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' OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR JUDGMENT ON A STIPULATED RECORD AND CROSS-MOTION FOR JUDGMENT ON STIPULATED RECORD, WITH INCORPORATED MEMORANDUM OF LAW

At issue are two laws enacted by the Maine Legislature to help ensure that consumer reports (sometimes referred to as "credit reports") do not unfairly include prejudicial information that may have no real bearing on a person's creditworthiness or fiscal responsibility. One law, referred to here as the "Medical Debt Reporting Act," restricts the reporting of debt resulting from medical expenses. The other, referred to here as the "Economic Abuse Debt Reporting Act," restricts the reporting of debt resulting from economic abuse. The plaintiff, Consumer Data Industry Association ("CDIA"), a trade association representing credit reporting agencies ("CRAs"), alleged that both laws were preempted by the federal Fair Credit Reporting Act ("FCRA"). Primarily, CDIA claimed that a provision in FCRA broadly preempts states from regulating anything relating to the content of consumer reports.

The First Circuit rejected this argument. Instead, it held that whether the two Maine Acts are partially preempted turns on whether they regulate subject matters actually regulated by the relevant FCRA provision. It did not reach CDIA's separate argument that the Economic Abuse

Debt Reporting Act is preempted by a FCRA provision prohibiting states from enacting laws with respect to conduct required by a FCRA provision governing identity theft. It remanded those issues to this Court. For the reasons set forth below, neither Debt Reporting Act is preempted, in whole or in part. The relevant FCRA provision addresses the inclusion of certain types of "adverse" information on consumer reports. Medical and economic abuse debts are not necessarily "adverse" information, but, even when they are, and as the federal Consumer Financial Protection Bureau recognized, the FCRA provision regulates only how long such information can remain on a consumer report and does not preempt states from regulating what may initially be included on a consumer report. While the FCRA provision does address certain aspects of the reporting of veterans' medical debt, the First Circuit recognized that it does not preempt Maine from regulating the reporting of non-veterans' medical debt. And even with respect to veterans' medical debt, the Medical Debt Reporting Act is not preempted, for the reasons discussed below. Finally, the Economic Abuse Debt Reporting Act is not preempted by the separate FCRA provision because economic abuse and identity theft are different, and the conduct required by the Act is different than the conduct required by the FCRA provision.

The Court should thus deny CDIA's motion for judgment on a stipulated motion and grant defendants' cross-motion. In further support, defendants rely upon the following Memorandum of Law:

MEMORANDUM OF LAW

STATUTORY AND PROCEDURAL BACKGROUND

The Maine Debt Reporting Acts

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, c. 77 and codified at 10 M.R.S. § 1310-H(4). As enacted, the Medical Debt Reporting Act 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).

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, c. 407. As currently codified, the relevant portion of the Medical Debt Reporting Act states:

> 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 4102, subsection 5, 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).[1] "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. § 4102(5).

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. FCRA has a savings clause preserving State authority:

> 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

[1] As part of a recodification of Maine's protection from abuse statutes, the reference for the definition of "economic abuse" was amended in 2022. Me. P.L., c. 647, pt. B, § 4.

states were free to enact laws regulating consumer credit reporting" and then "enumerated several exceptions").[2]

Section 1681t(b) sets forth various exceptions to the general rule of non-preemption, and two of those exceptions are at issue here. First, "[n]o 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).[3] Second, "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the conduct required by the specific provisions of . . . section 1681c-2 of this title." 15 U.S.C. § 1681t(b)(5)(C). Section 1681c-2, entitled "Block of information resulting from identity theft," addresses the actions that CRAs must take upon proper notification from a consumer that information in the consumer's file was the result of identity theft. 15 U.S.C. § 1681c-2.

Procedural History

On September 26, 2019, CDIA filed a lawsuit against the Maine Attorney General and the Superintendent of the Maine Bureau of Consumer Credit Protection seeking a declaration that the two Debt Reporting Acts are preempted by 15 U.S.C. § 1681t(b)(1)(E) and an injunction barring defendants from enforcing the laws. ECF 1. The parties agreed to resolve the matter via cross-motions for judgment on a stipulated record. ECF 13. During briefing, CDIA made the

[2] 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)).

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

additional argument that the Economic Abuse Debt Reporting Act is preempted by 15 U.S.C. § 1681t(b)(5)(C). ECF 15, PageID 162-64.

On October 8, 2020, this Court entered an order granting CDIA's motion and denying defendants' motion. ECF 41. The Court concluded that Section 1681t(b)(1)(E) preempts any state law that seeks to regulate information contained in consumer reports, regardless of whether the law addresses a subject matter regulated under Section 1681c. PageID 367-68. The Court also noted that because Section 1681c regulates the reporting of veterans' medical debt, it regulates medical debt generally. PageID 368-69. The Court thus held that both Debt Reporting Acts are preempted by Section 1681t(b)(1)(E). In light of this holding, the Court did not reach CDIA's alternative argument that the Economic Abuse Debt Reporting Act is separately preempted by Section 1681t(b)(5)(C). PageID 369.

The First Circuit vacated this Court's order. *Consumer Data Indus. Ass'n v. Frey*, 26 F.4th 1 (1st Cir. 2022), *cert. denied*, 215 L. Ed. 2d 47, 143 S. Ct. 777 (2023). The First Circuit concluded that Section 1681t(b)(1)(E) does not preempt all state laws regulating the content of consumer reports, but instead only those that relate to subject matter regulated under Section 1681c. *Id*., at 6-10. The First Circuit then examined the scope of Section 1681c. The court noted that subject to three exceptions set forth in Section 1681c(b), Section 1681c(a)(1)-(5) regulates the reporting of various types of adverse information, such as bankruptcies, civil judgments, and accounts placed for collection, with a "catch-all" provision prohibiting the reporting of "[a]ny other adverse item of information, other than records of convictions of crimes[,] which antedates the report by more than seven years." *Id*., at 10-11.[4] The court noted

[4]The court noted that there is a "scrivener's error" in this provision – there should be a comma after "convictions of crimes." *Id*., at 10 n.5; *see also Moran v. Screening Pros*, LLC, 943 F.3d 1175, 1183 n.6 (9th Cir. 2019).

that 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 by the immediately preceding provisions," but that "[m]easuring the reach of preemption," the provision "points to age." *Id*., at 11. The court concluded that the Debt Reporting Acts "are not preempted in their entirety by Sections 1681c(a)(5) and 1681c(b)." *Id*., at 14. Because CDIA had "not developed any argument as to whether and how the [Debt Provisions] might trench on this more circumscribed 'subject matter' -- i.e., the 'items of information' listed in Section 1681c(a)," the First Circuit remanded the issue to this Court. *Id*.

The First Circuit then considered – and rejected – CDIA's argument that because Sections 1681c(a)(7) and (8) regulate the reporting of veterans' medical debt, the provisions constitute the regulation of medical debt generally. The court "conclude[d] that Sections 1681c(a)(7) and 1681c(a)(8) only regulate the reporting of veterans' medical debt, not medical debt in general." *Id*., at 12. So, it was "clear" to the court that "Sections 1681c(a)(7) and 1681c(a)(8) have no preemptive effect for non-veterans' medical debt." *Id*. (emphasis added); *see also id*., at 14 ("Sections 1681c(a)(7) and 1681c(a)(8) do not preempt the Medical Debt Reporting Act insofar as it regulates non-veterans' medical debt."). The court found that "the scope of their partial preemptive effect on the Medical Debt Reporting Act as it applies to veterans' medical debt is less obvious." *Id*., at 12. But because the parties had not briefed that partial preemption issue, the First Circuit remanded it to this Court. Finally, because this Court had not addressed CDIA's argument that the Economic Abuse Debt Reporting Act is preempted by Section 1681t(b)(5)(c), the First Circuit remanded that issue as well. *Id*., at 13-14.

On remand, this Court identified the following as the remaining issues to be resolved:

(1) Whether and to what extent the Medical Debt Reporting Act or the Economic Abuse Debt Reporting Act is partially preempted by Section 1681t(b)(1)(E); *see Consumer*

Data Indus. Ass'n v. Frey, 26 F.4th 1, 14 (1st Cir. 2022).

(2) Whether and to what extent Sections 1681c(a)(7) and 1681c(a)(8) have a "partial preemptive effect on the Maine Medical Debt Reporting Act as it applies to veterans' medical debt"; *id*. at 12-13.

(3) Whether Maine's Economic Abuse Debt Reporting Act is preempted by Section 1681t(b)(5)(C), which blocks the reporting of information resulting from identity theft; *see id.* at 14.

ECF 62.

ARGUMENT

I. 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). "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).

> 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). The Supreme Court has been clear that express preemption provisions must be narrowly construed. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 518 (1992) (express preemption provisions must be construed "in light of the presumption against the pre-emption of state police

power regulations" and "[t]his presumption reinforces the appropriateness of a narrow reading of [the express preemption provision at issue]").[5]

II. The Debt Reporting Acts Are Not Partially Preempted by Section 1681t(b)(1)(E).

The First Circuit held that Section 1681t(b)(1)(E) "narrowly preempts" only those state laws relating to "specific subject matters" regulated by Section 1681c. *Consumer Data Industry Assoc.*, 26 F.4th at 14. The court identified two relevant provisions of Section 1681c – Section 1681c(a)(5) and Section 1681c(b). The Court referred to Section 1681c(a)(5) as a "catch-all" provision. *Id*., at 11. The preceding provisions – Sections 1681c(a)(1)-(4) – impose time limits on the reporting of certain information. Consumer reports may not contain bankruptcy cases older than ten years or certain other information (such as civil judgments, records of arrest, paid tax liens, and accounts placed for collection) older than seven years. 15 U.S.C. § 1681c(a)(1)-(4). The "catch-all" provision prohibits consumer reports from containing "[a]ny 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)(5). The other provision referenced by the First Circuit – Section 1681c(b) – provides exemptions allowing consumer reports used for certain purposes (such as for credit transactions exceeding $150,000 or employment of an individual at a salary exceeding $75,00) to contain information that otherwise must be excluded.

The First Circuit concluded that the "catch-all language [of Section 1681c(a)(5)] is broad enough to cover medical debt and debt resulting from domestic abuse, which consist of adverse items of information not covered by the immediately preceding provisions." *Consumer Data*

[5] In *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016), the Supreme Court said that it was not invoking the presumption against pre-emption but was instead focusing only on the "plain wording" of the express preemption provision. The *Puerto Rico* Court's statement must be read in the context of the facts of that case, where there could be no doubt about the meaning of the provision. *Id*. There is nothing suggesting that the Court intended to silently overrule *Medtronic* and *Cipollone*.

Industry Assoc., 26 F.4th at 11. But this is not necessarily so. As used in this provision, the Federal Trade Commission ("FTC") has interpreted "adverse" as meaning "unfavorable" or "opposed to one's interests," so to be covered by the catch-all, "information must cast the consumer in a negative light or unfavorable light." *Advisory Opinion to Seham*, 1998 WL 34323743 (Apr. 17, 1998); *see also Jenkins v. CARCO Grp., Inc*., 339 F. Supp. 3d 1223, 1229-30 (D. Kan. 2018) (finding that *Seham* and two other FTC advisory opinions interpreting "adverse item of information" were persuasive authority);[6] FTC Staff Report, *40 Years of Experience With the Fair Credit Reporting Act* (July 2011), at 55 ("The seven-year reporting period applies only to 'adverse' information that casts the consumer in a negative or unfavorable light.").[7] The mere fact that a person has a debt is not "adverse" information. If it were otherwise, a consumer reporting agency could not, for example, disclose on a report that a consumer has a 30-year mortgage. So, to the extent that the Debt Reporting Acts apply to the reporting of debts that are not delinquent or in collection, they do not relate to the subject matter of Section 1681c(a)(5).

More importantly, though, and as the First Circuit recognized, in "[m]easuring the reach of preemption, Section 1681c(a)(5) points to age." *Consumer Data Industry Assoc.*, 26 F.4th at 11.[8] The Consumer Financial Protection Bureau (the "Bureau"), the agency to which Congress granted general rulemaking authority over FCRA, 15 U.S.C. § 1681s(e)(1), has found that "although how long the specific types of information listed in section 1681c may continue to appear on a consumer report is a subject matter regulated under section 1681c, what or when

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[6] The other advisory opinions were *Advisory Opinion to Nadell*, 1998 WL 34323718 (June 9, 1998) and *Advisory Opinion to Rosen*, 1998 WL 34323763, at *3 (June 9, 1998).

[7] The Report is available at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

[8] The Court cited to a scholarly article stating that Section 1681c "is less about the substantive character of the information and much more about its age." Elizabeth D. De Armond, *Preventing Preemption: Finding Space for States to Regulate Consumers' Credit Reports*, 2016 B.Y.U. L. Rev. 365, 408 (2016), *cited by Consumer Data Industry Assoc.*, 26 F.4th at 11 n.7.

items generally may be initially included on a consumer report is not a subject matter regulated under section 1681c." The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 FR 41,042, 41,044 (July 11, 2022).[9] With respect to Section 1681c(a)(5) in particular, the Bureau found that it regulates how long adverse items information may appear on consumer reports, "but not whether or when adverse items may initially appear on a consumer report." *Id*. The Bureau concluded that because most of Section 1681c's provisions "relate only to how long information may appear," it "does not provide any general restrictions on the content of a consumer report," and "State laws relating to what or when items generally may be initially included on a consumer report—or what or when certain types of information may initially be included on a consumer report—would generally not be preempted by section 1681t(b)(1)(E)." *Id*. CDIA thus misses the point when it argues that the relevant question is not how FCRA regulates the subject matter, but whether it regulates it. Pltf. Br., at 14. As the Bureau correctly recognized, the subject matter regulated by 15 U.S.C. § 1681c(a)(5), as well as subsections (1)-(4), is stale adverse information. This is different than the subject matters regulated by the Debt Reporting Acts – debt resulting from medical expenses and debt resulting from economic abuse.

The Bureau went on to consider whether a state could prohibit CRAs from including medical debt in consumer reports for a period of time after the debt was incurred, and it concluded that "such a law would generally not be preempted." *Id*., at 41,045. The Bureau noted that "although medical debt information may be 'adverse information,'" Section

[9] This interpretive rule was not subject to notice-and-comment rulemaking. *Id*., at 41,046. That does not mean, though, as CDIA claims, that it "should not be accorded any deference." Pltf. Br., at 14 n.12. Interpretive rules are not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but they are still entitled "some deference;" namely, they are "entitled to respect" to the extent they have the "power to persuade." *Christensen v. Harris Cnty*., 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)); *see also Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 76 (1st Cir. 2006).

1681c(a)(5) "regulates only the subject of how long such information may appear on a consumer report, not the content of the information or when such information may initially appear." *Id*. The Bureau concluded the same for state laws prohibiting CRAs from including eviction information on a consumer report – even if that is "adverse information," Section 1681c(a)(5) regulates "how long such information may appear on a consumer report, not the content of the information." *Id*.

The Debt Reporting Acts are not preempted because they regulate the extent to which certain information may initially appear, not how long information may be included on a consumer report. The Medical Debt Reporting Act prohibits the reporting of debt from medical expenses unless the first delinquency occurred at least 180 days previously. 10 M.R.S. § 1310-H(4). Medical debt that was paid in full may not be reported. *Id*. And medical debt on which the consumer is making agreed-upon periodic payments must be reported in the same manner as a consumer credit transaction. *Id*. The Economic Abuse Debt Reporting Act prohibits the reporting of debt determined to be the result of economic abuse. *Id*. The Acts do not regulate how long adverse information may remain on a consumer report and thus do not overlap with the subject matter of Section 1681c(a)(5).

To the extent CDIA argues that the Medical Debt Reporting Act intrudes on the subject matter covered by Section 1681c(a)(6), it is plainly wrong. That provision does not address debt at all. Subject to two exceptions, Section 1681c(a)(6) simply prohibits consumer reporting agencies from disclosing the name, address and telephone number of entities furnishing medical information. It does not address the extent to which medical debt can be disclosed. CDIA points out that FCRA defines "medical information" as including "the payment for the provision of health care to an individual." Pltf. Br., at 15 (citing 15 U.S.C. § 1681a(i)). CDIA fails to explain

how this is relevant, though, given that while Section 1681c(a)(6) does restrict the reporting of the name, address, and telephone number of furnishers of medical information, Section 1681c does not address the reporting of medical information.

III. The Medical Debt Reporting Act Is Not Partially Preempted by Sections 1681c(a)(7) and 1681c(a)(8).

The First Circuit expressly stated that it was "clear . . . that Sections 1681c(a)(7) and 1681c(a)(8) have no preemptive effect for non-veterans' medical debt." *Id*., at 12 (emphasis added). The only issue is the extent to which these provisions preempt the Medical Debt Reporting Act as applied to veterans' medical debt. The First Circuit left it to the parties to develop arguments on that issue on remand. *Id*. But CDIA has not developed any real argument regarding the partial preemptive effect of Sections 1681c(a)(7) and 1681c(a)(8), and the issue should be deemed waived. *See Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, Loc. Lodge No. 1821 v. Verso Paper Corp.*, 80 F. Supp. 3d 247, 279 (D. Me. 2015); *LaFlamme v. Colvin*, No. 1:14–cv–57–DBH, 2015 WL 519422, at *7 (D. Me. Feb. 6, 2015); *see also United States v. Flores-Rivera*, 787 F.3d 1, 29-30 (1st Cir. 2015).

If the Court does reach the issue, Sections 1681c(a)(7) and 1681c(a)(8) do not preempt application of the Medical Debt Reporting Act to veterans. As the First Circuit recognized, the subject matter of Sections 1681c(a)(7) and (8) is the reporting of veterans' medical debt, while the subject of the Medical Debt Reporting Act is all medical debt. The regulated subjects are thus different. The fact that there might sometimes be overlap between matters covered by the Medical Debt Reporting Act and those covered by Sections 1681c(a)(7) and 1681c(a)(8) is not dispositive. For example, as discussed below, economic abuse might sometimes also constitute identity theft, but this does not mean that a statute addressing debt arising from economic abuse relates to the same subject matter as one addressing debt arising from identity theft.

The subject matters are different for other reasons. Both Sections 1681c(a)(7) and 1681c(a)(8) apply only to nationwide CRAs – *i.e.*, those that compile and maintain information about consumers on a nationwide basis. 15 U.S.C. § 1681c(a)(7), (8); 15 U.S.C. § 1681a(p). The covered subject, then, is the reporting of veterans' medical debt by nationwide CRAs. The Medical Debt Reporting Act, on the other hand, regulates all CRAs. Moreover, Section 1681c(a)(7) prohibits nationwide CRAs from reporting information relating to a veteran's medical debt if the medical services were provided less than a year before and the agency has actual knowledge that the information relates to a veteran's medical debt. 15 U.S.C. § 1681c(a)(7). Section 1681c(a)(8) prohibits nationwide CRAs from reporting information about "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." 15 U.S.C. § 1681c(a)(8). The Medical Debt Reporting Act has similar provisions, but also an additional one – when a consumer is making regular agreed-upon payments toward a debt resulting from medical expenses, CRAs must report it in the same manner as a debt related to a consumer credit transaction. 10 M.R.S. § 1310-H(4)(C). This is a subject area not addressed by 15 U.S.C. § 1681c(a)(7) and (8).

In sum, the Medical Debt Reporting Act does not impose requirements or prohibitions with respect to subject matter regulated by Section 1681c, and it is not preempted with respect to its application to medical debt of veterans or non-veterans.

IV. The Economic Abuse Debt Reporting Act is Not Preempted by Section 1681t(b)(5)(C).

Section 1681t(b)(5)(C) prohibits states from imposing requirements or prohibitions "with respect to the conduct required by the specific provisions of . . . section 1681c-2 of this title." 15

U.S.C. § 1681t(b)(5)(C). CDIA claims that the Economic Abuse Debt Reporting Act is preempted by Section 1681t(b)(5)(C) because Section 1681c-2 dictates the actions CRAs must take in response to a claim of identity theft, and "most often" a claim of economic abuse would also be a claim of identity theft. Pltf. Br., at 23.[10] CDIA is wrong for two reasons: economic abuse is not the same as identity theft, and, in any event, the "conduct required" by Section 1681c-2 is different than the conduct required by Section 1681c-2. *See* 87 FR 41,043 ("[S]ection 1681t(b)(5) does not preempt State laws unless they concern conduct required by the enumerated portions of the FCRA.").

Section 1681c-2 requires credit reporting agencies to block information regarding transactions that a consumer identifies as resulting from an alleged identity theft upon receipt of

> (1) appropriate proof of the identity of the consumer;
> (2) a copy of an identity theft report;
> (3) the identification of such information by the consumer; and
> (4) a statement by the consumer that the information is not information relating to any transaction by the consumer.

15 U.S.C. § 1681c-2(a). The credit reporting agency must promptly notify the furnisher of the information of the alleged identity theft and that a block has been requested. 15 U.S.C. § 1681c-2(b). If the agency makes certain determinations, it may decline or rescind a block. 15 U.S.C. § 1681c-2(c). "Identify theft" is defined as "a fraud committed using the identifying information of another person. . . ." 15 U.S.C. § 1681a(q)(3); *see also* 12 C.F.R. § 1022.3(h) ("Identity theft means a fraud committed or attempted using the identifying information of another person without authority.").

[10] In the First Circuit, CDIA argued that the Economic Abuse Debt Reporting Act is preempted only "to the extent that [it] attempts to govern the CRA's response to a report of identity theft." Appellee Brief in Appeal No. 20-2064, at 28.

The Economic Abuse Debt Reporting Act applies not to identity theft, but to economic abuse, which 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

19-A M.R.S. § 4102(5). While there could be instances where conduct that constitutes economic abuse also constitutes identity theft, the overlap between the two is minimal. First, there is all manner of conduct that would be considered economic abuse that would not be identity theft. It is impossible to see how coercing a person into using credit or property, withholding access to money or credit cards, preventing a person from attending school or going to work, or withholding food, clothing, medications, or shelter could be considered identity theft.[11] Theft or fraud might constitute identity theft depending on how they are perpetrated, but it is also easy to imagine many scenarios where that would not be the case.

Moreover, conduct constitutes economic abuse only when it is committed for the purpose of "causing or attempting to cause an individual to be financially dependent." 19-A M.R.S. § 4102(5). There is no motive element when it comes to the definition of identity theft. So, for example, identity theft committed solely for the purpose of financial gain would not be considered economic abuse. In short, economic abuse is not the same as identity theft – it covers

[11] Oddly, CDIA claims that things like withholding access to money and credit cards and coercing the use of credit or property "would likely meet the definition of 'identity theft.'" Pltf. Br., at 23. It does not explain how, for example, forcing a person to take out a loan or denying them access to a bank account would constitute identity theft. It also suggests that CDIA has not reviewed the testimony of survivors of economic abuse and their advocates, who detailed many instances of economic abuse that would not be considered identity theft. *See* ECF 13-4, PageID 52-112

a broad range of conduct that would not be considered identity theft and excludes a broad range of other conduct that would be considered identity theft.[12]

In any event, Section 1681t(b)(5)(C) preempts only those state laws which impose requirements or prohibitions "with respect to the conduct required by the specific provisions of . . . section 1681c-2." 15 U.S.C. § 1681t(b)(5)(C) (emphasis added). The conduct required by the Economic Abuse Debt Reporting Law is not the same as the conduct required by 15 U.S.C. § 1681c-2. The former requires a CRA, after being provided with specified documentation by a consumer that a debt is the result of economic abuse, to reinvestigate the debt and remove any reference to debt it determines to be the result of economic abuse. 10 M.R.S. § 1310-H(2-A). The latter, on the other hand, requires a CRA, after being provided with specified documentation by a consumer that certain information was the result of alleged identity theft, to block that information and notify the furnisher. 15 U.S.C. § 1681c-2(a), (b). The agency is not required to conduct any investigation, but it can remove the block if it determines that the information was blocked in error, that the consumer made a material misrepresentation, or that the consumer obtained the goods, services or money as a result of the blocked transaction. 15 U.S.C. § 1681c-2(c)(1). So even in cases where economic abuse is also identity theft, the Economic Abuse Debt Reporting Law is not preempted because the conduct it requires is different than the conduct required by the "specific provisions" of Section 1681c-2.

CDIA suggests that the Economic Abuse Debt Reporting Act is invalid because CRAs "do not have a legal obligation to adjudicate the enforceability of a debt as part of its FCRA

[12] Even if identity theft might sometimes also constitute economic abuse, this is a facial challenge. So, the fact that some circumstances might exist where application of the Economic Abuse Debt Reporting Act would be preempted is not sufficient to find the entire Act preempted. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.").

dispute processes." Pltf. Br., at 20. Even if that is so under FCRA, that does not mean that states may not impose such an obligation under their own laws. More fundamentally, though, the Economic Abuse Debt Reporting Act does not require CRAs to adjudicate the validity of debts. Upon receipt of requisite documentation and depending on the outcome of an investigation, it simply requires CRAs to remove from consumer reports references to debts resulting from economic abuse. This has nothing to do with whether the debts are valid.

CDIA also claims that the procedure for getting Economic Abuse Debt removed from a credit report "raise[] real issues of due process." Pltf. Br., at 19. This is so, says CDIA, because "[t]here 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." *Id*. Nothing in the Economic Abuse Debt Reporting Act precludes CRAs, as part of their investigation, from giving these individuals an opportunity to respond. Moreover, CDIA does not seem to be claiming its own due process rights are being interfered with, only those of third parties whose interests CDIA has no standing to assert. Finally, CDIA did not allege a due process claim in its complaint, and even now it does not develop any real argument.

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, in whole or in part.

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 5th day of June, 2023, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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