FCRA Preemption of State Law

A GUIDE THROUGH MUDDY WATERS

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I. Introduction

This article discusses various issues with Fair Credit Reporting Act [FCRA] preemption, highlighting the most unsettled preemption issues under the statute. A review of these issues reveals a judicial need to more broadly construe and thoroughly enforce the FCRA's preemption provisions to provide for more certain outcomes by credit market participants, create more efficient interstate credit markets, and provide more credit opportunities for consumers.

It is vital that we have a national credit reporting system. Creditors need to be able to make credit decisions quickly – and often at a distance – with confidence that those decisions are grounded in correct information about the consumer.

Recognizing this, Congress in 1970 enacted the Fair Credit Reporting Act.[1] It saw a need to ensure that the credit reporting agencies, which "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers . . . , exercise their grave responsibility with fairness, impartiality, and a respect for the consumer's right to privacy."[2] Although many states already possessed laws governing credit reporting, requiring the interstate entities that make up the credit reporting network to comply with fifty sets of laws was unworkable. Congress recognized a need to create "a uniform national standard," so "companies will not have to comply with a patchwork of State laws."[3]

Despite Congress's stated goal of providing clarity to the credit reporting world, the FCRA — through amendments and additions — has itself become a patchwork of at times inconsistent regulations. In its current form, it contains three principal provisions dictating when and how the

FCRA preempts state law. Section 1681t(a) is the general preemption provision, providing that the FCRA does not preempt state law except to the extent those laws are inconsistent with the FCRA.[4] The subsequent provision, section 1681t(b), lists more that twenty specific FCRA sections, declaring that no state may impose any requirement or prohibition with respect to duties arising under those sections.[5] Finally, section 1681h(e) provides that consumers may not bring certain tort claims against credit reporting agencies, furnishers of credit information, or users of that information.[6]

The state of the law interpreting these preemption provisions is confused, with some courts (relying on strained reasoning and disregarding the purpose behind the statute) giving them a far more narrow reading than others. Nationwide uniformity in interpretation is key to the functioning of the FCRA. Without it, reporting agencies and information furnishers have no clear guidance in administering the reporting system, and consumers have no clear guidance in seeking recourse against unlawful practices.

This article discusses each of the three principal FRCA preemption provisions, examining their function and the interplay between them. As is apparent from the statute and the case law, interpreting the FCRA's provisions fairly and properly results in a broad and comprehensive preemption scheme, which in turn leads to a more effective FCRA.

II. General preemption of "inconsistent" state law.

Since its enactment, the FCRA has included a general statement concerning its preemption of inconsistent state law. In its current form, that provision reads,

> [T]his title does not annul, alter, affect, or exempt any person subject to the provisions of this title 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 provisions of this title*, and then only to the extent of any inconsistency.[7]

What makes a state law "inconsistent" with the FCRA? Courts construe the term such that a state law is not inconsistent merely because it regulates a matter addressed by the FCRA.[8] Rather, FCRA section 1681t(a) preempts only those state laws "in direct conflict with federal law such that compliance with both is impossible, or the state law is an obstacle to the accomplishment of the full purposes and objectives of Congress."[9] This is in harmony with the Federal Trade Commission's interpretation of the section, which states that the "basic rule" is that "State law is preempted by the FCRA only when compliance with inconsistent State law would result in violation of the FCRA."[10]

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Applying these principles, the Eight Circuit in *Davenport v. Farmers Ins. Group* upheld a provision in the Minnesota Insurance Fair Information Reporting Act that insurers notify customers and secure written authorization before collecting and disclosing the customers' personal information.[11] Plaintiffs alleged that the defendant-insurer violated the provision by not securing their authorization before collecting and disclosing their personal information.[12] The insurer moved to dismiss, arguing that because the FCRA allows the collection and disclosure of such information and does not require any notice or authorization, the federal law preempted the MIFIRA.[13] The district court found that the FCRA did not preempt this state statute. The Eighth Circuit agreed, noting that while the insurance company

was correct that the FCRA does not expressly require insurance companies to notify consumers before collecting personal information, it also does not affirmatively prohibit them from doing so without first providing notice.[14] The state law thus was not "inconsistent with" the FCRA.[15]

Not all state laws containing more stringent requirements than the FCRA, however, are consistent with the federal scheme. In *Retail Credit Company v. Dade County*, the court held that the FCRA preempted a county ordinance requiring reporting agencies disclosing information to consumers to also disclose the source of that information.[16] The plaintiff reporting agency brought the action seeking a declaratory judgment that the ordinance was invalid. Compliance with the ordinance did not inherently require violation of the FCRA, as the FCRA provided only that the reporting agency "need not" disclose the source of the information.[17] A reporting agency would not be in violation of the FCRA for doing so. Nevertheless, the court held that the county ordinance was preempted after examining the FCRA's legislative history. Early drafts of the FCRA contained provisions requiring the disclosure of the source, but this detail was "deliberately omitted" from the final bill after Congress heard testimony that the disclosure of information sources could potentially result in the "drying up" of those sources.[18] The law thus was inconsistent with the FCRA even though it was not incompatible with the text of the FCRA.

III. Exceptions to the general preemption provision.

The FCRA underwent a substantial revision in 1996. The general provision that the FCRA does not preempt state laws except to the extent they are inconsistent with the FCRA remained, but Congress added a litany of exceptions to that general provision.[19] Now, whether they are otherwise inconsistent with the FCRA or not, "[n]o requirement or prohibition may be imposed under the laws of any state with respect to" issues related to various FCRA sections.[20]

Many of these exceptions are narrow and specific. For example, no state may impose any requirement or prohibition with respect to "the conduct required by" the FCRA's sections covering credit card number truncation, fraud alerts, consumer complaints coordination among agencies, or records disposal.[21] Similarly, states may not impose any requirement or prohibition with respect to the frequency of free annual credit disclosures.[22]

Others are written broadly, and as a result are more likely to be open to various interpretations. The nine exceptions under section 1681t(b)(1), for example, preempt all state requirements or prohibitions "with respect to any subject matter regulated under" various FCRA sections.[23] By preempting state laws concerning "the subject matter" of these sections, Congress expanded the FCRA's preemptive reach beyond the duties and procedures specifically enumerated therein. Subject matters covered by these provisions include the information contained in consumer reports, the prescreening of consumer reports, information available to identify theft victims, and the use of consumer information to make a solicitation for marketing purposes.[24] States may impose no requirement or prohibition concerning these subject matters, even if the law concerns an aspect of the subject matter that is not covered in the FCRA. Whether a state law implicates one of these "subject matters," however, may not always be clear. As is discussed in Section V.D below, courts and litigants have expended considerable energy since 1996 debating which state law claims implicate "the subject matter regulated under § 1681s-2, relating to the responsibilities of persons who furnish information to consumer reporting agencies."[25]

IV. Preemption of claims "in the nature of defamation, invasion of privacy, or negligence" against credit reporting agencies.

In what courts have described as a "quid pro quo for full disclosure," section 1681h(e) grants consumer reporting agencies qualified immunity from certain tort claims.[26] Under this provision,

> no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to sections 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report, except as to false information furnished with malice or willful intent to injure such consumer.[27]

The FCRA thus preempts state law causes of action "in the nature of" defamation, invasion of privacy, or negligence if two prerequisites are met: (1) the information was disclosed pursuant to sections 1681g, 1681h, or 1681m; and (2) the defendant did not act with malice or willful intent.[28]

A. *Impact of the requirement that the information be disclosed pursuant to sections 1681g, 1681h, or 1681m.*

Sections 1681g, 1681h, and 1681m all govern disclosures made *to* consumers. The former two require consumer reporting agencies to disclose consumer information to a consumer at his or her request, while the latter requires users of consumer reports taking adverse action against a consumer to disclose information to that consumer.[29] Because these sections do not regulate disclosures made to third parties, plaintiffs have argued that section 1681h(e) preempts only those claims arising from communications between the defendant and the consumer.

The better reading of section 1681h(e), however, is that it should not be read so narrowly. The preemption is plainly meant to encompass some actions for defamation, as defamation is one of the three causes of action specifically listed in the provision.[30] But a cause of action for defamation *necessarily* arises out of a disclosure to a third party.[31] Thus under the narrow reading,

"the provision would bar only those defamation claims that would fail as a matter of law."[32] The inclusion of defamation in section 1681h(e) would be superfluous and meaningless. To interpret the statute in such a way would violate the well-established principle of statutory construction that, "a statute ought, upon the whole, to be so constructed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[33] Accordingly, some courts have rejected the narrow reading entirely.[34]

Other courts have declined to hold that section 1681h(e) preempts state law claims when the disclosure is made to a third party, but effectively arrive at the same result by holding that a claim is preempted if the consumer receives a copy of the report *at any time*.[35] In *Thornton*, the plaintiff first became aware that her credit report contained the allegedly defamatory statement— that she had been "for the past four months living without benefit of matrimony with a male companion"—when her insurance agent called requesting information on the "companion."[36] Thornton requested a copy of the report, and then sued Equifax for defamation and libel.[37] The Eighth Circuit held that Thornton's receipt of her report brought her claims within the section 1681h(e)'s preemption, even though she requested the report only after being informed by a third party of the allegedly tortious statement.[38] Other courts have similarly found that "[t]he conditional privilege of section 1681h(e) applies even though the consumer first learns of the derogatory information from a third party, as long as the credit reporting agency later provides the information to the consumer pursuant to the FCRA."[39] A consumer complaining of information in a credit report is likely to at some point request and receive the report pursuant to the FCRA. Because of this, a defendant will rarely if ever be faced with a suit based solely on a disclosure made to third parties.

B. *The claim is preempted unless the defendant acted with malice or willful intent.*

Even if the consumer establishes that the information at issue was never disclosed pursuant to sections 1681g, 1681h, or 1681m, the state law claim is still preempted by the FCRA unless the defendant acted "with malice or willful intent to injure" to consumer.[40] Because "malice" is not defined in the FCRA, courts use the meaning given to the term in the context of libel litigation.[41] In that context, the Supreme Court has held that a statement is made with malice if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not."[42] "Reckless disregard," in turn, is shown through evidence that the defendant "entertained actual doubt about the truth of the statement."[43]

Because malice cannot be shown except where the reporting agency actually knew a statement was false, or doubted its truthfulness, the claim is necessarily preempted if the defendant had no notice of the inaccuracy at the time the report was made.[44] In *Yeager*, the consumer brought claims for defamation, invasion of privacy, negligence, and tortious interference against TRW.[45] The dispute centered on a civil judgment that was incorrectly listed on four successive credit reports, which Yeager claimed resulted in lenders denying him credit he otherwise would have obtained.[46] Yeager did not learn of or inform TRW of the problem until after the third credit report was issued. The court granted TRW summary judgment with respect to the first three credit reports, holding that "[m]alice cannot be shown where there is no evidence which would indicate that the agency in question had notice of the inaccuracy in its report until after the report was published."[47] Because Yeager had notified TRW of the mistake prior to the issuance of the fourth report, the claims as they related to that final report were allowed to proceed.[48]

It is similarly difficult to show "willful intent," which is demonstrated by establishing that the defendant "knowingly and intentionally commit[ted] an act in conscious disregard for the rights of others."[49] The willful intent prong of the preemption test results in somewhat of a paradox within section 1681h(e). The provision purports to preempt claims "in the nature of . . . negligence . . . except as to false information furnished with . . . willful intent,"[50] but there of course can be no claim of negligence alleging willful intent. As one court explained,

> This results in a requirement that Plaintiff prove intentional or malicious negligence. This level of negligence is inherently contradictory in that negligence does not include an element of intent. In fact, "intentional negligence" is an oxymoron. There is no cause of action . . . for negligence where the offending action was taken with intent to injure.[51]

Whether or how this contradiction impacts the interpretation of the statute is unclear. Congress plainly intended to preempt all claims that do not involve malicious or intentional injury, including negligence claims.

V. Preemption of claims "in the nature of defamation, invasion of privacy, or negligence" against credit information furnishers.

On its face, section 1681h(e) applies equally to any "person who furnishes information to a consumer reporting agency" as it does to consumer reporting agencies themselves.[52] And for almost 30 years after the FCRA's enactment, it did. But in 1996, when Congress added the preemption provisions in section 1681t(b), one of those exceptions to the general rule provided that "[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under §1681s-2, relating to the responsibilities of persons who furnish information to consumer reporting agencies."[53] (Section 1681s-2(a) regulates the duty of a furnisher of information to provide accurate information; section 1681s-2(b) regulates the duties a furnisher of information has upon receiving notice of a dispute.)[54]

The addition of section 1681t(b)(1)(F) has resulted in a heated debate as to how to reconcile it with section 1681h(e). "Attempting to reconcile the two sections has left the district courts in disarray."[55] The inconsistency between the two is clear. Under section 1681h(e), credit information furnishers may not be found liable for state law defamation, invasion of privacy, or negligence claims "*except* as to false information furnished with malice or intent to injure."[56] But under section 1681t(b)(1)(F), credit information furnishers are not subject to *any* state law related to their role as furnishers.[57]

Fifteen years after section 1681t(b)(1)(F) was introduced, this debate is still unresolved. No circuit court has addressed the issue,[58] but the dozens of federal district courts that have tackled it have over time developed three distinct approaches: the "total preemption" approach, the "statutory" approach, and the "temporal" approach.[59] Even within some circuits, there is no consensus as to which of these disparate theories is correct.[60]

A. *The "total preemption" approach.*

The clearest of the three approaches is the "total preemption" approach, which, as its name implies, posits that with the addition of section 1681t(b)(1)(F) all state law claims against credit information furnishers that touch upon FCRA-related issues are preempted.[61] Courts adopting this approach contend that, despite the fact that Congress did not remove mention of credit information regarding furnishers in section 1681h(e), it intended for the new section 1681t(b)(1)(F) to preempt even those claims previously allowed under 1681h(e). As explained by the

court that first adopted the approach,

> While Congress did not specifically provide . . . that section 1681t supersedes 1681h, it is clear from the face of section 1681t(b)(1)(F) that Congress wanted to eliminate all state causes of action "relating to the responsibilities of persons who furnish information to credit reporting agencies." Any other interpretation would fly in the face of the plain meaning of the statute.[62]

Where this approach is applied, a consumer may not bring any state law claim concerning a furnisher's FCRA obligations, "including those involving malicious and willful tortious conduct."[63]

B. *The "temporal" approach.*

The total preemption approach has been criticized by some courts, which believe it contravenes the principle that statutes should not be construed in a manner that renders any clause or word superfluous.[64] They argue that total preemption improperly ignores the fact that the words "person who furnishes information to a consumer reporting agency" remain in section 1681h(e). Nevertheless, these courts recognize that some theory is needed to reconcile sections 1681h(e) and 1681t(b)(1)(F).

The temporal approach is one such attempt to harmonize the two sections without finding total preemption. Under this approach, section 1681h(e) preempts state law claims based on the actions of a furnisher of information *before* the receiver has received notice of the inaccuracy, and section 1681t(b)(1)(F) applies *after* the furnisher receives such notice.[65]

The total preemption approach is the fairest reading of the statute, and is the most supportive of the clear Congressional intent.

Sections 1681s-2(a)(1)(A) and (B) govern the furnishing of information with "reasonable cause to believe that the information is inaccurate" or after notification from the consumer of an inaccuracy.[66] Section 1681s-2(b) specifically deals with duties after receiving a notice of dispute from a reporting agency.[67] Thus, courts adopting the temporal approach reason that section 1681s-2 only regulates furnishers of information after they receive notice that the furnished information may not be accurate.[68] Because section 1681t(b)(1)(F) applies only to "subject matter[s] regulated under § 1681s-2,"[69] these courts believe that section 1681h(e) still governs the preemption of claims arising prior to the furnisher receiving actual or constructive notice of inaccuracy.[70]

The end result of this approach is that state law claims against furnishers are preempted unless both (1) the actions giving rise to the claim occurred before the furnisher had notice of the inaccuracy, and (2) the claim alleges malice or willful intent to injure the consumer.[71]

C. *The "statutory" approach.*

The third approach to reconciling the two preemption provisions is the "statutory" approach, under which section 1681t(b)(1)(F) preempts only statutory state causes of action, leaving section 1681h(e) to address the preemption of common law state causes of action.[72] Courts applying this approach reason that section 1681h(e) refers to common law causes of action—"defamation, invasion of privacy, or negligence"[73]—while section 1681t(b)(1)(F) "appears to" deal only with state statutory regulations.[74] In support of the latter point, these courts note that Congress excepted two state statues from being preempted by section 1681t(b)(1)(F).[75] Thus under the statutory approach, a consumer cannot bring any state statutory claim against a credit information furnisher, but can bring a state common law claim if either malice of willful intent to injure is alleged.

D. *Conclusion: "Total preemption" is the most sensible approach.*

Of these three theories, the total preemption approach finds the most support in the FCRA, and most faithfully captures Congressional intent. The other two approaches are founded on misreadings of the FCRA, and result in preemption schemes that can only be described as illogical.

The temporal approach is based on the fallacy that section 1681s-2 only governs a furnisher's responsibilities after receiving notice of an inaccuracy. In reality, the "subject matter regulated under section 1681s-2"[76] is the "duty of furnishers of information to provide accurate information,"[77] regardless of whether the furnisher has notice of any inaccuracy.[78] Moreover, this approach leads to a "perverse"[79] and "troubling"[80] result: it gives furnishers more protection for acts committed after receiving notice of dispute than for acts committed before receiving notice.[81] If the temporal approach is correct, a consumer can bring a tort action against a furnisher who had no notice that the information was incorrect, but is prevented from bringing a tort action against a furnisher who had notice of the incorrect information, even if the furnisher acted with willful intent to injure the consumer.[82] This cannot have been the intent of Congress. As one court remarked, "[i]t seems odd . . . that Congress intended to protect furnishers of information more once they have knowledge that a consumer is disputing an item on his credit report; one would, logically, expect the opposite policy."[83]

The result of the statutory approach is nearly as puzzling. There is no logical reason why Congress would indiscriminately preempt all statutory claims, but allow certain common law claims. Nothing inherent to statutory claims separates them from common law claims, other than the fact that they are codified. An objective look at sections 1681h(e) and 1681t(b)(1)(F) demonstrates that Congress did not endeavor to create separate preemption rules for statutory and common law claims. Section 1681t(b)(1)(F) does not limit itself to statutory claims. The evidence cited by courts in support of the conclusion that it does so—that there are two exceptions to the provision, and they are both statutes—is superficial, and the reliance on it is misguided. Courts applying the statutory approach thus are forced to "read[] an element into section 1681t(b)(1)(F) that its text does not contain."[84] Likewise, section 1681h(e) does not limit itself to common law claims. It specifically applies to "any action or proceeding *in the nature of* defamation, invasion of privacy, or negligence."[85] There is no reason why this should not apply equally to any statutory claim that is "in the nature of" defamation, invasion of privacy, or negligence.

Indeed, the United States Supreme Court, interpreting another federal law preempting any "requirement or prohibition . . . imposed under State Law," rejected the argument that Congress intended only to trump state statues.[86] "[S]uch an analysis is at odds both with the plain words of the [Act] and with the general understanding of common-law damages actions. The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules."[87] The same analysis applies equally to the FCRA.

As one district court explained, the "plain language of

section 1681t(b)(1)(F) clearly eliminated all state causes of action against furnishers of information."[88] The section unambiguously states that "[n]o requirement or prohibition may be imposed under the laws of any State . . . relating to the responsibilities of persons who furnish information to consumer reporting agencies."[89] Another court put it even more succinctly: "[Section 1681t(b)(1)(F)] is clear and unequivocal. It means what it says."[90] The legislative history confirms that the total preemption approach reflects Congress's intent.[91] Representatives Kennedy and Thomas explained that the 1996 amendments to section 1681t were meant to create "a uniform national standard," "so companies will not have to comply with a patchwork of State laws."[92] Allowing consumers to bring any state law claim arising out of a credit information furnisher's FCRA responsibilities would frustrate Congress's intent in creating that uniform national standard.[93] It is no surprise that within the Ninth Circuit, whose courts may have the most experience with consumer FCRA claims, this is the majority view.[94]

The temporal and statutory approaches grew out of a desire to read the FCRA in a manner that does not render superfluous the words "person who furnishes information to a consumer reporting agency" in section 1681h(e). But those alternate approaches suffer from and create even greater problems. They cut off the FCRA's nose to spite its face. "[W]hile the rule against superfluities is a helpful tool of statutory interpretation, it is not an inexorable command, and need not be followed at all costs."[95] None of the three approaches is without problem, but the total preemption approach is the fairest reading of the statute, and is the most supportive of the clear Congressional intent.

VI. Conclusion

Congress rightly intended the FCRA to serve as a comprehensive statute regulating the practice and industry of credit reporting. Over the years, numerous states have enacted legislation further regulating this conduct. These statutes, although well meaning, make it inefficient and often confusing for lenders, creditors, and credit reporting agencies to conduct business. This is especially true in an increasingly mobile and transient consumer/borrower population with more interstate creditor/consumer-lender situations. This ultimately negatively impacts consumers, borrowers, and credit applicants caught up in a credit reporting system made more inefficient by an ever-expanding web of state regulation that approaches and often subtly encroaches on the FCRA — which was intended to be comprehensive and generally preemptive. In gray areas courts would serve Congressional intent, market efficiency, and consumer interests by interpreting FCRA preemption broadly. This would eliminate confusion, provide certainty, and make credit markets more efficient and available.

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1 15 U.S.C. § 1681, et seq.
2 15 U.S.C. § 1681.
3 Kodrick v. Ferguson, 54 F. Supp. 2d 788, 794 (N.D. Ill. 1999) (quoting 140 Cong. Rec. H9810–11) (concerning the 1996 amendment to the FCRA).
4 15 U.S.C. § 1681t(a).
5 *Id*.
6 15 U.S.C. § 1681h(e).
7 15 U.S.C. § 1681t(a) (emphasis added).
8 Davenport v. Farmers Ins. Group, 378 F.3d 839, 843 (8th Cir. 2004); Cisneros v. U.D. Registry, Inc., 39 Cal. App. 4th 548, 577–78 (1995).
9 *Cisneros*, 39 Cal. App. 4th at 577.
10 16 C.F.R. § 622.
11 *Davenport*, 378 F.3d at 843.
12 *Id*. at 841.
13 *Id*.
14 *Id*. at 842.
15 *Id*. at 843.
16 393 F. Supp. 577, 581–82 (S.D. Fla. 1975).
17 *Id*. at 581.
18 *Id*. at 581–82.
19 15 U.S.C. § 1681t (a), (b).
20 15 U.S.C. § 1681t(b).
21 15 U.S.C. §§ 1681t(b)(5)(A),(B),(G),and (H).
22 15 U.S.C. § 1681t(b)(4).
23 15 U.S.C. § 1681t(b)(1). The section also lists several state laws that would be preempted by this section, but which Congress determined should be grandfathered in as they existed at the time of the section's 1996 enactment.
24 15 U.S.C. §1681t(b)(1)(A), (E), (G), and (H).
25 15 U.S.C. § 1681t(b)(1)(F).
26 Thornton v. Equifax, Inc., 619 F.2d 700, 703 (8th Cir. 1980) (citing Retail Credit Co. v. Dade County, 393 F. Supp. 577, 584 (S.D. Fla. 1975) ("It is clear that the qualified immunity provided for by Congress is meant to be a 'quid pro quo for full disclosure.'")).
27 15 U.S.C. § 1681h(e).
28 *Id*.; *see also Thornton*, 619 F.2d at 703.
29 15 U.S.C. §§ 1681g, 1681h, 1681m.
30 15 U.S.C. § 1681h(e).
31 McKeown v. Sears Roebuck & Co., 335 F. Supp. 2d 917, 942–43 (W.D. Wis. 2004) ("All defamation claims arise out of disclosures to third parties; it is a prima facie element of the claim.").
32 *Id*.
33 TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).
34 *McKeown*, 335 F. Supp. 2d at 943; Carlson v. Trans Union, LLC, 261 F. Supp. 2d 663, 664 n.2 (N.D. Tex. 2003).
35 *Thornton*, 619 F.2d at 704; Gohman v. Equifax Information Svcs., *LLC*, 395 F. Supp. 2d 822, 829 (D. Minn. 2005); Graham v. CSC Credit Svcs., Inc., 306 F. Supp. 2d 873, 882 (D. Minn. 2004).
36 *Thornton*, 619 F.2d at 702.
37 *Id*. at 704–05.
38 *Id*. at 704.
39 Graham v. CSC Credit Svcs., Inc., 306 F. Supp. 2d 873, 882 (D. Minn. 2004); *see* Gohman v. Equifax Information Svcs., *LLC*, 395 F. Supp. 2d 822, 829 (D. Minn. 2005).
40 15 U.S.C. § 1681h(e).
41 *Thornton*, 619 F.2d at 705; Yeager v. TRW Inc., 984 F. Supp. 517, 523 (E.D. Tex. 1997); Wiggins v. Equifax Svcs., Inc., 848 F. Supp. 213, 223 (D.D.C. 1993).
42 New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964), *cited in Thornton*, 619 F.2d at 705 and *Wiggins*, 848 F. Supp. at 223.
43 *Wiggins*, 848 F. Supp. at 223.
44 *See Yeager*, 984 F. Supp. at 524.
45 *Id*. at 519.
46 *Id*.
47 *Id*. at 524.
48 *Id*. at 524–25.

49 *Id.* at 523 (citing Wiggins, 848 F. Supp. at 219).
50 15 U.S.C. § 1681h(e).
51 Carlson, 261 F. Supp. 2d at 665 (discussing Texas negligence law); *see* Shannon v. Equifax Information Svcs., 764 F. Supp. 2d 714, 727–28 (E.D. Penn. 2011) ("By definition, a plaintiff cannot allege willful negligence. Therefore, the only negligence action that Plaintiff can pursue if a negligence action under the FCRA.").
52 15 U.S.C. § 1681h(e).
53 15 U.S.C. § 1681t(b)(1)(F). Section 54A(a) of chapter 93 of the Massachusetts Annotated Laws and section 1785.25(a) of the California Civil code, as in effect in 1996, are excepted from this provision. 15 U.S.C. §§ 1681t(b)(1)(F)(i)–(ii).
54 Whether the FCRA preempts causes of action against information furnishers not specifically related to either of these issues is another question. The California Supreme Court recently held the FCRA did not preempt a claim that a medical provider had furnished confidential patient information to a consumer reporting agency, concluding that section 1681t(b)(1)(F) preempts state law claims only insofar as they arise out of a requirement or prohibition with respect to the specific duties regulated by section 1681s-2. Brown v. Mortensen, ___ P.3d ___, 2011 WL 2409913 (Cal. 2011).
55 Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1166 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 71 (2010). In *Gorman*, the Ninth Circuit noted that the district court had applied the total preemption approach, but that "[i]n the end, we need not decide this issue." *Id.* at 1167 (9th Cir. 2009); *see also* Ross v. FDIC, 625 F.3d 808, 814 n.* (4th Cir. 2010) (commenting that "[c]ourts have taken a variety of approaches to resolving this conflict," but that its "disposition of this case on other grounds means we need not address this issue").
56 15 U.S.C. § 1681h(e) (emphasis added).
57 15 U.S.C. § 1681t(b)(1)(F).
58 Though they have recently had the opportunity. The Ninth Circuit has twice this year declined reach the issue. Johnson v. Wells Fargo Home Mortgage, Inc., 635 F.3d 401, 421 (9th Cir. 2011); Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1167 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 71 (2010). The Tenth Circuit had its own opportunity in 2010. *See* Ross v. FDIC, 625 F.3d 808, 814 n.* (4th Cir. 2010).
59 Buraye v. Equifax, 625 F. Supp. 2d 894, 898 (C.D. Cal. 2008).
60 *See, e.g.*, *Id.* at 899 (noting that within the Ninth Circuit, courts utilize both the total preemption and statutory approaches).
61 Nelson v. Equifax Information Svcs., LLC, 522 F. Supp. 2d 1222, 1233 (C.D. Cal. 2007); *see also Buraye*, 625 F. Supp 2d at 900; Roybal v. Equifax, 405 F. Supp. 2d 1177, 1181 (E.D. Cal. 2005); Davis v. Maryland Bank, No. 00-04191, 2002 WL 32713429, at *12–*13 (N.D. Cal. 2002); Riley v. General Motors Acceptance Corp., 226 F. Supp. 2d 1316, 1324–25 (S.D. Ala. 2002).
62 Jaramilo v. Experian Information Solutions, Inc., 155 F. Supp. 2d 356, 361–62 (E.D. Pa. 2001).
63 *Buraye*, 625 F.Supp.2d at 899 (citing *Davis*, 2002 WL 32713429, at *13).
64 *See, e.g.*, Barnhill v. Bank of America, N.A., 378 F. Supp. 2d 696, 700–01 (D. S.C. 2005) (citing TRW Inc., 534 U.S. at 31).
65 Kane v. Guaranty Residential Lending, Inc., No. 04-CV-4847, 2005 WL 1153623, at *8 (E.D.N.Y.) May 16, 2005); *see also* Ryder v. Washington Mut. Bank, F.A., 371 F. Supp. 2d 152, 154–55 (D. Conn. 2005); Woltersdorf v. Pentagon Fed. Credit Union, 320 F. Supp. 2d 1222, 1226–27 (N.D. Ala. 2004); Stafford v. Cross Country Bank, 262 F. Supp. 2d 776, 785–86 (W.D. Ky. 2003); Vazquez-Garcia v. Trans-Union de Puerto Rico, 222 F. Supp. 2d 150, 161 (D. P.R. 2002); Aklagi v. NationsCredit Fin. Svcs., 196 F. Supp. 2d 1186, 1194–95 (D. Kan. 2002).
66 15 U.S.C. §§ 1681s-2(a)(1)(A)–(B).
67 15 U.S.C. § 1681s-2(b).
68 *Kane*, 2005 WL 1153623, at *8.
69 15 U.S.C. § 1681t(b)(1)(F).
70 *Kane*, 2005 WL 1153623, at *8.
71 *See Barnhill*, 378 F. Supp. 2d at 701; *Vazquez-Garcia*, 222 F. Supp. 2d at 163.
72 Meisel v. USA Shade and Fabric Structures, Inc., ___ F. Supp. 2d ___, 2011 WL 2413174, at *6 (N.D. Tex. June 14, 2011); *Barnhill*, 378 F. Supp. 2d at 703; *see also* Wolfe v. MBNA Amer. Bank, 485 F. Supp. 2d 874, 886–87 (W.D. Tenn. 2007); Gorman v. Wolpoff & Abramson, LLP, 370 F. Supp. 2d 1005, 1009–1010 (N.D. Cal. 2005); McCloud v. Homeside Lending, 309 F. Supp. 2d 1335,1341–42 (N.D. Ala. 2004); Gordon v. Greenpoint Credit, 266 F. Supp. 2d 1007, 1013 (S.D. Ia. 2003); Carlson v. Trans Union, LLC, 259 F. Supp. 2d 517, 521(N.D. Tex. 2003); Johnson v. CitiMortgage, Inc., 351 F. Supp. 2d 1368, 1375–76 (N.D. Ga. 2004)
73 15 U.S.C. § 1681h(e).
74 McCloud v. Homeside Lending, 309 F. Supp. 2d 1335, 1341 (N.D. Ala. 2004).
75 *Id*.
76 15 U.S.C. § 1681t(b)(1)(F).
77 15 U.S.C. § 1681s-2(a).
78 *Gordon*, 266 F. Supp. 2d at 1013 (holding the temporal approach to be "strained at best" because section 1681s-2 "charges furnishers of information with a duty to report accurate information regardless of whether the furnisher has notice of the dispute").
79 *Barnhill*, 378 F. Supp. 2d at 702.
80 *Johnson*, 351 F. Supp. 2d at 1374.
81 *Id*. at 1374–75; *Barnhill*, 378 F. Supp. 2d at 702.
82 *Barnhill*, 378 F. Supp. 2d at 702.
83 *Johnson*, 351 F. Supp. 2d at 1375; *see also Meisel*, 2011 WL 2413174, at *7.
84 *Kane*, 2005 WL 1153623, at *9.
85 15 U.S.C. § 1681h(e) (emphasis added).
86 Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992), *cited in* Carruthers v. American Honda Fin. Corp., 717 F. Supp. 2d 1251, 1255 (N.D. Fla. 2010).
87 *Id.*
88 *Jaramilo*, 155 F. Supp. 2d at 362, *quoted in* Riley, 26 F. Supp. 2d at 1322.
89 15 U.S.C. § 1681t(b)(1)(F).
90 *Carruthers*, 717 F. Supp. 2d at 1254.
91 *Buraye*, 625 F. Supp. 2d at 900 (quoting *Davis*, 2002 WL 32713429, at *13) (adopting the total preemption approach because "the legislative history demonstrates that Congress enacted section 1681t(b(1)(F) in order to create a uniform scheme governing disclosure of credit information"); *Carruthers*, 717 F. Supp. 2d at 1256.
92 Kodrick v. Ferguson, 54 F. Supp. 2d 788, 794 (N.D. Ill. 1999) (quoting 140 Cong. Rec. H9810–11).
93 *See Buraye*, 625 F. Supp. 2d at 900 (citing *Davis*, 2002 WL 32713429, at *13).
94 *Id.* at 899 (observing that the majority of courts in the Ninth Circuit have utilized the total preemption approach, and listing cases).
95 *Carruthers*, 717 F. Supp. 2d at 1257 (collecting authorities).