

## Federal Court Holds that FCRA Preempts State Credit Reporting Restrictions

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Earlier this fall, a federal court granted a trade association's motion for a declaratory judgment against the Maine attorney general and the superintendent of Maine's Bureau of Consumer Credit Protection. The litigation concerned amendments the Maine legislature enacted to the Maine Fair Credit Reporting Act. *Consumer Data Indus. Ass'n v. Frey*, 2020 U.S. Dist. LEXIS 187061 (D. Me. 2020).

As readers of CPW already know, consumer credit reports matter as they can determine whether, and on what terms, a person may obtain a mortgage, a student loan, a credit card, or other financing. The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., was enacted by Congress in 1970 to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (citing 15 U.S.C. § 1681). To accomplish this objective, the FCRA regulates the creation and the use of consumer reports by consumer reporting agencies for certain specified purposes (such as credit transactions, insurance, licensing, consumer-initiated business transactions, and employment).

In 2013, the current version of the Maine Fair Credit Reporting Act was enacted for the purpose of **supplementing** the FCRA. The Maine law required "consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner that is fair and equitable to the consumer, with regard for confidentiality, accuracy, relevancy and proper use of this information . . . ." 10 M.R.S.A. § 1307. The trade association in *Frey*, whose members include consumer credit reporting agencies ("CRAs"), commenced litigation in 2019 challenging two amendments to the Maine Fair Credit Reporting Act as preempted by the FCRA.

- The first amendment, titled "An Act Regarding Credit Ratings Related to Overdue Medical Expenses," placed restrictions on when a medical debt could be included in a consumer report. For instance, a CRA was precluding from reporting debt from medical expenses on a consumer's consumer report when the date of the first delinquency of the debt was less than 180 days prior to the date that the debt was reported.
- The second amendment, titled "An Act to Provide Relief to Survivors of Economic Abuse," provided that under certain circumstances if a debt was the product of "economic abuse," a

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CRA was required to remove references to the debt from the consumer's report.

In resolving the challenges raised to these two amendments, the court in *Frey* was primarily concerned with how broadly preemption language in the FCRA should be construed. The provision at issue provided that:

(b) General exceptions. ***No requirement or prohibition may be imposed under the laws of any State—***

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

(E) ***[15 U.S.C. § 1681c], relating to information contained in consumer reports***, except that this subparagraph shall not apply to any State law in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996 . . .

15 U.S.C. § 1681t(b)(1)(E) (emphasis added). The trade association took the position that this language should be read to encompass all claims relating to information contained in consumer reports (with the phrase “relating to information contained in consumer reports” acting as a description of the subject matter § 1681c regulates). Defendants, by contrast, argued for a more narrow interpretation.

The court sided with the trade association. According to the court, this amendment (and others) reflected an affirmative choice by Congress to set “uniform federal standards” regarding the information contained in consumer credit reports. As such, by seeking to exclude additional types of information, the court held that the Maine Amendments intrude upon a subject matter that Congress had sought to expressly preempt from state regulation. The Maine amendments were preempted by the FCRA.

Some of the COVID-19 relief measures that have been adopted at the federal level included changes to the FCRA under the CARES Act. As the second wave of infections continues to have a lasting impact on consumers, it is conceivable that states will be pressed to take measures into their own hands—which may include additional state legislation in the credit reporting arena (with FCRA preemption a potential area of future litigation). Stay tuned.

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