

**THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

CONSUMER DATA INDUSTRY  
ASSOCIATION, §  
Plaintiff §  
V. § CIVIL ACTION NO:  
STATE OF TEXAS THROUGH §  
KEN PAXTON, IN HIS OFFICIAL §  
CAPACITY AS ATTORNEY GENERAL §  
OF THE STATE OF TEXAS, §  
Defendant §

**PLAINTIFF'S FIRST AMENDED**  
**COMPLAINT FOR DECLARATORY JUDGMENT**

COMES NOW Plaintiff, Consumer Data Industry Association (“CDIA”), and files this First Amended Complaint for Declaratory Judgment regarding the statute enacted by the 86<sup>th</sup> Regular session of the Texas Legislature as S.B. 1037, captioned “Relating to Limitations on the on the Information Reported by Consumer Reporting Agencies” (“SB 1037”). Senate Bill 1037 was signed into law by the Governor and effective May 31, 2019. Senate Bill 1037 amends Texas Business and Commerce Code Chapter 20 “Regulation of Consumer Credit Reporting Agencies” by adding § 20.05(a)(5) to include requirements of consumer reporting agencies relating to the content of consumer reports, which law is preempted by the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §1681 *et seq.*

In support of its complaint, the Plaintiff CDIA would show as follows.

## I. PARTIES

1. Plaintiff CDIA is an international trade association founded in 1906, which is organized under the laws of Missouri with its principal place of business in Washington, D.C. CDIA's membership includes the three nationwide credit reporting agencies ("CRAs"), Experian, Equifax, and Trans Union, and other CRAs that furnish information concerning Texas consumers. In its more than 100-year history, CDIA has worked with the U.S. Congress and with State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the efforts leading to the enactment of the FCRA in 1970 and every subsequent amendment to the FCRA. In this role, CDIA also represents the interests of the consumer reporting industry before every State legislature.

2. Defendant State of Texas through Attorney General Ken Paxton, acting in his official capacity, can be served by delivering service to General Paxton with a copy to Darren McCarty, Deputy Attorney General for Civil Litigation, Price Daniels, Sr. Building, 209 West 14<sup>th</sup> Street, 8<sup>th</sup> Floor, Austin, Texas 78701.

## II. JURISDICTION AND VENUE

3. This action arises under the FCRA, 15 U.S.C. §§ 1681c<sup>1</sup> and 1681t(b)<sup>2</sup> and the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff's cause of action is based upon, and seeks judicial interpretation of, 15 U.S.C. § 1681 *et seq.*, including but not limited to § 1681c, which is given express preemptive

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<sup>1</sup> <https://www.govinfo.gov/content/pkg/USCODE-2010-title15/html/USCODE-2010-title15-chap41-subchapIII-sec1681c.htm>

<sup>2</sup> <https://www.govinfo.gov/content/pkg/USCODE-2011-title15/html/USCODE-2011-title15-chap41-subchapIII-sec1681t.htm>

effect by § 1681t (b)(1)(E) as they relate to Texas' attempt to limit consumer report content governed by the FCRA.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1331(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred within this District. In addition, Defendant resides in this District. *See* 28 U.S.C. § 1331(b)(1).

### **III. FACTUAL BACKGROUND**

5. This action seeks to prevent the State of Texas ("Texas") from undermining the accuracy, integrity, and reliability of consumer report information that is essential to the "needs of commerce" and the "efficiency of the banking system" throughout the United States by impermissibly regulating the content of consumer reports. *See*, 15 U.S.C. § 1681.

6. This harm is threatened by the enactment of legislation amending Tex. Bus. & Com. Code Chapter 20, to attempt to prohibit CRAs doing business in Texas from including certain information in their consumer reports in Texas, which amendments are codified in Tex. Bus. & Com. Code § 20.05(a) (5) (the "Texas Law") and any enforcement thereof by the State of Texas.

7. The Texas Law is preempted by FCRA § 1681t(b)(1)(E).

8. The Attorney General has declined to give Plaintiff assurances that it will never enforce Tex. Bus. & Com. Code § 20.05(a)(5) with respect to the medical account collection information that Plaintiff's members already report consistent with the FCRA.

9. This action seeks a declaration as to the preemptive effect of 15 U.S.C. § 1681t(b)(1) as applied to the Texas Law with which Plaintiff's members must otherwise comply.

10. A declaration construing the Texas Law as preempted would prevent Plaintiff's members from having to make material changes to their day-to-day business operations to come into compliance with the Texas Law, described below, and change the products they already

provide which, while permissible under the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, would be prohibited by the Texas Law.

**A. TEXAS SENATE BILL 1307**

11. Senate Bill 1037, captioned “Relating to Limitations on the Information Reported by Consumer Reporting Agencies,” was signed into law by the Texas Governor on May 31, 2019. Senate Bill 1037 was effective immediately upon signing.

12. Senate Bill 1037 amended the Texas Fair Credit Reporting Act (“Texas FCRA”) to add Tex. Bus. & Com. Code § 20.05(a)(5), which attempts to prohibit a CRA from preparing a consumer report containing information related to a medical collection account, specifically:

... [a] collection account with a medical industry code, if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim...

Tex. Bus. & Com. Code § 20.05(a)(5).

**B. FCRA PROVISIONS AND FEDERAL PREEMPTION**

13. When enacting the Fair Credit Reporting Act, the U.S. Congress found that:

- (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
- (2) An elaborate system has developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
- (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
- (4) There is a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.

15 U.S.C. § 1681(a). Congress also made clear that purpose of the FCRA is to:

[R]equire that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information 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(b).

14. In order to meet the FCRA goals, Congress required that the accuracy and integrity of consumer report information be subject to a uniform, national standard. It prohibited states from interfering in those aspects of consumer reporting that are fundamental to the national uniformity of the system. *See, gen.*, 15 U.S.C. § 1681t. The statute thus enumerates express limits on the impact of state law regarding consumer reports, including the information contained in consumer reports. The FCRA, at § 1681t, in pertinent part, specifically prohibits states from attempting to regulate the content of consumer reports as follows:

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State:

(1) with respect to any subject matter regulated under  
\* \* \*

(E) section 1681c of this title, relating to information contained in consumer reports, 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). Thus, any state law that attempts to regulate the content of consumer reports is preempted under the FCRA (unless it was in effect on September 30, 1996).

15. The Texas Law regulates the content of consumer reports by prohibiting the inclusion of certain medical account information in reports in Texas. Tex. Bus. & Com. Code § 20.05(a)(5), added by SB 1037, in pertinent part, prohibits the following:

SECTION 1. Section 20.05, Business & Commerce Code, is amended by amending Subsection (a) and adding Subsection (d) to read as follows:

(a) Except as provided by Subsection (b), a consumer reporting agency may not furnish a consumer report containing information related to:

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(5) a collection account with a medical industry code, if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim; or

See S.B. 1037, enrolled text (the prohibited information will be referred to as “Medical Account Information”).<sup>3</sup>

16. This attempt at regulation of consumer report content is expressly prohibited by the FCRA.

17. The activities of CRAs, including Plaintiff’s members, are governed by the FCRA.

18. As of the effective date of the SB 1037, consumer reports prepared by some of Plaintiff’s CRA members have included Medical Account Information where such information is furnished about the consumer to the CRA, consistent with the requirements of the FCRA.

19. Upon information belief, certain Medical Account Information would be viewed by the Attorney General as prohibited by the Texas Law.

20. Because certain of Plaintiff’s members currently maintain Medical Account Information on consumers today, which the FCRA permits them to include in consumer reports, Plaintiff’s members would have to make significant changes to their operations in order to come into compliance with the Texas Law.

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<sup>3</sup> <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB01037F.pdf#navpanes=0>. Underlined language indicates language added in 2019 by S.B. 1037 to the existing statute

**C. DEFENDANT'S ENFORCEMENT ACTIONS AGAINST CDIA MEMBERS**

21. The Texas Attorney General has investigated multiple CDIA members related to their credit reporting business on at least two occasions in just the last five years.

22. First, in 2015, the Texas Attorney General, along with the Attorneys General of 29 other states investigated Experian, Equifax and Trans Union (the “NCAP Participants”) alleging violations of the federal FCRA and related state laws.

23. The state Attorneys General alleged that the NCAP Participants violated the FCRA and state law by furnishing credit reports that contained inaccurate information. Additionally, the state Attorneys General noted that nearly 20% of consumer reports contained medical debt that resulted from involuntary, unplanned and unpredictable debt from medical services for which prices are rarely provided in advance.

24. The NCAP Participants denied that they violated the FCRA and state law, denied their reports were inaccurate, and otherwise denied any wrongdoing, but nonetheless voluntarily agreed to implement certain changes to their credit reporting practices as set forth in the National Consumer Assistance Plan (“NCAP”).

25. Under NCAP, the NCAP Participants agreed to: (1) “prevent the reporting and display of medical debt identified and furnished by Collection Furnishers when the date of first delinquency is less than one hundred and eighty (180) days prior to the date that the account is reported to the CRAs;” and (2) “implement a process designed to remove or suppress known medical collections furnished by Collections Furnishers from files within the CRAs’ respective credit reporting databases when such debt is reported either as having been paid in full by insurance or as being paid by insurance.” *See Assurance of Voluntary Compliance/Accordance of Voluntary Discontinuance attached hereto as Exhibit A (“Exhibit A”), para. IV(E)(3)(a), (c), respectively.*

26. “Collection Furnishers” are defined to mean “collection agencies or debt purchasers that furnish data to any of the CRAs.” *See Exhibit A*, para. IV(E)(1)(a).

27. The reporting restrictions set forth in Tex. Bus. and Com. Code § 20.05 apply not only to the NCAP Participants, but to any CRA that prepares reports in Texas, and it imposes broader requirements related to medical debt than NCAP in that it: (i) regulates consumer reports prepared by all CRAs, and not just the three participants in the NCAP settlement; (ii) prohibits the reporting of Medical Collection Account Information where a consumer was covered by insurance at the time the account was due, and does not just prevent the reporting of the Medical Account Information furnished by Collection Furnishers defined in NCAP when the date of first delinquency is less than 180 days prior to the date it is reported to the CRAs; and (iii) includes collection accounts for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim, as opposed to the requirements under NCAP to only remove accounts where the debt was reported as having been paid in full by insurance or as being paid by insurance.

28. As a result, all member CRAs that have Medical Collection Account Information will be required to make substantial changes to their business operations with respect to Medical Collection Account Information, even if they previously adjusted their practices pursuant to NCAP.

29. The NCAP Participants and certain other member CRAs, and the companies that furnish information to those CRAs, utilize a specialized credit reporting format for the furnishing and reporting of credit report information, known as the Metro 2® Format, which is set forth in the Credit Reporting Resource Guide (the “CRRG”). The Metro 2® Task Force is comprised of representatives from Equifax, Experian, Innovis, and TransUnion. The Task Force maintains the

Metro 2® Format, a data specification created for data furnishers to report credit information to major credit reporting agencies in a standardized format. CDIA maintains and publishes the CRRG on behalf of the Taskforce.

30. Currently, the Metro 2® reporting format does not have a reporting field to indicate that the consumer was covered by a health benefit plan at the time that treatment was rendered by the medical provider. Nor does the Metro 2® reporting format have a reporting field to allow the furnisher to indicate that the consumer was seeking treatment for treatment that the health benefit plan would deem out of network. Thus, the CRAs that maintain medical information do not have a way to easily identify which information they currently maintain that would fall within the scope of the Texas Law.

31. When NCAP was agreed upon, it included requirements that the NCAP Participants create two new Metro 2® format codes for the identification of covered medical debt that would be furnished so that they could identify those accounts to assure compliance with NCAP. *See Exhibit A, para. IV(E)(3)(b).*

32. The data changes required by the NCAP settlement were not fully implemented until September 2017, more than two years after the effective date of the NCAP settlement. Implementation of these changes required system changes at each of the CRAs as well as each of the furnishers which had to begin reporting with those codes, the training of furnishers on how to properly utilize the codes, and to change the reporting systems and related materials to identify those codes and report data in a compliant way.

33. Upon information and belief, it would take at least as long implement similar changes required to comply with the Texas Law.

34. All of Plaintiff's members that presently maintain medical collection account information will have to adopt similar processes as those contemplated under the NCAP Settlement in order to identify whether they have accounts that would be covered by Texas Law, and take steps to assure the removal of such data from their files, or otherwise prevent such data from being included in Texas consumer reports (i.e. suppression of the data).

35. The Texas Attorney General also initiated an investigation in 2017 into Equifax following a data breach reported by Equifax that year. In July 2019, the Federal Trade Commission, the Consumer Financial Protection Bureau, and the attorneys general of 48 states (including Texas), the District of Columbia, and Puerto Rico entered a settlement with Equifax in which Equifax agreed to implement and maintain a comprehensive data security program, provide certain other consumer benefits, and pay certain amounts in restitution and penalties, including \$175 million to the state attorneys general.

#### **IV. CAUSES OF ACTION**

##### **Count I: Declaratory Judgment**

36. CDIA restates and realleges the foregoing paragraphs of this Complaint as though fully set forth herein.

37. Pursuant to the Declaratory Judgments Act, 28 U.S.C. §§ 2201(a) and 2202, Plaintiff requests that the Court enter a judgment interpreting the FCRA, 15 U.S.C. § 1681c, § 1681t, and its preemptive effect with regard to Tex. Bus. & Com. Code § 20.05(a)(5). Plaintiff prays that this Court declare the rights and obligations of the parties under those statutes.

38. Plaintiff CDIA and Defendant State of Texas have fundamental disagreements regarding the interpretation and application of 15 U.S.C. § 1681c, § 1681t, and Tex. Bus. & Com. Code § 20.05(a)(5). A declaration from this Court would resolve this controversy and provide the

parties with certainty regarding their legal rights and obligations related to the accurate and uniform reporting of Medical Collection Account Information.

39. Plaintiff CDIA thus requests that the Court declare the following:

- a. That the FCRA, § 1681c, governs the content of consumer reports, including whether and what type of Medical Collection Account Information may be included in a consumer report;
- b. That FCRA § 1681t(b)(1)(E) preempts state laws that attempt to govern or regulate the content of consumer report information;
- c. That Tex. Bus. & Com. Code § 20.05(a)(5) is an attempt by the State of Texas to regulate the content of consumer reports; and
- d. That Tex. Bus. & Com. Code § 20.05(a)(5) is therefore preempted by the FCRA pursuant to 15 U.S.C. § 1681t(b)(1)(E).

40. The interests CDIA seeks to protect in this action are central to CDIA's mission.

CDIA's members will suffer immediate and irreparable harm if they are forced to even temporarily comply with state law that is preempted by the FCRA. The Court's favorable determination concerning the federal preemption and declaratory relief issues presented in this Complaint will prevent this harm.

41. Because Tex. Bus. & Com. Code § 20.05(a)(5) attempts to exclude otherwise reportable information from being included in consumer reports where the FCRA expressly permits the inclusion of such information, it is expressly preempted by federal law.

42. Because CDIA's member CRAs are subject to the prohibition set forth in Tex. Bus. & Com. Code § 20.05(a)(5), there is an actual controversy over which this Court has jurisdiction to award declaratory relief under 28 U.S.C. §§ 2201 *et seq.*

**Count II: Permanent Injunctive Relief**

43. CDIA restates and realleges the foregoing paragraphs of this Complaint as though fully set forth herein.

44. CDIA and its members are entitled to the entry of injunctive relief in the form of a permanent injunction, prohibiting Defendant from enforcing Tex. Bus. & Com. Code § 20.05(a)(5) because it is preempted by 15 U.S.C. § 1681t(b)(1)(E).

**CONDITIONS PRECEDENT**

45. All conditions precedent for Plaintiff to recover in this action have been performed or have occurred.

**PRAYER for RELIEF**

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF CDIA prays that the Defendant be cited to appear and answer herein, and, that upon final hearing, this Court enter declaratory judgment in favor of Plaintiff, and declare that Tex. Bus. & Com. Code § 20.05(a)(5) is preempted by the 15 U.S.C. § 1681t(b)(1)(E). Plaintiff CDIA thus asks that the Court declare the following:

- (a) That the FCRA, § 1681c, governs the content of consumer reports, including whether and what type of Medical Collection Account Information may be included in a consumer report;
- (b) That FCRA § 1681t(b)(1)(E) preempts state laws that attempt to govern or regulate the content of consumer report information;
- (c) That Tex. Bus. & Com. Code § 20.05(a)(5) is an attempt by the State of Texas to regulate the content of consumer reports; and
- (d) That Tex. Bus. & Com. Code § 20.05(a)(5) is therefore preempted by the FCRA pursuant to 15 U.S.C. § 1681t(b)(1)(E).

1. Plaintiff further prays that this Court enter a permanent injunction against Defendant from enforcing Tex. Bus. & Com. Code § 20.05(a)(5) on the grounds that it is preempted by 15 U.S.C. § 1681t(b)(1)(E).

2. Plaintiff further requests that the Court enter such other and further relief as the Court may deem just and proper.

August 5, 2020

Respectfully submitted,

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