UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

PLAINTIFF'S SECOND MOTION FOR JUDGMENT ON THE RECORD WITH INCORPORATED MEMORANDUM OF LAW

COMES NOW, Plaintiff Consumer Data Industry Association ("CDIA") and pursuant to this Court's Procedural Order dated March 29, 2023, and in accordance with District of Maine Local Rule 56, submits its Second Motion for Judgment on the Record with Incorporated Memorandum of Law on the three issues to be decided by this Court, consistent with the Order of the First Circuit in *Consumer Data Industry Association v. Frey*, 26 F.4th 1 (1st Cir. 2022).

PROCEDURAL POSTURE AND STANDARD OF REVIEW

As this Court is aware, this Court previously granted judgment in favor of CDIA on its initial motion for judgment on the record, holding that § 1681t(b)(1)(E) of the Fair Credit Reporting Act broadly preempted state laws that attempt to regulate the content of consumer reports, and finding that two Maine laws challenged within the Complaint were thus preempted. [Dkt. No. 41.] The Defendants appealed that judgment [Dkt. No. 43], and the First Circuit reversed, holding that the Fair Credit Reporting Act's preemption provision did not preempt state laws as broadly as this Court found, and remanded the case for further proceedings consistent with its

order. *Consumer Data Industry Association v. Frey*, 26 F.4th 1 (1st Cir. 2022). The parties agree that this matter is now before the Court on three discrete issues:

a. Whether and to what extent are the Medical Debt Reporting Act and/or the Economic Abuse Debt Reporting Act preempted by 15 U.S.C. § 1681t(b)(1)(E);

b. Whether and to what extent is the Medical Debt Reporting Act preempted by 15 U.S.C. §§ 1681c(a)(7) and/or 1681c(a)(8); and

c. Whether and to what extent is the Economic Abuse Debt Reporting Act preempted by 15 U.S.C. § 1681t(b)(5)(C).

The parties both continue to rely on the original Joint Stipulation of the Record ("Record" or "R") and Joint Stipulation of Facts ("Facts" or "JSOF") [Dkt. Nos. 13, 14] 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).

SUMMARY OF THE ARGUMENT

Even after remand, this case raises a pure question of law: whether, and to what extent, the challenged Maine laws are preempted by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. ("FCRA"). Notwithstanding the First Circuit's ruling that the FCRA's preemption provision § 1681t(b)(1)(E) does not preempt state law as broadly as CDIA initially argued and this Court found

herein,[1] the 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") remain preempted by § 1681t(b)(1)(E) because they regulate the same subject matter as the FCRA.

In the context of § 1681t(b)(1)(E), the First Circuit found that the phrase "subject matter" is defined by the kind of information regulated under § 1681c(a),[2] which is the reporting of adverse information. *Frey*, 26 F.4th at 11. "Adverse information" is regulated within § 1681c(a) by placing a temporal restriction (or, in the case of records of conviction, expressly providing that they are reportable without a temporal limitation) based on the subtype of information – various forms of public record data, delinquent consumer account information, and all "other items of adverse information." 15 U.S.C. § 1681c(a). There can be no genuine dispute that the information governed by Maine's Laws falls within the scope of the FCRA's adverse information requirements of § 1681c(a).[3] Admittedly, the FCRA regulates the reporting of all forms of adverse information,

[1] For preservation purposes, CDIA notes continuing objection to the First Circuit's holding that the FCRA preemption provision did not preempt state laws as broadly as this Court found in its order of October 8, 2020 [Dkt No. 41] granting Plaintiff's initial Motion for Judgment [Dkt. No. 15]. Given the First Circuit's reversal of this Court's decision, Plaintiff does not expect its earlier arguments to be addressed again by this Court on remand. However, given the now interlocutory nature of the First Circuit's earlier ruling, Plaintiff's reassert the arguments made in their Motion for Judgment [Dkt. No. 15] by reference simply to avoid any argument that those arguments in favor of more expansive preemption have been waived should it decide to pursue appeal and/or further Petition for *Certiorari* once the case is in a procedurally final posture. *See generally In Re Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131, 152-153 (1st Cir. 1990) ("A party's failure to oppose specific arguments in a motion to dismiss results in waiver of those issues"); s*ee also United States v. Zannino*, 890 F.2d 1, 17 (1st Cir. 1990); *Melendez v. Otero*, 964 F.2d 1225, 1226, n.1 (1st Cir. 1992) (holding that arguments not supported by "developed argumentation" on appeal are deemed waived).

[2] While this accurately states the First Circuit's holding, respectfully, the text of the preemption provision § 1681t(b)(1)(E) refers to § 1681c in its entirety – not just § 1681c(a), although for the purpose of this motion, the subject matters regulated by Maine's Laws are regulated in § 1681c(a).

[3] The First Circuit agreed stating "[the catch-all language is broad enough to cover medical debt and debt resulting from domestic abuse, which consist of adverse items of information not covered

and has since its inception, 15 U.S.C. § 1681c (1970), while the Medical Bill Act only regulates one form of adverse information, medical debt, 10 M.R.S.A. 1310-H(4). The subject matter of both laws, however, is the same.

Even if this Court were to conclude that the subject matter of 'adverse information' is too broad, and the "subject matter" must be one specifically itemized in §1681c(a), the Medical Bill Act is preempted. Section 1681c(a) regulates public record data (not relevant here), and delinquent consumer account information, which category includes both medical debt and debt incurred through fraudulent means (or that otherwise might be subject to removal under the economic abuse rules). Generally speaking, medical account information furnished to the NCRAs almost exclusively consists of accounts in some stage of collection activity.[4] Thus, medical account information falls within 15 U.S.C. § 1681c(a)(4) and § 1681c(a)(5). In addition to the reporting period of medical information, the FCRA regulates when, how, and what kind of medical information may be included in consumer reports. *See* 15 U.S.C. § 1681c(a)(6), 15 U.S.C. § 1681b(g)(1).

Similarly, the Economic Abuse Act regulates the reporting of adverse consumer account information, in particular consumer financial information, as it requires a CRA to remove such records when a consumer establishes that they have suffered economic abuse, as defined under the law. The kind of consumer financial information subject to removal under this process includes

---

by the immediately preceding provisions." *Frey.* 26 F.4th at 11.

[4] Consumer Financial Protection Bureau, *Medical Debt Burden in the United States*, p. 24 (2002)("Medical debt can have an adverse impact on an individual's financial health beyond the immediate cost of remitting payment for medical services received. If a medical bill remains unpaid after a certain period of time, the debt can be sent to collections, and individuals can face adverse events such as decreased access to credit…") https://files.consumerfinance.gov/f/documents/cfpb_medical-debt-burden-in-the-united-states_report_2022-03.pdf (last visited May 8, 2023).

accounts that were opened through fraud or identity theft, as defined under the FCRA. As such, both Maine Laws regulate the same subject matter as the FCRA – the reporting of adverse information on consumers, and at times, the exact same kind of adverse information. As a result, both the Medical Billing Act and the Economic Abuse Act are preempted by § 1681t(b)(1)(E).

The Economic Abuse Act is also preempted under the conduct preemption provision of § 1681t(b)(5) of the FCRA because it purports to regulate the conduct of CRAs in responding to claims of economic abuse, which must be treated as identity theft and fraud claims under the FCRA. The Economic Abuse Act interferes with the FCRA requirements by requiring a different response to the receipt of information (i.e., removing the information entirely), whereas the FCRA only requires the CRA to block the information and notify the furnisher of the identity theft or fraud claim. The FCRA also permits a CRA to rescind a block under certain circumstance, which the Economic Abuse Act does not recognize. As such, the Economic Abuse Act attempts to regulate the same "conduct required by" the FCRA, and is preempted.

Based on the Record and the Facts, CDIA is entitled to 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.

ARGUMENT

I. The Maine Laws Regulate the Same Subject Matters as FCRA Section 1681c, and Are Thus Preempted.

The first issue before this Court is whether and to what extent are the Medical Bill Act and/or the Economic Abuse Act preempted by 15 U.S.C. § 1681t(b)(1)(E). In short, because the Maine Laws and the FCRA regulate the same subject matters (i.e., the same kind of information), Maine's Laws are preempted.

A. The subject matter preempted under section 1681t(b)(1)(E) is items of adverse information, including consumer's medical debt.

FCRA section 1681t(b)(1) preempts state laws that attempt to regulate – by imposing requirements or prohibitions with regard to - various "subject matters" in order to preserve the desired uniformity resulting from a federal standard. The FCRA provides:

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,. . ."

15 U.S.C. § 1681t(b)(1)(E).

CDIA first argued that "subject matter" for the purpose of federal preemption under 1681t(b)(1)(E) was "the information contained in consumer reports." The First Circuit disagreed, and held that the scope of § 1681t(b)(1)(E)'s preemptive effect was limited by the kinds of information regulated under § 1681c(a). *CDIA v. Frey*, 26 F.4th at 24. The First Circuit questioned whether and how Maine's Laws "might trench on this more circumscribed "subject matter" – i.e., the "items of information" Listed [sic] in section 1681c(a)" and remanded the case for briefing. *Id.* at 11. Thus, we turn to § 1681c(a) to define the "subject matter" regulated thereunder; namely, the reporting of various items of adverse information in consumer reports.

Titled "Obsolete Information," § 1681c was initially limited the amount of time adverse information could be included in consumer reports. 15 U.S.C. § 1681c (1970).[5] With the 1996 amendments, together with the enactment of the additional preemption provisions, Congress expanded § 1681c, retitling it "Relating to information contained within consumer reports,"

[5] Certain intervening versions of section 1681c were titled "Reporting of obsolete information prohibited" before the title was changed in 1996. *See, e.g.*, 15 U.S.C. § 1681c (1995).

adopted new requirements related to certain information that must be included, and how other information may be reported, and titled subpart (a) "[i]nformation excluded from consumer reports." 15 U.S.C. § 1681c (1996). This version of the FCRA not only regulated the period during which adverse information of various forms could be reported (the original obsolescence rules), but it also mandated how the CRAs must calculate the 7-year reporting period for the more serious types of adverse information (accounts that are in a charge-off status or were referred for collection), and for all medical account information. 15 U.S.C. § 1681c(c)(1).

It was also in 1996 that Congress took steps to further regulate the substance of medical information included in consumer reports, and not just its reporting period. 15 U.S.C. § 1681c (1998). Relevant here, the then-enacted § 1681c(a)(6) prohibited CRAs from including medical information that disclosed or implied details regarding a consumer's medical care in consumer reports. 15 U.S.C. § 1681c(a)(6). In 2003, Congress acted again to further regulate the reporting of medical information, and limited the circumstances under which reports containing medical account information may even be provided to an end user, if at all. 15 U.S.C. § 1681b(g)(1) (generally requiring a consumer's consent to allow the reporting of medical information for employment and insurance purposes, and limiting any reporting of the financial aspects of medical account information upon so long as the information reported does not "provide information sufficient to infer the specific provider, or nature of services, products or devices." *Id.* Most recently, in 2018, Congress again further limited the reporting of adverse information, particularly the reporting of veteran's medical debt by the nationwide consumer reporting agencies' ("NCRAs"). 15 U.S.C. §§ 1681c(a)(7) & (8).

As a result, today FCRA § 1681c(a) regulates the reporting of all forms of adverse information on consumers as follows:

> . . .no consumer reporting agency may make any consumer report containing any of the following items of information: . . .
>
> (1) *Cases under title 11 [United States Code] or under the Bankruptcy Act*, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.
>
> (2) *Civil suits, civil judgments,* and records of arrest that from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.
>
> (4) *Accounts placed for collection or charged to profit and loss* which antedate the report by more than seven years.
>
> (5) *Any other adverse item of information*, other than records of convictions of crimes which antedates the report by more than seven years.

15 U.S.C. §§ 1681c(a)(2), (4), and (5) (emphasis added). The catch-all provision, § 1681c(a)(5), regulates all types of adverse information not specifically addressed elsewhere in the section. This catch-all provision was necessary to allow flexibility in the development of the contents of consumer reports, but also to limit the reporting period of any new form of adverse information CRAs may elect to report.

For example, in 1970, data obtained from a variety of 'alternative' sources used in credit reports today were not included in credit reports of the past, such as utility payment data and rental history data.[6] In fact, some data sets may not have even existed at the time, such as cell phone plan payment history information.[7] Thus, the catch-all provision covers all kinds of consumer

[6] Even as of August 2020, a CFPB blog reports that most utilities do not furnish data to the nationwide consumer reporting agencies. *Does my history of paying utility bills, like telephone, cable, electricity, or water, go in my credit report?* (Aug. 2020), https://www.consumerfinance.gov/ask-cfpb/does-my-history-of-paying-utility-bills-like-telephone-cable-electricity-or-water-go-in-my-credit-report-en-1817/ (last visited May 8, 2023).

[7] The first cell phone was not even commercially available until 1983. James Hardy, *The First Cell Phone: A Complete Phone History from 1920 to the Present* (Jan. 2022), https://historycooperative.org/first-cell-phone/ (last visited May 8, 2023).

information that is adverse to the interests of the consumer, which is not otherwise regulated under a different provision of § 1681c(a), limiting the reporting of such information to seven years.[8]

In addition to the general reporting periods above, Congress chose to further regulate the reporting of medical information for all consumers under § 1681c(a):

> . . .no consumer reporting agency may make any consumer report containing any of the following items of information: . . .
>
> **(6)** 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. . .

15 U.S.C. §1681c(a)(6). Congress also specifically regulated the reporting period for adverse information reflecting veteran's medical debt:

> **(7)** With respect to a consumer reporting agency described in section 1681a(p) of this title, any information related to a veteran's medical debt if the date on which the hospital care, medical services, or extended care services was rendered relating to the debt antedates the report by less than 1 year 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.
>
> **(8)** With respect to a consumer reporting agency described in section 1681a(p) of this title, 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

[8] Certainly, no one would argue that medical debt information, or debt that resulted from economic abuse, are not items of adverse information subject to the reporting periods in § 1681c(a).

> its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act.

15 U.S.C. §§ 1681c(a)(7) and (8). Section 1681c(b) provides a list of exempted transactions where the limitations of §1681c(a)(1)-(5) do not apply (including larger credit and life insurance transactions, plus opportunities for employment with a salary equal or greater to $75,000), and a CRA may include such information in those consumer reports.

FCRA § 1681c also regulates how to calculate the reporting period for account history information that includes medical information and seriously delinquent accounts. 15 U.S.C. §1681c(c)(1). For all accounts placed for collection or charged to profit and loss, which are adverse information regulated by § 1681c(a)(4), as well as with respect to medical information, which is another form of adverse information regulated by §1681c(a)(6), a CRA must calculate the reporting period in a specific way. Titled "Running of Reporting Period," subsection 1681c(c)(1) provides:

> The 7-year period referred to in paragraphs (4) and (6) of subsection (a) shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.

15 U.S.C. §1681c(c)(1). As the FTC explained, this period establishes the commencement of the information's 7-year reporting period.[9] The effect of § 1681c(c)(1) is that a CRA may report these

[9] Fed. Trade Comm'n, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*, 2011 WL 3020575, at 58 (July 2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf ("40 Years Report") ("Section 623(a)(5) requires an information furnisher that reports a collection or chargeoff or similar action to a CRA to provide the month and year of the commencement of the delinquency that led to the action. This section requires the CRA to use that date as the start of the obsolescence period.").

accounts from receipt, until the expiration of 7 years *from the first date of the consumer's delinquency.*

Therefore, the subject matter of FCRA § 1681c(a), and thus the 'subject matter' for the purpose of determining whether these state laws are preempted, is the regulation of adverse items of information – this answers the question "what" is preempted.[10] There are a variety of types of adverse items of information that fall into the "adverse information" subject matter, including adverse public records (bankruptcy records, civil suits and judgments, tax liens, records of arrest, and records of conviction), as well as adverse, or delinquent, consumer financial account information, including accounts placed for collection, accounts charged to profit and loss, and any other information that falls into "other adverse items of information" about the consumer. Congress has chosen to further and specifically regulate the reporting of accounts that contain medical information for <u>all</u> consumers, and provided additional protection for <u>veterans</u> with regard to the reporting of their medical debt, each of which are a subset of delinquent consumer account information.

B. <u>The Medical Bill Act is preempted by the FCRA subject matter preemption provision because the FCRA regulates the same medical information that the Maine Medical Bill Act purports to regulate</u>.

The FCRA and the Medical Bill Act both regulate the same subject – the reporting of adverse information in consumer reports. Admittedly, the FCRA regulates all forms of adverse information, and Maine's Medical Bill Act only regulates the reporting of one form of adverse information. Nonetheless, the laws both regulate the same subject matter – the reporting of adverse

[10] The "how" the adverse information is regulated is temporarily – some adverse information may be reported without any time limitation, some for a period of seven years, or some for a period of ten years, depending on the nature of the information.

information. As such, the Maine Medical Bill Act is preempted.

Defendant may argue that CDIA misstates the "subject matter" of 1681t(b)(1)(E)'s federal preemption, and that one must turn to each of the specific types of adverse information to determine scope. However, as explained above, there are various types of "adverse information" regulated by section 1681c(a) – public record data, adverse consumer financial account information, and any "other item of adverse information." Here, the medical debt referred to in the Medical Bill Act would fall within the adverse consumer financial information regulated by multiple subsections of § 1681c(a), including a combination of subparts § 1681c(a)(4) (accounts placed for collection or charged to profit and loss), § 1681c(a)(5) (any other adverse item of information), and § 1681c(a)(6) (medical information).[11]

Moreover, under existing relevant case law, the subject matter of the state regulation need not be identical to be preempted, but falls if it "concerns" or "relates to" the same subject matter as that regulated by the FCRA. *See Ross v. FDIC*, 625 F. 3d 808 (4th Cir. 2010) (where state law claim concerned the same activity as the FCRA regulates in 1681s-2, namely the furnishing of information by creditors to CRAs). Thus, a state law need not mirror the FCRA for preemption to apply, nor must the state law expressly contradict the FCRA provision, or even regulate the subject

[11] To the extent the Court does not believe the "subject matters" are particular enough in light of the First Circuit's ruling, CDIA would further characterize the subject matters as: the filing for bankruptcy protection; civil suits; civil judgments; records of arrest; paid tax liens; accounts placed for collection or charged to profit and loss; records of convictions of crimes; medical information; veteran's medical debt; and "any other adverse item of information." In any event, the information regulated by each of Maine's Laws would fall under, at least, "any other adverse item of information" about the consumer, but could also fall into the category of accounts placed for collection or charged to profit and loss, or medical information, or both, and are therefore still preempted.

matter in the exact same way; it must just regulate a subject matter that relates to or concerns the same as the FCRA.

For example, a number of courts have held that state laws that attempt to limit the sale of mortgage trigger lists (i.e. a limited form of a consumer report consistent with FCRA § 1681b providing notice that the consumer has applied for a mortgage), are preempted by the FCRA's subject matter preemption related to prescreening. *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009) (where state law claims were found preempted by section 1681t(b)(1)(A), because the report was sold for prescreening purposes); *CDIA v. Swanson*, 2007 WL 2219389 (D. Minn. 2007) (same). In *Swanson*, the court explained that the manner in which the subject matter was regulated was not relevant to the question of federal preemption; what mattered was whether the subject matter is already regulated by the FCRA:

> [w]hether selling mortgage-trigger lists is explicitly authorized by § 1681b(c)(1) (as CDIA argues) or explicitly forbidden by § 1681b(c)(3) (as Swanson argues), the "subject matter" of mortgage-trigger lists is unquestionably regulated by § 1681b(c), and thus, under § 1681t(b)(1)(A), neither Minnesota nor any other state may prohibit or regulate their sale.

Id. at *4.

Other circuit courts have applied that same rationale in cases examining state laws that were preempted because they were related to the same subject matter of the FCRA – specifically, a creditor's furnishing of information to CRAs – without regard to how the FCRA may have regulated the subject. *See Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011) (finding claims related to inaccurate furnishing of account data preempted by § 1681t(b)(1)(F) stating "[the] extra federal remedy in §1681s-2 was accompanied by extra preemption in §1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges."); *Pinson v. Equifax Credit Info. Services, Inc.*,

316 Fed. Appx. 744 (10th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. §1681t(b)(1)(F)); and *Marshall v. Swift River Academy, LLC*, 327 Fed. Appx. 13 (9th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. § 1681t(b)(1)(F)); *Ross v. FDIC*, 625 F. 3d 808 (4th Cir. 2010). In *Ross v. FDIC,* the Fourth Circuit held that the FCRA preempted North Carolina's unfair and deceptive trade practices act claims that were based upon a company's furnishing activities because the claim "concern[ed]" information furnished to a consumer reporting agency. *Ross*, 625 F. 3d 808 at 813. The court said the plaintiff's common law claim

> …runs into the teeth of the FCRA preemption provision. Her claim concerns a furnisher's reporting of inaccurate credit information to CRAs, an area regulated in great detail under §§ 1681s-2(a)-(b). Because Ross's [state law] claim seeks to use § 75-1.1 as a "requirement or prohibition" under North Carolina law concerning "subject matter regulated under section 1681s-2," it is squarely preempted by the plain language of the FCRA. 15 U.S.C. § 1681t(b)(1)(F).

Id. (emphasis added).

Thus, the question is not *how* the FCRA regulates the subject matter (whether it limits the reporting of that information for a period of time, or outright prohibits certain descriptive information from being included in the report), but *whether* the FCRA regulates the subject matter.[12] If the rule were otherwise, and subject matter preemption depended upon the state law

[12] To the extent the Defendants rely on an interpretive rule announced by the Consumer Financial Protection Bureau ("CFPB") titled The Fair Credit Reporting Act's Limited Preemption of State Laws (https://files.consumerfinance.gov/f/documents/cfpb_fcra-preemption_interpretive-rule_2022-06.pdf) (the "Opinion"), CDIA respectfully submits that the opinion should not be accorded any deference by this Court, as it is well settled that interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995) (internal citations omitted). Moreover, CDIA believes that the CFPB exceeded its limited rulemaking authority - both under the FCRA and the Consumer Financial Protection Act, Title X of the Dodd Frank Act, 12 U.S.C. § 5481 *et seq.,* in promulgating the rule, which renders the rule ultra vires and/or unenforceable under the APA and general Constitutional principles. *See* 5 U.S.C. § 706(2) setting forth the scope of judicial review courts have to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

regulating the information in the same way as the FCRA, there would be no need for the conflict preemption rule set forth in 15 U.S.C. § 1681t(a), or the conduct preemption provisions of § 1681t(b)(5), as they would be rendered superfluous. Instead, the question is whether the state law regulates the same subject matter as the FCRA.

Here, however, with respect to Maine consumers, the Medical Bill Act and the FCRA regulate the same information. The Medical Bill Act provides that 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." 10 M.R.S.A. § 1310-H. Under the FCRA, the term "medical information"--

> (1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to--
>
> (A) the past, present, or future physical, mental, or behavioral health or condition of an individual;
>
> (B) the provision of health care to an individual; or
>
> (C) the payment for the provision of health care to an individual.

15 U.S.C.A. § 1681a(i) (emphasis added). The information regulated under the FCRA related to "the payment for the provision of health care to an individual" is the same information described under the Medical Bill Act, namely, "debts from medical expenses." In this way, the Medical Bill Act "runs into the teeth" of the FCRA, and the law is preempted. *Ross*, 625 F. 3d 808 at 813. That should end the inquiry.

Even if not procedurally infirm, the CFPB's rule submitted to the Court is an inappropriate attempt to influence this Court's decision on matters solely within its power and authority to effect. It is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The scope of federal preemption is not an issue delegated to the agency to regulate or enforce, yet the CFPB elected to comment on the preemptive scope of § 1681t, and 'hypothetically' addressed the very fact pattern at issue in this case. It was wholly inappropriate for the CFPB to opine on the very issues presented to this Court, and others, for decision.

It is also notable that, although the rules themselves are different, both laws regulate the same medical debt in similar ways (their manner of regulation) – by prescribing when and how such information may be reported, the circumstances under which the information may be reported, and when the same information may not be reported. The Medical Bill Act regulates one type of adverse information – "debt from medical expenses," and it does so in three ways: (i) it regulates when the debt may first be reported by prohibiting CRAs from reporting any medical information about a Maine consumer in a credit report until after the record has been in the CRA's possession for at least 180 days; (ii) it regulates how long the information may remain on an account by requiring CRAs to remove medical debts upon proof 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" as is industry custom and practice); and (iii) it affirmatively requires CRAs to report medical debt – regardless of the age of the account – 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." 10 M.R.S.A. §1310-H(4).[13]

As described in detail above, the FCRA also regulates medical information in multiple ways: (i) it permits the reporting of medical information for only a limited number of purposes and upon satisfaction of additional conditions (i.e. consumer's consent) under §1681g(b)(1), or for transactions that satisfy an exception under §1681c(b); (ii) it regulates the nature of the information that may be reported so that the underlying medical care is not reflected in the consumer report

[13] Ironically, this last provision would require CRAs to continue to report medical debt information, even when the CRAs have otherwise made the decision to voluntarily remove over half of the medical debt information they maintain from consumer reports. See *First Changes to Reporting of Medical Collection Debt Roll Out July 1, 2022,* (https://www.experianplc.com/media/latest-news/2022/first-changes-to-reporting-of-medical-collection-debt-roll-out-july-1-2022/) (last visited May 2, 2023).

information in §1681c(a)(6); and (iii) it limits the period of time during which the information may be reported in §§ 1681c(a)(4) & (5). Therefore, Maine's Medical Bill Act is preempted by § 1681t(b)(1)(E) because both Maine's law and the FCRA regulate the same subject matter – the reporting of adverse information in consumer reports, particularly, medical debt information.

C. The Economic Abuse Act also regulates the same subject matter as the FCRA § 1681c, and is therefore preempted.

The Economic Abuse Act fares no better than the Medical Bill Act, as it too regulates the same subject matters as the FCRA. The Economic Abuse Act created a mechanism by which individuals who have suffered economic abuse by a spouse or partner may contact a CRA and request that the CRA exclude specific items of consumer financial account information from their credit report that resulted, in some way, from the economic abuse the individual claims to have suffered. 10 M.R.S.A. §1310(H)(4). The law requires the CRA to conduct a reinvestigation and evaluate the merits of the consumer's claim of economic abuse, and, if it finds the consumer to be a victim under the law, prohibits the reporting of such information by the CRA. Therefore, the Economic Abuse Act regulates not necessarily a specific type of adverse information, like medical debt, but any consumer financial account or other item of adverse information that was incurred as a result of the economic abuse. While the goals of the law are laudable, the mechanism here is misdirected, and likely to cause problems for consumers, creditors, and CRAs alike.

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.

10 M.R.S.A. § 1310-H(2-A). Economic Abuse is defined 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.

10 M.R.S.A. § 4002(3-B). Effectively, the law creates a special type of dispute that CRAs must handle in accordance with state law. There are legal and practical problems with this approach.

First, the subject matter is preempted by 15 U.S.C. § 1681t(b)(1)(E). The clear purpose behind the Economic Abuse Act is to free the victim from the financial burdens related to repayment of certain consumer debts, and the negative consequences of delinquent debt showing up on the consumer's report (i.e., the existence of derogatory credit report information, which likely results in a lower credit score for the consumer) when those accounts have been taken over or controlled by the abuser. Economic abuse includes circumstances where, among other things, there has been an "unauthorized or coerced use of credit or property, withholding access to money or credit cards, stealing from or defrauding of money or assets, exploiting the individual's resources for personal gain of the defendant." 10 M.R.S.A. § 4002(3-B). Therefore, consumers will be able to claim economic abuse as a means to eliminate **adverse items of information** from their credit report that are in a delinquent status and/or are the result of fraud or other forms of identity theft descried above.

The FCRA already governs when adverse items of information, including consumer financial account information, may be included in a report , 156 U.S.C. § 1681c(a), or when such information must be blocked from reporting when the consumer is a victim of fraud or identity theft, 15 U.S.C. §1681c-1, including most of the scenarios of economic abuse as defined under

Maine's law.[14] In any event, whether the 'subject matter' is the reporting of adverse information in a consumer report, or it is the reporting of adverse consumer financial account information, or is more narrowly drawn to accounts placed for collection, charged off, or which are simply other items of adverse information, the data the Economic Abuse Act is intended to regulate is same subject matter, and is therefore preempted.

From a practical perspective, these requirements raise real issues of due process as well. The information a consumer may provide in support of their request is *not* limited to a court order or judicial finding of actual economic abuse; even mere allegations of unlawful conduct are sufficient.[15] There is no opportunity for the alleged tortfeasor, or the creditor, to respond to the allegations of abuse that purport to absolve the consumer of financial liability with respect to the account. *See* 10 M.R.S.A. § 1310-H(2-A).

---

[14] Section III below addresses conduct preemption of state laws that attempt to dictate how a CRA must respond to such identity theft claims and reports.

[15] 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 adjudication of the propriety and enforceability of the debt is a role best left to the courts. In fact, every circuit court to decide the question has held that CRAs do not have a legal obligation to adjudicate the enforceability of a debt as part of its FCRA dispute processes. *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008); *Mader v. Experian Info. Sols., Inc.*, 56 F.4th 264 (2d Cir. 2023); *Chuluunbat v. Experian Info. Sols., Inc.*, 4 F.4th 562 (7th Cir. 2021) (concluding that CRAs "were not required to determine that the debt was invalid as a matter of law because '[o]nly a court can fully and finally resolve the legal question of a loan's validity,') (citations omitted); *Batterman v. BR Carroll Glenridge, LLC*, 829 F. App'x 478, 481 (11th Cir. 2020) (finding plaintiff's theory of inaccuracy was actually "a contractual dispute" to be resolved by a court and not a CRA) (per curiam); *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015) (providing that FCRA's reinvestigation provisions "do[] not require CRAs to resolve legal disputes about the validity of the underlying debts they report"); *Saunders v. Branch Banking and Tr. Co.*, 526 F.3d 142, 150 (4th Cir. 2008) (noting that "[c]laims brought against CRAs based on a legal dispute of an underlying debt raise concerns about 'collateral attacks' because the creditor is not a party to the suit, while claims against furnishers … do not raise this consideration because the furnisher is the creditor on the underlying debt"); *Wadley v. Experian Info. Sols., Inc.*, 241 F. App'x 132, 135 (4th Cir. 2007) ("The FCRA does not provide a cause of action to collaterally attack an accurate credit report"). As the Ninth Circuit explained, CRAs "are ill-equipped to adjudicate contract disputes, [and] courts have been loath to allow consumers to mount collateral attacks on the legal validity of their debts in the guise of FCRA reinvestigation claims." *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 891 (9th Cir. 2010). The Economic Abuse Act effectively provides a mechanism for the consumer to collaterally attack the underlying credit transaction. To the extent a CRA receives notice of that the consumer is a victim

of identity theft, the FCRA proscribes the manner in which the CRA must respond – and as a result, the Economic Abuse Act is also preempted by the FCRA's conduct preemption provisions, 15 U.S.C. §§ 1681t(b)(5)(B) &(C), as discussed in Section III below.

III. The Economic Abuse Act is Also Preempted by Virtue of Conduct Preemption Pursuant to § 1681t(b)(5).

The third issue before this Court is whether the Economic Abuse Act is preempted by the §1681t(b)(5)(C), and this Court should answer in the affirmative as the FCRA imposes specific conduct requirements on CRAs when they receive claims of identity theft and fraud like the kind to be regulated by the Economic Abuse Act.

The FCRA's conduct preemption limitation is different from the subject matter preemption in that the entire subject matter regulated by the FCRA is not preempted under § 1681t(b)(5); rather, only those state laws that would regulate the CRA's conduct would be preempted. The FCRA provides: "No requirement or prohibition may be imposed under the laws of any State . . . with respect to the conduct required by the specific provisions of . . . [§ 1681c-2]." 15 U.S.C. §1681t(b)(5)(B). "Conduct" is defined as "personal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves; collectively, a person's deeds. . ." *Conduct,* Black's Law Dictionary (11th ed. 2019). A law that requires one to take an action is quintessentially the regulation of the person's "conduct;" therefore, "conduct" requirements are those FCRA provisions that require the CRA to do, or not to do something.

Here, § 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 his/her 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). There is no reinvestigation permitted under the FCRA to ascertain the merits of the alleged fraud or identity theft; the CRA is simply required to place the block to prevent the reporting of such information upon submission of a block request that meets the requirements of the FCRA. *See id.* Therefore, the FCRA imposes specific conduct requirements on CRAs that receive notice of identity theft and fraud.

Moreover, placing a block is not the same as removing the information from consumer reports. When a CRA places a block, it must promptly provide notice to the creditor who furnished the record, and advise that the information furnished may be the result of identity theft; that an identity theft report has been filed; a block requested; and the effective dates of the block. 15 U.S.C. §1681c-2(b). The furnisher (such as, with respect to debt, the creditor) must then fulfill its responsibilities under the FCRA related to the account. *See* 15 U.S.C. § 1681s-2(a)(6). If the furnisher determines that the consumer is ultimately responsible for the debt, the furnisher is permitted to furnish the account back to the CRA again. *Id.* Under the FCRA, a CRA may decline or rescind a block if the block was requested in error, the block was initially 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).[16]

The Economic Abuse Act also requires the CRA take specific action in response to a claim of economic abuse, including identity theft and fraud, and engage in a fact-finding adjudication of

[16] In such a case, the FTC recognized that CRAs will often "receive and be required to act upon" Identity Theft related requests "before the Identity Theft complaint is fully investigated by the law enforcement agency" and therefore "be faced with the initial responsibility for determining the legitimacy of an Identity Theft claim." *Id.* at 63926. This balancing of the FCRA's identity theft procedures reflects the limited ability of a CRA to adjudicate the truth of such claims, and limits the impact a CRA may have on the rights and responsibilities of parties to accounts. 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.

the *truth* of the consumer's allegations (i.e. whether a debt or portion of a debt results from economic abuse), and then requires that the CRA block the reporting of the account on a permanent basis. 10 M.RS.A. §1310-H(2-A). These requirements therefore dictate the conduct of CRAs upon receipt of a claim of economic abuse, which would most often also be a claim of identity theft under the FCRA, and are therefore preempted.

Comparing the definition of economic abuse to the definition of identity theft under the FCRA, it is clear that these laws overlap. Economic abuse includes circumstances where, among other things, there has been an "unauthorized or coerced use of credit or property, withholding access to money or credit cards, stealing from or defrauding of money or assets, exploiting the individual's resources for personal gain of the defendant." 10 M.R.S.A. § 4002(3-B). Under the FCRA, these same actions would likely meet the definition of "identity theft, which is defined as "a fraud committed using the identifying information of another person." 15 U.S.C. § 1681a(q)(4). Federal regulation expanded the definition of identity theft to include "a fraud committed or attempted using the identifying information[17] of another person without authority." 12 C.F.R. § 1022.3(h). The clear terms of the Economic Abuse Act demonstrate that the majority of challenges to account information will come from consumers who have been deemed victims of identity theft.

Because both the FCRA and the Economic Abuse Act attempt to impose regulations on

[17] ***Identifying information*** means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any:

(1) Name, social security number, date of birth, official state or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(3) Unique electronic identification number, address, or routing code; or

(4) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

CRAs on its conduct upon receipt of notice of identity theft related to debts resulting from economic abuse, the Economic Abuse Act is preempted to the extent it imposes duties on CRAs with respect to notice of alleged economic abuse.

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.

May 8, 2023

Respectfully submitted,

/s/ Ryan P. Dumais

Ryan P. Dumais
Eaton Peabody
77 Sewall Street #3000
Augusta, ME 04330
Phone: (207) 729-1144 ext. 3810
Fax: (207) 729-1140
rdumais@eatonpeabody.com

Rebecca E. Kuehn
Jennifer L. Sarvadi
Hudson Cook LLP
1909 K Street NW
4th Floor
Washington, DC 20006
Phone: (202) 715-2008
Facsimile: (202) 223-6935
rkuehn@hudco.com
jsarvadi@hudco.com

Attorneys for Plaintiff
Consumer Data Industry Association