**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MAINE**

CONSUMER DATA INDUSTRY ASSOCIATION, Plaintiff, v. AARON M. FREY, in his official capacity as the Attorney General of the State of Maine, *et al.*, Defendants.	CIVIL ACTION NO.: 1:19-cv-00438-GZS

**DEFENDANTS' MOTION FOR JUDGMENT ON A STIPULATED RECORD
WITH INCORPORATED MEMORANDUM OF LAW**

Consumer reports (more commonly referred to as "credit reports") can have a profound impact on a person's life. They can determine whether, and on what terms, a person may obtain a mortgage, a student loan, a credit card, or other financing. They may also affect whether a person can get rental housing, a job, or even basic utilities. To help ensure that consumer reports do not unfairly include prejudicial information that may have no real bearing on a person's credit worthiness or fiscal responsibility, Maine's Legislature passed two laws last session amending Maine's Fair Credit Reporting Act. The first, "An Act Regarding Credit Ratings Related to Overdue Medical Expenses," prohibits the reporting of debt arising from medical expenses when the debt is less than 180 days old or when it has been paid or settled in full. Further, if the consumer is making periodic payments on the debt pursuant to an agreement with the medical provider, the debt must be reported in the same manner as debt related to a consumer credit transaction would be reported. It is appropriate to treat medical debt differently because it is

usually not one that is voluntarily incurred (and thus not reflective of fiscal irresponsibility) and can be massive, thus having a disproportionate impact on a credit report.

The second law is "An Act to Provide Relief to Survivors of Economic Abuse." If a consumer provides documentation that a debt is the result of economic abuse *(i.e*, withholding a person's access to a bank account or coercing a person into co-signing a loan), a reporting agency must conduct an investigation. If it confirms that the debt is the result of economic abuse, it must remove the debt from the consumer's credit report. As a person testifying in favor of the law noted, most survivors of domestic abuse also experienced economic abuse, and this can make it difficult for survivors to create financial independence and stability for themselves and their families.

The plaintiff, a trade association that includes the three nationwide credit reporting agencies (Experian, Equifax and Trans Union) argues that both laws are preempted by the federal Fair Credit Reporting Act ("FCRA"). Plaintiff is wrong. Subject to certain exceptions, FCRA preserves the States' authority to regulate the collection and use of information relating to consumers. The plaintiff cites to one exception, which it argues broadly preempts States from regulating anything having to do with the content of consumer reports. In fact, the exception is much narrow – it only preempts States from imposing requirements or prohibitions with respect to subject matters regulated under a specific FCRA provision relating to information contained in consumer reports. Other courts have so construed the exception, and this construction is supported by the presumption against preemption and the principle that preemption provisions must be narrowly construed. Because neither of the Maine laws relates to subject matter regulated under the FCRA provision at issue, neither is preempted. In further support, defendants rely upon the following Memorandum of Law:

MEMORANDUM OF LAW

The Maine Credit Reporting Laws

Law Relating to Medical Debts

In early 2019, L.D. 110, "An Act Regarding Credit Ratings Related to Overdue Medical Expenses" was introduced to the First Regular Session of the 129th Legislature. The bill was subsequently amended and enacted as Maine Public Law 2019, ch. 77 (hereinafter referred to as "Chapter 77") and codified at 10 M.R.S. § 1310-H(4). As enacted, the law states:

> 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. § 1310-H(4).

The sponsor, Representative Chris Johansen, explained the purpose of the law:

> This bill was written to protect people from the ramifications of sometimes hard to avoid bad credit reports associated with medical bills. Medical bills are unique in that they are usually an unplanned for expense. You can have insurance but sometimes not enough. The debt I have acquired for my car or home is planned for usually with the help of my lender.

See Johansen Test., Feb. 12, 2019 (Document 13-3, PageID 41); *see also* Superintendent of Bureau of Consumer Credit Protection Test., Feb. 5, 2019 (Document 13-3, PageID 44) ("Many instances of medical debt are unplanned – it's not like deciding to purchase a car or house."); Cashman Test. (on behalf of Maine Association of Realtors), Feb. 12, 2019 (stating that it is "unfair" for a consumer to be disqualified from financing because of medical debt that is being paid off "because medical debt is generally not indicative of poor personal financial management but rather, often, the result of catastrophic medical events"). (Document 13-3, PageID 47).

There was good reason for the Legislature to give special treatment to medical debt. "Even one single medical bill can keep someone from receiving credit at a desirable rate, or perhaps from receiving credit at all." Elizabeth D. De Armond, *Preventing Preemption: Finding Space for States to Regulate Consumers' Credit Reports*, 2016 B.Y.U. L. Rev. 365, 378 (2016). Moreover, "no one has demonstrated a clear link between financial competence and medical debt, and it is not intuitively obvious that such a link exists, as few people voluntarily or frivolously take on expensive medical care." *Id*. Research by the Consumer Financial Protection Bureau "demonstrate[d] that a large portion of consumers with medical debts in collections show no other evidence of financial distress and are consumers who ordinarily pay their other financial obligations on time." *Consumer Credit Reports: A Study of Medical and Non-Medical Collections*, Report of the Consumer Financial Protection Bureau, December, 2014, at p. 38;[1] *see also* Kenneth P. Brevoort & Michelle Kambara, Data Point: "Medical Debt and Credit Scores (May 2014), at p. 5-6 (indicating that medical debt is not predictive of the consumer's credit worthiness).[2]

---

[1] Available at https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf , *accessed on* April 17, 2020.
[2] Available at http://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf, accessed on Jan. 22, 2020.

Law Relating to Economic Abuse Debt

Also in early 2019, L.D. 748, "An Act to Provide Relief to Survivors of Economic Abuse" was introduced to the First Regular Session of the 129th Legislature. The bill was amended and enacted as Maine Public Law 2019, ch. 407 (hereinafter referred to as "Chapter 407"). A provision relating to consumer reports was codified at 10 M.R.S. § 1310-H(2-A):

> 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.

10 M.R.S. § 1310-H(2-A). "Economic abuse" is defined to mean

> 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. § 4002(3-B).

The primary sponsor of the bill stated that one in four women and one in nine men experience domestic abuse, and that the vast majority of domestic abuse cases include economic abuse. Rep. Jessica Fay Test., April 3, 2019 (Document 13-4, PageID 50). She stated: "Power and control is at the root of domestic violence and controlling finances is another very effective way for an abuser to achieve that." *Id*. (PageID 51). She also noted that an abuser's control of finances can make it difficult for the victim to leave. *Id*. (Page ID 51).[3]

[3] The primary sponsor submitted to the legislative committee a publication from the National Coalition Against Domestic Violence, which stated that 94-99% of domestic violence survivors also experienced

Citing to a recently completed report, a representative of the Maine Coalition to End Domestic Violence noted that 81% of domestic abuse survivors cited economic abuse as an obstacle to separating from their abusers. *See* Mancuso Test., April 2, 2019 (Document 13-4, PageID 55). She stated that victims often need "relatively short-term economic stability while they create an independent household and untangle themselves from the financial mess their abuser has created," and that the bill would help provide such stability by, among other things, providing "credit repair relief." *Id*. (Page ID 55-56). She explained:

> With respect to the credit report relief, the reasoning is simple: credit ratings that have been tarnished by economic abuse, and coerced debt in particular, result in longer shelter stays, victims returning to their abusers, or victims calculating that they can't afford to leave their abuser in the first place. Employers, landlords and utility companies make extensive use of credit histories in screening potential employees, tenants and customers. Credit abuse is a tactic that abusers use to maintain control over their victim, because abusers understand that without a job, rental housing, reliable transportation and basic utilities (all of which are hard to accomplish with damaged credit), it is almost impossible for a survivor to be economically stable, secure, and independent.

Id. (Page ID 57). She concluded by noting that with "approximately half of the state's homicides and assaults each year being a result of domestic violence," and "81% of survivors here in Maine noting economic abuse as a barrier to separation," "we have to make economic abuse relief an overt and accessible part of the safety net." *Id*. (PageID 57); *see also* Nicole Golden-Bouchard Test. (Document 13-4, PageID 68-69) (Pine Tree Legal Assistance staff attorney testifying that economic abusers tell victims that "they can't leave because no one will rent to them or give them an account for lights or heat because their credit is destroyed," and that "the victim feels they can't survive on their

---

economic abuse and that 21-60% of domestic violence victims lose their jobs as result of the abuse. *See* "Facts About Domestic Violence and Economic Abuse" (Document 13-4, PageID 52-53).

own and often times they are right" and "resign themselves to being trapped in the abusive relationship").[4]

Various survivors of domestic abuse explained how the accompanying economic abuse had impacted their credit scores and made it more difficult to create stable lives for themselves after leaving their abusers. *See* Christie Davis Test. (Document 13-4, PageID 60-61); Rachel Glaser Test. (Document 13-4, PageID 62-63); Patrisha Mc:Lean Test. (Document 13-4, PageID 64-65); Jeannine Lauber Oren Test., (Document 13-4, PageID 66).

The Federal Fair Credit Reporting Act

Recognizing that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," Congress enacted FCRA in 1970 to ensure "reasonable procedures for meeting the needs of commerce … in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681. As originally enacted, FCRA had a savings clause broadly preserving State authority:

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

Pub. L. 91-508, § 622 (codified at former 15 U.S.C. § 1681(t). The Consumer Credit Reporting Reform Act of 1996 amended this savings clause by carving out certain areas in which States would be precluded from regulating. The current version of the savings clause states:

[4] The bill was also supported by the Maine Women's Lobby (Document 13-4, PageID 70-71), the Maine Commission on Domestic and Sexual Abuse (Document 13-4, PageID 75-76), Maine Equal Justice (Document 13-4, PageID 77-80), and Legal Services for the Elderly (Document 13-4, PageID 84-85).

> Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a). So, unless a state law falls within one of the exceptions in subsections (b) and (c), it is preempted only to the extent it is inconsistent with FCRA. *See Stafford v. Cross Country Bank*, 262 F. Supp.2d 776, 786 (W.D. Ky. 2003) ("in § 1681t(a) Congress provided that states were free to enact laws regulating consumer credit reporting" and then "enumerated several exceptions").[5]

Section 1681t(b)(1) sets forth various exceptions to the general rule of non-preemption, and all of the sections follow a similar pattern. The section begins by stating that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under" various other sections of FCRA. 15 U.S.C. § 1681t(b)(1). Those sections are then listed out, along with a description of each section. So, for example, it lists "subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports" and "subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer." 15 U.S.C. § 1681t(b)(1)(A), (C). In each case, a specific FCRA provision is identified followed by, as defendants interpret it, a "relating to" clause providing a general description of the identified provision.

[5] A state law is "inconsistent" with a FCRA provision only when compliance with the former would result in a violation of the latter. *See Aghaeepour v. N. Leasing Sys., Inc*., 378 F. Supp.3d 254, 263 (S.D.N.Y. 2019) ("The Senate Report directly explains how this savings clause functions, providing that the phrase 'State laws which are inconsistent with Federal law are preempted to the extent to the inconsistency' means that 'no State law would be preempted unless compliance would involve a violation of Federal law.'" (citing S. Rep. No. 517, 91st Cong., 1st Sess. 8 (Nov. 5, 1969)).

CDIA argues that the two Maine laws are preempted by 15 U.S.C. § 1681t(b)(1)(E), which prohibits states from imposing requirements or prohibitions "with respect to any subject matter regulated under. . . section 1681c of this title, relating to information contained in consumer reports."[6] According to CDIA, this means that "any state law that attempts to regulate the content of consumer reports is preempted under the FCRA." Complaint, ¶ 12 (Doc. 13-1, PageID 32). This, though, reads out of the statute the express reference to matters "regulated under" Section 1681c. If, as plaintiff claims, Congress intended to preempt all state laws regulating the content of consumer reports, it could have said simply that. Instead, Congress chose to expressly reference Section 1681c, and that can only mean that one must look to Section 1681c to determine whether a particular law is preempted. And because Section 1681c does not regulate the matters regulated by the Maine laws, the Maine laws are not preempted.

Argument

There is a presumption against preemption and express preemption provisions must be narrowly construed.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). "Preemption is strong medicine, not casually to be dispensed." *Grant's Dairy--Maine, LLC v. Commissioner of Maine Dept. of Agriculture, Food & Rural Resources*, 232 F.3d 8, 18 (1st Cir. 2000). "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[6] There is an exception to the exception for state laws in effect on September 30, 1996, but that does not apply to the Maine laws which, as discussed above, were enacted in 2019.

Federal law may supersede state law in three different ways: 1) Congress can include language in the law that expressly preempts certain state laws; 2) the law can create a scheme of regulation that is so comprehensive that it essentially "occupies the field" and leaves no room for state regulation; or 3) the state law actually conflicts with federal law. *See, e.g., Hillsborough County, Florida. v. Automated Medical Laboratories, Inc*., 471 U.S. 707, 713 (1985). Here, CDIA argues only that express preemption applies. Complaint, ¶ 24 (Document 13-1, PageID 35) (alleging that the Maine laws should be enjoined "because they [are] expressly preempted by 15 U.S.C. § 1681t(b)91)(E).").

"Express preemption occurs when Congress states in the text of legislation that it intends to preempt state legislation in the area." *EEOC v. Massachusetts*, 987 F.2d 64, 67-68 (1st Cir. 1993); *see also Grant's Dairy--Maine*, 232 F.3d at 15 ("Express preemption occurs only when a federal statute explicitly confirms Congress's intention to preempt state law and defines the extent of that preclusion.").

> Two presumptions inform the process of determining the scope of an express preemption clause. First, the familiar assumption that preemption will not lie absent evidence of a clear and manifest congressional purpose must be applied not only when answering the threshold question of whether Congress intended any preemption to occur, but also when measuring the reach of an explicit preemption clause. Second, while the scope determination must be anchored in the text of the express preemption clause, congressional intent is not to be derived solely from that language but from context as well.

Massachusetts Ass'n of Health Maint. Organizations v. Ruthardt, 194 F.3d 176, 179 (1st Cir. 1999) (emphasis in original, citation omitted).

Because of the presumption against preemption, express preemption provisions must be narrowly construed. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir.

2005) ("This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation.").

Other Courts Have Narrowly Interpreted the Preemptive Scope of Section 1681t(b)(1).

Although a different provision of 15 U.S.C. § 1681t(b)(1) was at issue, the California Supreme Court held that in deciding whether a state law is preempted, the relevant inquiry is whether the FCRA provision at issue actually regulates the same duties as the state law. *See Brown v. Mortensen*, 253 P.3d 522 (Cal. 2011). The, the plaintiffs claimed that a debt collector, working for their dentist, violated state law by disclosing their confidential medical information to consumer reporting agencies. *Id*., 524-25. The debt collector argued that their claims were preempted by 15 U.S.C. § 1681t(b)(1)(F), which states: "No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under. . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies." The lower court had held that "all state law claims arising from the furnishing of information to consumer reporting agencies are preempted" by this provision. 253 P.3d at 525.

The Supreme Court reversed. It looked at the precise scope of Section 1681s-2 and found that it "regulates the actions of furnishers in two areas: it imposes a duty to provide accurate information and it dictates what furnishers must do upon receiving official notice from a consumer reporting agency of a dispute concerning the completeness or accuracy of information they have provided." *Id*., at 528 (citations omitted). It found that there were two possible interpretations of the "subject matter regulated" under Section 1681s-2. On the one hand, it could be "read as preempting only state laws that attempt also to regulate a furnisher's duties with respect to accuracy or the handling of disputes after receiving official notice," which, the court

noted, was the view adopted by "[n]umerous federal district courts." *Id*. (citing *Pasternak v. Trans Union*, 2008 WL 928840, *3-4 (N.D. Cal.2008); *Carlson v. Trans Union, LLC*, 259 F.Supp.2d 517, 521–522 (N.D. Tex. 2003); *Stafford v. Cross Country Bank*, 262 F.Supp.2d 776, 785–87 (W.D. Ky.2003); *Dornhecker v. Ameritech Corp*., 99 F.Supp.2d 918, 930–31 (N.D.Ill.2000). In other words, only claims arising out of duties actually regulated by Section 1681s-2 would be preempted. *Id*. On the other hand, the court noted,

> the subject matter of section 1681s–2 could be read more broadly as encompassing all "[r]esponsibilities of furnishers of information to consumer reporting agencies," as the provision is captioned, and thus preempting any attempt by the several states to enforce laws imposing on furnishers duties additional to the two specific duties imposed by the section—that is, as embodying a congressional determination to impose on furnishers these, and only these, duties and to immunize them from any other legal obligations.

Id.

In resolving the ambiguity, the court recognized that "[t]he presumption against preemption applies fully in cases considering whether Congress intended by passage of the FCRA and subsequent amendments to displace state law." *Id*., at 526. It held that "the presumption against preemption is sufficiently powerful to impose upon courts a 'duty to accept the reading that disfavors pre-emption' as among equally plausible interpretations of an express preemption clause." *Id*., at 529 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). The court also considered the legislative history of the Consumer Credit Reporting Reform Act of 1996 and found evidence that with respect to Section 1681t(b), "Congress intended preemption only in a few discrete areas where it had in fact adopted a standard intended to serve as a uniform national standard" and that Section 1681t(b)(1)(F) was not intended to be

"an act of mini-field preemption, intended to preempt all state laws implicating any duty that could have been regulated by section 1681s–2 but was not." *Id.*, at 532. [7]

Accordingly, the court applied a narrow interpretation of the preemption provision and held that "section 1681t(b)(1)(F) preempts state law claims only insofar as they arise out of a requirement or prohibition with respect to the <u>specific furnisher duties regulated by section 1681s-2</u>, i.e., the duties to provide accurate information and to take action upon being notified of a dispute." *Id.*, at 533 (emphasis added). The court ultimately held that the plaintiffs' "claims as pleaded, having as their gravamen issues neither of accuracy nor of credit dispute resolution, do not involve the same subject matter as section 1681s–2 and are not preempted." *Id.*, at 535.

A federal court reached a similar conclusion with respect to the preemptive scope of Section 1681t(b)(1)(E), the very same provision that is at issue here. *Gottman v. Comcast Corp.*, 2018 WL 1071185 (E.D. Cal. Feb. 23, 2018). At issue there was a California law requiring that when a person uses a credit report in connection with an application for credit, and notices that information on the application does not match information on the report (such as the consumer's address and social security number), the person must take reasonable steps to confirm the applicant has not stolen the identity of someone else. *Id.*, at *2. When Comcast was sued for violating this statute, it argued that the statute was preempted by Section 1681t(b)(1)(E), which, as discussed above, prohibits States from imposing requirements or prohibitions "with respect to any subject matter regulated under . . . section 1681c of this title, relating to information contained in consumer reports. *Id.* Comcast noted that Section 1681c requires that when a person requests a credit report from a consumer reporting agency and the request has an address for the consumer that "substantially differs" from the address in the reporting agency's file, the

[7] The court also found "instructive . . . Congress's passage of HIPPA at the same time as the 1996 Reform Act." *Id.*, at 530.

agency most notify the requester. 15 U.S.C. § 1681c(h)(1). It also requires the Consumer Financial Protection Bureau to promulgate regulations setting forth the actions that requesters of consumer reports must take when notified of an address discrepancy by a consumer reporting agency. 15 U.S.C. § 1681c(h)(2). Comcast argued that "the 'subject matter' preempted under § 1681c(h) is clear and includes any state law. . . that defines the obligations of both consumer reporting agencies and report requesters when a consumer provides an address that differs from the one in the credit report." *Id.*, *4.

The court rejected this argument. It noted that the "subject matter regulated" under Section 168c(h) is ambiguous. It found that while Section 1681t(b)(1)(E) "could be read broadly as preempting all state laws relating to any information contained in consumer reports," the presumption against preemption supported rejecting such a broad reading. *Id.*, *4. Instead, the court held that Section 1681t(b)(1)(E) preempts only those areas where Congress "'had adopted an actual standard'" and not areas that could have been regulated but were not. *Id.* (quoting *Brown*, 253 P.3d at 532).[8] The court also recognized that "a state may give the consumer more protections than the FCRA as long as the state law is not an obstacle to the execution of the FCRA," and that California's imposition of obligations on users of consumer credit reports "does not obstruct the obligations of consumer reporting agencies or furnishers under federal law when

[8] In *Simon v. DirectTV, Inc.*, 2010 WL 1452853 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, 2010 WL 1452854 (D. Colo. Apr. 12, 2010). the court held that a state law prohibiting the inclusion on consumer reports of convictions older than seven years was preempted by Section 1681t(b)(1)(E). But, Section 1681c expressly addresses criminal background information – arrests older than seven years cannot be disclosed, and records of convictions are expressly exempted from a general provision prohibiting the disclosure of adverse information older than seven years. 15 U.S.C. § 1681c(a)(2), (5). Thus, the court held that both the state and federal law "address the limits on the disclosure of criminal arrests and convictions in consumer reports" and that the "subject matter of the [state law] concerns matters regulated under the federal statute." *Id.*, *4. Under CDIA's theory (that state laws that regulate the content of consumer reports are automatically preempted), there would have been no need for the court to have considered the actual subject matter regulated by Section 1681c(a).

informational discrepancies are found in the consumer's information." *Id.*, *5. The California law was "not preempted because it establishes duties for users of consumer reports that are not addressed by the FCRA." *Id.*, *4

CDIA's Argument Would Result in Surplus Language.

CDIA's argument that every state law "relating to information contained in consumer reports" is preempted would render superfluous Congress's express reference to "subject matter regulated under . . . Section 1681c." "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751–52 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

Here, the relevant language states: "No requirement or prohibition may be imposed under the laws of any State. . . with respect to any subject matter regulated under . . . section 1681c of this title, relating to information contained in consumer reports." 15 U.S.C. § 1681t(b)(1)(E). CDIA's interpretation would turn into surplusage the phrase "subject matter regulated under. . . section 1681c." If Congress had wanted to broadly preempt States from regulating the content of credit reports, it could have left out reference to Section 1681c and instead stated: "No requirement or prohibition may be imposed under the laws of any State relating to information contained in consumer reports." Of course, this is not what Congress said; rather, it expressly referenced "subject matter regulated under . . . section 1681c," and the Court should reject an interpretation that would make this surplusage. *See, e.g., Lawless v. Steward Health Care Sys.,*

LLC, 894 F.3d 9, 23 (1st Cir. 2018) ("courts should try to avoid interpretations that render statutory language mere surplusage"); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 26 (1st Cir. 2006) ("We must read statutes, whenever possible, to give effect to every word and phrase.").

Apply the principle that an interpretation making language surplusage is to be avoided, the phrase "relating to information contained in consumer reports" is best understood as a general description of Section 1681c and not as the scope of preemption. Indeed, Section 1681c is entitled "Requirements relating to information contained in consumer reports." 15 U.S.C. § 1681c. The same convention is used throughout Section 1681c. For example, state laws are preempted if they relate to subject matter regulated under 1) "subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;" 2) "subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;" 3) "section 1681s-3 of this title, relating to the exchange and use of information to make a solicitation for marketing purposes;" and, 4) "subsections (i) and (j) of section 1681c-1 of this title relating to security freezes." 15 U.S.C. § 1681t(b)(1)(A), (C), (H), (J). In other words, Section 1681t's overall approach is to define the scope of preemption by reference to matters regulated by specific statutes and then give a general description of each such statute. It is hard to imagine that Congress intended the description of the statute to define the scope of preemption and, again, that would make references to the statutes surplusage. It would also dramatically expand the scope of preemption to subject matters beyond those actually regulated by the identified statutes. The presumption against preemption, the requirement to narrowly construe express preemption provision, and the duty of courts, when it comes to ambiguous statutes, to accept the reading that disfavors preemption, all warrant rejecting CDIA's

argument that Section 1681c broadly preempts entire subject areas regardless of whether they are actually regulated by the identified FCRA provisions.

The Maine Laws Do Not Impose Prohibitions or Requirements With Respect to Subject Matter Regulated Under Section 1681c.

Section 1681c requires that certain information be excluded, and other information included, in consumer reports. 15 U.S.C. § 1681c(a), (b), (d). It also requires consumer credit agencies to 1) indicate when a customer has closed an account or disputes information, 2) truncate credit card numbers, and 3) take action when there is a discrepancy in addresses. 15 U.S.C. § 1681c(e), (f), (g), (h). There is nothing in Section 1681c addressing the actions a consumer credit agency must take when notified that debt is the result of economic abuse or the extent to which such debt may (or may not) be included in consumer reports. Quite simply, Section 1681c does not, at all, regulate in the area of economic abuse or debt incurred as a result of such abuse.

The only provisions in Section 1681c regulating the reporting of medical debt relate to veterans. 15 U.S.C. § 1681c(a)(7), (8). One provision restricts "nationwide" consumer reporting agencies[9] from reporting a veteran's medical debt that is less than one year old, and the other restricts such agencies from reporting a veteran's medical debt that has been fully paid or settled. *Id.*[10] Giving these provisions a narrow construction, as is required under a preemption analysis, the regulated subject matter is the medical debt of veterans. This is much narrower than the

---

[9] These are consumer reporting agencies "that regularly engage[] in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide: 1) Public record information. (2) Credit account information from persons who furnish that information regularly and in the ordinary course of business." 15 U.S.C. § 1681a(p).

[10] A separate provision limits the extent to which a consumer reporting agency may disclose the name, address and telephone number of entities furnishing medical information, but this provision does not address the extent to which medical debt itself can be disclosed. 15 U.S.C. § 1681c(a)(6).

subject matter regulated by Chapter 77, which is medical debt of all consumers. In *Gottman*, discussed above, the federal provision at issue was similarly narrower than the state provision. The state law required users of consumer reports to take certain actions after discovering that information on a person's credit application does not match information on the person's consumer report, while under FCRA, obligations on users are triggered only if they are advised of discrepancies by the consumer reporting agency. *Gottman*, 2018 WL 1071185, *2. The court held that because the standard adopted by Congress applied only when a user was notified of a discrepancy, the state law was not preempted. *Id.*, *4 ("Accordingly, [the state law] is not preempted because it establishes duties for users of consumer reports that are not addressed by the FCRA."). The court also recognized that "a state may give the consumer more protections than the FCRA as long as the state law is not an obstacle to the execution of the FCRA." *Id.*, *5. For the same reasons, Chapter 77 is not preempted. It imposes duties on consumer reporting agencies not addressed by 15 U.S.C. § 1681c(a)(7) and (8), and agencies can easily comply with both Chapter 77 and the FCRA provisions.

Conclusion

For the reasons set forth above, the defendants respectfully request that the Court enter judgment in their favor and hold that Chapter 77 and Chapter 407 are not preempted.

Dated: April 20, 2020

AARON M. FREY
Attorney General

/s/ Christopher C. Taub
Christopher C. Taub, Dep. Atty. Gen.
Christopher.C.Taub@maine.gov
Six State House Station
Augusta, Maine 04333-0006
Tel. (207) 626-8800
Fax (207) 287-3145

Counsel for Defendants

Timothy Feeley
Student Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this, the 20th day of April, 2020, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

RYAN P. DUMAIS
rdumais@eatonpeabody.com

REBECCA E. KUEHN
rkuehn@hudco.com

/s/ Christopher C. Taub
Christopher C. Taub
Deputy Attorney General
Christopher.C.Taub@maine.gov
Six State House Station
Augusta, Maine 04333-0006
Tel. (207) 626-8800