawsuit, finding it preempted by

§ 1681t(b)(1)(F). *Sigler v. RBC Bank*, 712 F. Supp. 2d 1265, 1269 (M.D. Ala. 2010) (internal citations omitted). In *Sigler*, the plaintiff's lawsuit against RBC Bank was dismissed because the plaintiff alleged that RBC engaged in tortious conduct when the bank furnished information to a consumer reporting agency; however, § 1681t(b)(F) provides that "[no] requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under . . . (F) section 623 [§1681s-2], relating to the responsibilities of persons who furnish information to consumer reporting agencies . . . " Thus, plaintiff's claim was preempted. *Id*.

Additionally, the Second Circuit Court of Appeals invalidated a claim under New York tort law where the plaintiff sought damages from a CRA related to sale of lists of consumers who may be interested in receiving certain offers of credit. *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009). The Second Circuit held that the FCRA preempted the state tort claims under FCRA § 1681t(b)(1)(A) because the specific information at issue was a "consumer report" compiled and sold by CRAs. FCRA § 1681t(b)(1)(A) preempts all requirements or prohibitions imposed "with respect to any subject matter regulated under subsection (c) or (e) of FCRA § 1681b, relating to the prescreening of consumer reports." *Id*. at. 106. The Second Circuit found that the allegations all "relate[d] to the prescreening of consumer reports," and therefore the claim was preempted by the FCRA. *Premium Mortgage*, 583 F.3d at 106-07; *see also Consumer Data Industry Ass'n v. Swanson*, 2007 WL 2219389 at *4 (D. Minn. 2007) (analyzing preemptive effect of § 1681t(b)(1)(A) on state law regulating the sale of mortgage-trigger lists). *See also Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 427-29 (S.D.N.Y. 2010) (holding that the plaintiffs' wrongful foreclosure claim was within the subject matter regulated by § 1681s-2, and therefore preempted); *Cosmas v. American Exp. Centurion Bank*, 757 F. Supp. 2d 489, 499–500 (D.N.J. 2010) (same).

As explained above, the FCRA expressly preempts any state law that attempts to prohibit or restrict the subject matter of Section 1681c, namely, the content of consumer reports. Section 1681c includes requirements related to the information which must be included in a consumer report, such as certain bankruptcy information, and notations relating to account closure and disputes, 15 U.S.C. §§ 1681c subparts (d), (e), and (f), as well as that information that may *not* be included, such as adverse information older than 7 years. 15 U.S.C. § 1681c(a)(5). Because the subject matter of Section 1681c is the content of consumer reports, any state law that seeks to govern the content of consumer reports is preempted, including the Medical Bill Act and relevant portions of the Economic Abuse Act. *See e.g. Simon v. DirecTv, infra.*

Further, with respect to the Medical Bill Act, Congress has expressly considered, and already spoken on, the questions of whether, when, and what types of medical debt information may be included in consumer reports. In exercising its judgment, Congress expressly chose to prohibit only *certain types of information related to consumer medical debt* from being reported and permitted the remainder to be included in consumer reports. There are two relevant provisions. First, under FCRA § 1681c(a)(6), a CRA may not include in a consumer report:

> The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless –
>
> (A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer; or
>
> (B) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.

The second key FCRA provision relating to medical information in consumer reports was added by Congress recently as part of the Economic Growth, Regulatory Relief, and Consumer

Protection Act, resulting in the adoption of Section 1681c(a)(8). FCRA § 1681c(a)(8) prohibits the nationwide CRAs (all three of which are members of CDIA) from reporting:

> any information related to a fully paid or settled veteran's medical debt that had been characterized as delinquent, charged off, or in collection if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act.

Thus, Congress has considered more than once the question of whether and what types of medical information may be included in consumer reports, choosing only to prohibit very specific information, and enumerating those restrictions in Section 1681c. Taking together the clear Congressional intent that the content of consumer report information must be free from state interference, as evidenced by Section 1681t(b)(1)(5), and the recent Congressional directive permitting the inclusion of certain medical information debt in Section 1681c, it is clear that the Medical Bill Act is preempted by the FCRA.

Defendants admit that the Maine Laws "impose limitations on the extent to which certain categories of information can be included in consumer credit reports . . . " *See* R. 2, Answer, para. 8. As explained above, this admission alone is determinative. State law is preempted by the FCRA's subject matter preemption provision when the state law's subject matter *concerns* the same subject matter of Section 1681c, which is titled "Requirements relating to information contained in consumer reports." As such, both the Medical Bill Act and the relevant provisions of the Economic Abuse Act are preempted by the FCRA.

V. The Economic Abuse Act is Also Preempted by Virtue of Conduct Preemption.

The Economic Abuse Act also is preempted to the extent that it requires the CRA to reinvestigate allegations of what amounts to identity theft and block reporting of that information, as Congress created an exclusive federal uniform process that all CRAs must follow in response

to such claims of identity theft. Section 1681c-2 (Section 605B) requires a CRA to "block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from *an alleged* identity theft" if the consumer provides proof of identity, a copy of an identity theft report, and "a statement by the consumer that the information is not relating to any transaction by the consumer." 15 U.S.C. § 1681c-2(a). Importantly, the FCRA provides a mechanism by which the furnisher of the information, generally a creditor, is informed of the block,[7] and also provides the CRA with the authority to decline or rescind a block if the block was requested in error, the block was placed based on a material misrepresentation of fact by the consumer, or the consumer obtained possession of goods, services, or money as the result of the blocked transactions. 15 U.S.C. 1681c-2(b) and (c).[8]

The FCRA preempts all requirements and prohibitions "under the laws of any State . . . with respect to the conduct required by the specific provisions of . . . [§ 1681c-2]." The Economic Abuse Act requires the CRA via its dispute process to engage in a fact-finding adjudication of the *truth* of the consumer's allegations (i.e. whether a debt or portion of a debt results from economic abuse) and then block the reporting of the account on a permanent basis, precisely the type of conduct required under section 1681c-2. Under the Economic Abuse Act's definition of "economic abuse," debts that result from economic abuse include "unauthorized or coerced use of

[7] The furnisher (account holder) then must fulfill its responsibilities under the FCRA related to the account. *See* 15 U.S.C. § 1681s-2(a)(6). Notably, if the furnisher determines that the consumer is ultimately responsible for the debt, the furnisher is permitted to furnish the account to the CRA again. *Id*.

[8] The balancing act reflected in section 1681c-1 acknowledges the limited ability of a CRA to adjudicate the rights and responsibilities of parties to accounts. *See, e.g., DeAndrade v. Trans Union LLC*, 523 F.3d 61, 69 (1st Cir. 2008) (recognizing that "whether the mortgage is valid turns on questions that can only be resolved by a court of law, such as whether DeAndrade ratified the loan. This is not a factual inaccuracy that could have been uncovered by a reasonable reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA"). The Economic Abuse Act disrupts this careful balance, forcing the CRA to become the adjudicator of claims between the furnisher and the consumer; a role best left to the courts.

credit or property" and "stealing from or defrauding of money or assets." Under the FCRA, "identity theft" means "a *fraud* committed using the identifying information of another person . . . " 15 U.S.C. 1681a(q)(4) (emphasis added). Both the FCRA and the Economic Abuse Act address debts resulting from fraudulent activities. Accordingly, to the extent that the Economic Abuse Act attempts to govern the CRA's response to a report of identity theft, it is preempted by § 1681t(b)(5)(C) of the FCRA.

CONCLUSION

For the foregoing reasons, the Consumer Data Industry Association respectfully requests that this Court find that the Medical Bill Act and relevant provisions of the Economic Abuse Act (found at 10 M.R.S.A. §1310H(4) and 10 M.R.S.A. § 131H(2-A)) are preempted by the FCRA, and enter judgment in its favor accordingly.

Date: April 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2020, a true and correct copy of the foregoing document was filed electronically via the Court's CM/ECF system causing electronic service upon all counsel of record as follows:

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