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 REPLY IN SUPPORT OF ITS SECOND MOTION FOR JUDGMENT ON THE RECORD

COMES NOW, Plaintiff Consumer Data Industry Association ("CDIA") pursuant to this Court's Procedural Order dated March 29, 2023, and in accordance with District of Maine Local Rule 56, submits its Reply in Support of Its Second Motion for Judgment on the Record on the issues remanded to this Court.

The fundamental question before this Court is: "what is it that each of the three statutes at issue regulates?" Whether in reference to the subject matter of FCRA section 1681c(a), the conduct required by section 1681c-2, or that of each of the Maine Laws, the fundamental question is the same. CDIA's reading of the relevant subject matters aligns with each law's statutory structure and with the context of the law as a whole. Defendants, on the other hand, interpret the provisions parsimoniously, and in a vacuum. In short, even reading these provisions through a more narrow, but fair, view of preemption than CDIA argued previously, the laws are preempted, either in full or in part.

ARGUMENT

Congress clearly intended to displace state law with regard to various subject matters and required conduct, and expressly preempted state laws that attempted to regulate the same. Where

an express statutory preemption provision exists, the presumption against preemption carries no weight. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Turning to the statutory text, section 1681c(a) of the FCRA regulates the reporting of adverse information on consumers, including medical debt, which is regulated with more specificity, and as such, the Maine Medical Debt Act is preempted. The FCRA further dictates the response owed to consumers by a CRA when a consumer discovers debts resulting from identity theft, which is one type of conduct the Economic Abuse Act is designed to remedy. The Maine Laws are preempted, in whole or in part, where they regulate the same information or conduct.

I. There Is No Presumption Against Preemption when the Preemption Provision Is Express.

Defendants raise the implied preemption doctrine of the "presumption against preemption," which the Supreme Court has indicated does not apply in express preemption cases. Even in the Supreme Court case cited to by Defendants, *Cipollone*, the Court explained, "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, ... we need only identify the domain expressly pre-empted by [that provision]." 505 U.S. at 517. In other words, "Once there is an express pre-emption provision … all doctrines of implied pre-emption are eliminated." *Id.* at 547 (Scalia, J., dissenting).[1] Thus, here, this Court need not construe the Maine Laws through a tinted lens, but should instead focus on the plain wording of the statutes before it.

[1] The Supreme Court has since reiterated that view, stating in *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115 (2016) that when a statute "'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Id.* at 125 (quoting *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)).

II. The Subject Matters Regulated by the Maine Laws Are Subsumed Within FCRA Section 1681c(a) And Are Therefore Preempted by Section 1681t(b)(E).

CDIA and Defendants agree on only one "subject matter" of the various laws – and that is that the Maine Medical Debt Act regulates the reporting of all medical debt on Maine consumers. That consensus, however, does not answer the question before this Court because Defendants argue for an interpretation of the FCRA that no court of law has ever adopted before, and which ignores the comprehensive framework of the FCRA's express text of section 1681c. Per the plain wording of section 1681c(a) the "subject matter" regulated thereby is the reporting of adverse items of information about consumers. 15 U.S.C. § 1681c(a).[2] Defendants argue that the subject matter of subsection 1681c(a)(1)-(5) is "stale adverse information." However, that reading is belied by the plain wording of the text itself, as section 1681c(a) regulates the reporting of information that never goes stale, and may always be reported. *See* 15 U.S.C. § 1681(a)(5).

CDIA's reading is based in the express statutory text – all forms of adverse information on consumers are regulated by subpart 1681c(a), either by virtue of falling within a specific category that is named, or because it falls within the catch-all of section 1681c(a)(5) – "all other adverse items of information" on consumers. While most types of adverse information are reportable for 7 or 10 years, criminal conviction information may always be reported – it never goes "stale." 1681c(a)(5). Thus, the subject matter of section 1681c(a) cannot be just "stale" information as argued by Defendants, because that is flatly wrong. Section 1681c(a) does not prohibit the reporting of positive information, no matter the age. Thus, the subject matter of section 1681c,

[2] Alternatively, the "subject matter" would at least be the specific kinds of information section 1681c(a) names: bankruptcy information, civil suits, judgments, tax liens, accounts placed for collection, accounts charged to profit and loss, *medical account information*, criminal records related to cases not resulting in conviction, criminal records related to cases that resulted in conviction, and *any other item of adverse information*. 15 U.S.C. § 1681(a)(1)-(5).

given the law of this case, has to be the regulation of adverse information on consumers, either generally, or at least the regulation of these types of adverse information.

As to each of the Maine Laws, the parties agree that the Maine Medical Debt Act regulates the reporting of all medical debt information on Maine consumers (Def.'s Opp'n Br. at 13); however, the agreement ends there. CDIA cites the express language of the applicable FCRA provisions, which regulate the reporting of all medical information (which includes medical debt) generally, while Defendants argue that somehow the smaller subset of medical debt is absent from regulation because the Maine law regulates the information in a different way. In the context of the preemption framework of 1681t(b), "subject matter" is a noun – it is the "thing" being regulated by each of the subsections listed below. The fact that the Maine Medical Debt Act regulates the same "thing" but does it in a different way, does not change the fact that it is the same "subject matter."[3] Thus, all medical information, including medical debt information is regulated by the FCRA section 1681c(a), and the Maine Medical Debt Act is preempted.

The Economic Abuse Act is also preempted to the extent that it regulates the same kinds of adverse information on consumers as section 1681c(a) – including the reporting of any civil suits, judgments, adverse payment history information or other adverse information. Given the statutory definition of economic abuse cited in Maine's law, it is clear that the entire point of the Economic Abuse Act's reporting provisions is to relieve the victim of the negative consequences of debt, and the late payments associated with debt incurred as a result of economic abuse. Me. Rev. Stat. tit. 19-A, § 4102(5).[4]

[3] Further, as noted in the opening brief, the FCRA does regulate the manner in which medical information may be reported- by prohibiting information in reports that would reveal the medical care provided, and by limiting the timing when medical information may first be reported in the case of U.S. veterans.

[4] Admittedly, this means that a CRA may have to accept a request to delete positive payment information resulting from economic abuse if the abuse did not mean the definition of "identity theft" under the FCRA. Respectfully, this result underscores why the subject matter of section 1681c(a) has to be the regulation of all information contained in a consumer report, although CDIA acknowledges that is not the law of this case.

Defendants argue that CDIA waived its argument with regard to the preemptive effect of subsections 1681c(a)(7) and (8); however, CDIA did not waive that any argument.[5] While not set out in a separate section, CDIA argued that the overall structure of section 1681c(a) regulates all adverse information, including medical information and medical debt, and explained the relationship between subsections 1681c(a)(5), (7), and (8), as well as how certain other adverse and medical information may be reported, including when it may first be reported in section1681c(c). *See* Pl.'s 2d Mot. for J. on the Record, ECF 65, at 7-11. Using this approach, Congress regulated the reporting of medical debt for all consumers, while giving special, additional protections to veterans with regard to how their medical debt may be reported by the nationwide consumer reporting agencies ("NCRAs"), which collectively aggregate the majority of furnished account information. The "subject matter" is still adverse information, specifically medical information. Subsections 1681c(a)(7) and (8) regulate whose medical debt gets additional protections with respect to the NCRAs, and what those additional protections are – more of the 'how' the information is regulated. However, given the claim of waiver, CDIA states affirmatively that section 1681c(a) does not, itself, preempt any law – it is section 1681t(b)(1) that preempts state law with respect to each "subject matter" listed within that subsection. Subpart (E) of 1681t(b)(1) refers one to section 1681c generally, and therefore, any subject matter addressed within any portion of section 1681c is preempted. That includes medical debt and other items of adverse information, including medical debt. All medical debt information about Maine consumers is regulated by both the FCRA and the Maine Medical Debt Act. As such, the law is preempted.

[5] Even if CDIA's opening brief did not call it out with desired specificity, Defendants have not been prejudiced as they have had a chance to fully brief the issue for this Court.

III. The Economic Abuse Debt Reporting Act Is Preempted by FCRA Section 1681t(b)(5)(C).[6]

In their opposition brief, Defendants try to definitionally differentiate "identity theft" and "economic abuse" – presumably because they recognize that the terms embrace the same conduct and thus federal preemption must win the day. Section 1681t(b)(5)(C) of the FCRA makes clear that "[n]o requirement or prohibition" may be imposed under any state law concerning "conduct" that CRAs are required to undertake in response to claims of identity theft. 15 U.S.C. § 1681t(b)(5)(C). And, indeed, Maine's Economic Abuse Debt Reporting Act imposes conduct requirements on CRAs when responding to "economic abuse" claims, which Defendants even grant (if halfheartedly) sometimes constitute "identity theft" claims.

Defendants' claim is, seemingly, that "economic abuse," as defined by Maine's law, and "identity theft," as defined by the FCRA, are not the same, and thus Maine's law does not run afoul of the FCRA preemption provision. As Defendants note (Opp'n Br. at 15), the FCRA defines the term "identity theft" to mean "a fraud committed using the identifying information of another person, subject to such further definition as the Bureau may prescribe, by regulation." 15 U.S.C. § 1681a. Relatedly, the FTC's Identity Theft Rules (which adopts the Bureau's Regulation Z's definition) defines "identity theft" as "a fraud committed or attempted using the identifying information of another person without authority." 16 C.F.R. § 681.1(b)(8); 12 C.F.R. § 1022.3(h). Maine's Economic Abuse Debt Reporting Act defines "economic abuse" to mean "causing or attempting to cause an individual to be financially dependent by maintaining control over the individual's financial resources, including, … *unauthorized or coerced use of credit or property*

[6] CDIA challenges the Economic Abuse Act only to the extent that the law requires a CRA to change the information it reports. All other forms of abuse, and all remedies available to the victim, would be unchanged. Victims may still pursue a state law action for relief, including an order that the abuser pay the victim for any losses, or other forms of relief.

… *or defrauding an individual of money or assets*." Me. Rev. Stat. tit. 19-A, § 4102(5) (emphasis added). It is true, the verbiage of the definitions is different, but as Defendant goes on to concede, conduct that "constitutes economic abuse" will also in some instances "constitute[] identity theft." Opp'n Br. at 16; *see also id.* at 13.

And so, Defendants are left with the curious argument that "economic abuse is not the same as identity theft" but that sometimes "economic abuse also constitutes identity theft." Opp'n Br. at 15-16. This dissonant assertion is the result of the inescapable reality that the Economic Abuse Debt Reporting Act's definition of "economic abuse," which sweeps in an array of wrongful conduct in addition to "identity theft," in the end, regulates identity theft, the same subject matter as Section 1681c-2 of the FCRA. A state cannot regulate a federally occupied field by simply crafting a broad law that encircles the field.

Presumably appreciating that fact, Defendants grasp for a different definitional straw, suggesting that Maine's Economic Abuse Debt Reporting Act's definition of "economic abuse" includes a "motive element" which the FCRA's definition of "identity theft" lacks. Opp'n Br. at 16. According to the Defendants, to qualify as "economic abuse," the conduct must be "for the purpose of 'causing or attempting to cause an individual to be financially dependent.'" *Id.* The Debt Reporting Act's definition does not use the phrase "for the purpose of," or any variation thereof, nor does the Act imply that a victim of economic abuse must show that the objective or intention motivating the abuse was to cause the victim to be financially dependent; it only indicates that financial dependency be the likely outcome. In this context, to require a victim of economic abuse to establish the perpetrator's state of mind would seem unreasonable, if not impossible in most cases – and certainly, would not be appropriate discernment for a CRA to undertake.

Defendant tries yet another angle, asserting that, even if economic abuse is also identity theft, the "conduct" required by the Economic Abuse Debt Reporting Act is different from that required by the FCRA. Opp'n Br. at 17. But therein lies the problem: The Maine Act purports to impose conduct requirements on CRAs in responding to claims of economic abuse, including identity theft claims, that go above and beyond what the FCRA requires. As Defendants explain, the Economic Abuse Debt Reporting Act requires CRAs to conduct an investigation in response to consumer claims of economic abuse, which the Defendants grant "might sometimes also constitute identity theft" claims, and then remove any reference to debt if the investigation substantiates the consumer's claim. Opp'n Br. at 13, 16-17. The FCRA does not require an investigation in response to identity theft claims, as the Maine Act does; it only requires that the CRA block the information and notify the furnisher of the identity theft claim. By imposing on CRAs the additional requirement of investigating identity theft claims, the Economic Abuse Debt Reporting Act flies directly in the face of Section 1681t(b)(5)(C)'s mandate that no state conduct requirement interfere with CRAs' identity theft duties under the FCRA. 15 U.S.C. § 1681t(b)(5)(C). Accordingly, the Economic Abuse Debt Reporting Act is preempted.

CONCLUSION

For the foregoing reasons, the Consumer Data Industry Association respectfully requests that this Court find that the Medical Bill Act is preempted to the extent it regulates how medical debt on Maine consumers may be reported by a CRA in a consumer report. Further, the Economic Abuse Act should be held preempted to the extent it regulates the conduct of a CRA in response to a claim of economic abuse by a consumer, or with respect to information the consumer alleges was the result of economic abuse. CDIA prays that this Court enter judgment in its favor accordingly.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2023, the foregoing Reply in Support of Plaintiff's Second Motion for Judgment on the Record was filed electronically via the Court's CM/ECF system which will send notification to all counsel of record.

/s/ Ryan P. Dumais
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