STUDENT BORROWER PROTECTION CENTER

BIG DATA & BIG ERRORS

Why Giving Furnishers a Free Pass Undermines the Credit Reporting System and Denies Consumers Access to Justice

May 2021

Prepared by:

John Albanese

BERGER MONTAGUE

About the Author

John Albanese is an Associate at Berger Montague. Mr. Albanese concentrates his practice on consumer protection with a focus on Fair Credit Reporting Act violations related to criminal background checks. Mr. Albanese has also prosecuted class actions related to illegal online lending, unfair debt collection, privacy breaches, and other consumer law issues.

Mr. Albanese is a graduate of Columbia Law School and Georgetown University. At Columbia, he was a managing editor of the Columbia Law Review and was elected to speak at graduation by his classmates. Mr. Albanese clerked for Magistrate Judge Geraldine Brown in the Northern District of Illinois.

The views expressed in this article are the author's alone.

Protect Borrowers

Table of Contents

Introduction

In March 2020, Congress passed the CARES Act which automatically suspended all payment obligations and halted all interest accrual on loans held by the Department of Education.[1] The CARES Act further required that for the purpose of reporting information about the loan to a credit bureau, each suspended payment was to be "treated as if it were a regularly scheduled payment made by a borrower."[2]

Instead of complying with the CARES Act, consumer reporting agencies and creditors have violated the credit reporting requirements in the statute. The most notorious example occurred in May 2020 when student loan servicer Great Lakes Educational Loan Services, Inc.[3] provided inaccurate information to the credit bureaus for millions of borrowers, incorrectly indicating that these borrowers had chosen to stop paying on their loans (an arrangement known as a "deferment"), rather than indicating these borrowers were current.[4] The Chief Operating Officer of the Department of Education's Office of Federal Student Aid characterized this reporting as an "error."[5] As a consequence of the misreporting, as many as five million consumers immediately saw an alarming and unexplained drop in their credit scores during a very vulnerable and trying time. These issues are not limited to Great Lakes. Other student loan servicers have violated the CARES Act.[6] And more generally, the misreporting is emblematic of the widespread and persistent problems of inaccurate furnishing and reporting of credit information that have plagued the credit reporting industry for decades.[7]

The Origins of Consumer Credit Information

People and entities that provide information to credit bureaus are generally known as "furnishers" and include a wide range of entities, from large banks reporting on mortgages and credit cards to landlords reporting on rent payments to hospitals and doctors reporting on medical debt.[8] The Consumer Financial Protection Bureau's ("CFPB") "Furnisher Rule" defines furnishers as "an entity that furnishes information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report."[9] Despite the presence of systemic credit reporting errors, however, it is difficult under current Fair Credit Reporting Act ("the FCRA")[10] jurisprudence to hold accountable furnishers of inaccurate credit information like Great Lakes even for widespread errors.

Under the courts' current interpretation of the FCRA, furnishers get a free pass to fix any erroneous information they provide to a credit bureau. As long as such fixes are made within 30 days of a dispute, a furnisher generally cannot be sued by a private party regardless of the harm caused by the misreporting.[11] Thus, furnishers have little incentive to get reporting right in the first instance. In other words, a consumer has no private right of action under the FCRA against a furnisher for misreporting, no matter how egregious or widespread it may be, as long as the furnisher corrects the reporting within 30 days.[12]

Even when credit reporting issues are corrected, these corrections are often made in a one-off manner with no investigation into the root causes of the misreporting or evaluation of whether any misreporting is systemic.[13] There are some court decisions that also find the FCRA does not permit private parties from obtaining injunctive relief, limiting the systemic remedies that may be available to consumers.[14]

Under the courts' current interpretation of the FCRA, furnishers get a free pass to fix erroneous information.

To make matters worse, through the FCRA's broad preemption provisions, the FCRA limits the abilities of state legislatures to provide more robust protections and remedies for consumers harmed by problems with furnishers.[15] In short, the FCRA and current case law make it very difficult to obtain relief for consumers against furnishers of credit information. As it currently stands, the FCRA fails to create the necessary incentives for both the credit bureaus or furnishers to identify, evaluate, or address widespread credit reporting and furnishing issues that harm consumers.

Student loans make up a major portion of the credit market and are the third most-prevalent tradeline on credit reports.[16] Student loans servicers frequently are accused of inaccurate credit reporting and are sued by individuals frequently.[17] But systematic or programmatic relief has not been obtained, and there are few, if any, signs that student loan servicers have made any efforts to improve their practices.[18]

This report discusses issues preventing furnishers of credit information from being held accountable for harmful errors with a focus on student loan servicers who report information to the major credit bureaus. Inaccurate credit reporting can severely damage a consumer's credit and corresponding credit scores, resulting in loan denials, increased interest rates, lower credit limits, higher insurance premiums, and even a loss of employment or rental opportunities.

Errors in credit reporting harm consumers and undermine the functioning of the credit system, and such errors have been ubiquitous for decades with no sign of abating under the current legal landscape.[19] Despite the obligations of the credit bureaus to ensure accuracy in credit reports, the bureaus have not been willing to adequately ensure that furnishers provide accurate information. This has been especially true during the COVID-19 pandemic; the Consumer Financial Protection Bureau reported in early 2021 that it had received over 279,000 consumer complaints in 2020 regarding credit reporting issues, making credit reporting the single most complained-about area of consumer finance that year (having accounted for 58 percent of all consumer complaints the Bureau received in 2020).[20] Moreover, the monthly rate of consumer complaints submitted regarding credit reporting issues in 2020 marked a 129 percent increase in the monthly volume of these complaints relative to the prior two years.[21]

As discussed in detail below, the FCRA was designed to be privately enforced and class actions against the credit bureaus have led to significant changes in credit reporting practices by the credit bureaus and improved protections for consumers. But the FCRA's limitations on private actions against furnishers, combined with its restrictions on how states may regulate furnishers through legislations have left furnishers largely unaccountable for even large-scale widespread reporting errors. Public enforcement simply has not been enough to ensure accuracy and fairness in credit reporting, especially when it comes to furnishers.

This report concludes with some recommendations to improve private and public remedies against credit furnishers, and student loan servicers, in particular.

Big Data & Big Errors

Background on the Credit Reporting Industry

The credit reporting industry is a multi-billion-dollar industry and growing.[22] The industry is largely dominated by the national consumer reporting agencies ("NCRAs"), Experian, Equifax, TransUnion. In the United States, nearly 200 million people have credit files with one of the NCRAs.[23]

The NCRAs receive information from creditors that generally report the status of credit accounts every month through electronic updates that are transmitted to the credit bureaus using a format called the Metro 2 Format. The Metro 2 format was created by the credit industry's trade association, the Consumer Data Industry Association ("CDIA:).[24] The Metro 2 format provides creditors with numerous fields and codes to use to report trade lines.[25] The CDIA has published the Credit Reporting Resource Guide to Metro 2 reporting for creditors to use.[26]

Student loans make up a significant portion of the consumer credit market. They are the third most reported loan product with 112 million tradelines reported representing 11 percent of total tradelines behind only credit cards and retail revolving accounts (store-branded credit cards) and ahead of mortgages and auto loans.[27] Moreover, research from the Consumer Financial Protection Bureau in 2017 indicated that the proportion of consumers who became "credit visible" (meaning that they began to be reported on) due to student loans more than doubled in the preceding ten years,[28] making student loans the second most common entry point into credit visibility for consumers under the age of 25.[29] Student loan debt reached a high of $1.7 trillion last year.[30]

A credit report is often reduced to a credit score. The most common credit scores are those created by the Fair Isaac Corporation or "FICO."[31] The NCRAs have also entered into a joint venture and developed their own credit scoring model called "VantageScore."[32] Although similar, FICO scores and VantageScore scores can differ significantly.[33] VantageScore is used by some prominent credit monitoring services including Credit Karma.[34]

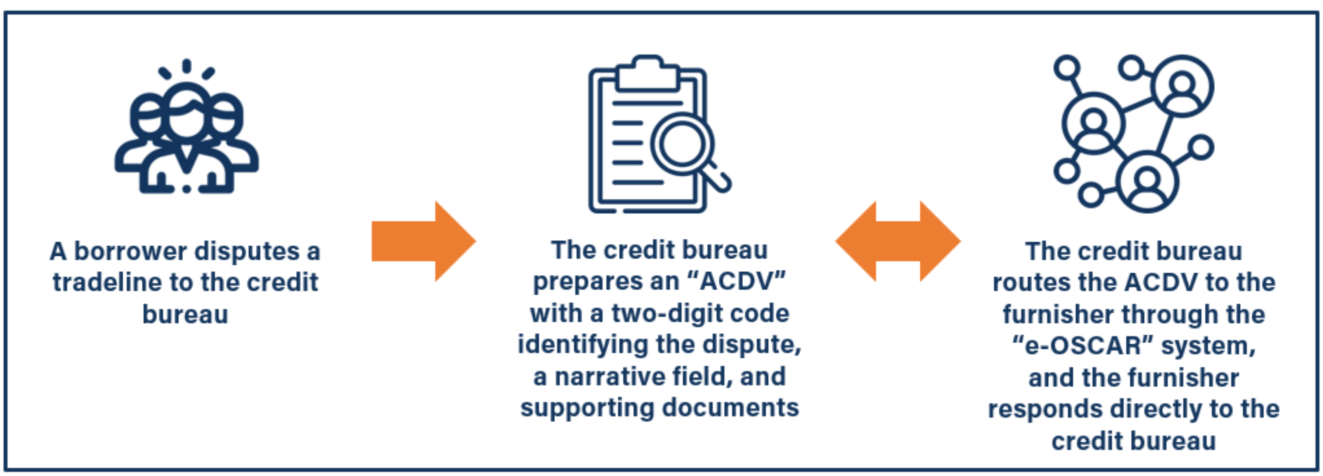
Even a single late payment on a loan or a line of credit can make a significant impact on a credit score and can remain on a credit report for up to seven years.[35] Per FICO, payment history makes up 35 percent of a credit score.[36] Other factors used in credit scoring include amounts owed, percentage of credit limit used, total balances and debt, length of credit history, and credit mix.[37] An inaccurate credit report and a lower credit score can lead to denial of credit applications, lower credit limits, higher interest rates, higher insurance premiums, and a denial of employment and housing opportunities.

Credit Reports are Error Prone and Difficult to Correct

Errors in credit reporting are widespread and persistent. In 2012, a Federal Trade Commission (FTC) study found that 20 percent of consumers had a verified error in their credit reports.[38] In 2020, the CFPB received 319,300 complaints from consumers regarding credit or consumer reporting, an increase of 107 percent from 2019 and representing 59 percent of the total complaints received by the CFPB.[39] The CFPB noted that many complaints involved the drop in credit scores after Great Lakes reported the student loans it services as in deferment.[40]

To assist consumers in combatting the widespread misreporting, the FCRA provides consumers with a right to dispute inaccurate items on credit reports but the system is flawed.[41] If a consumer disputes a tradeline to the NCRAs, the dispute is routed through the "e-OSCAR" which is a system developed by the credit bureaus to transmit consumer disputes to creditors.[42] The credit bureau will transmit an Automated Consumer Dispute Verification form ("ACDV") that distills the consumer's dispute into a two-digit code, along with a narrative field.[43] Beginning in 2013, the e-OSCAR system allowed for the inclusion of any supporting documents the consumer submitted with their dispute.[44]

Figure 1. The FCRA Does not Create a Direct Path to Hold Furnishers Accountable



It is well-documented that the credit dispute system does not function well. The credit bureau merely serves as a conduit to pass along the dispute, and their agents are not empowered to exercise discretion with respect to a consumer's dispute.[45] No further investigation is conducted into the consumer's dispute and the consumer reporting agencies simply "parrot" what the furnisher provides them.[46] For instance, in 2017, the CFPB found that one or more consumer reporting companies "failed to review and consider the attached documentation and relied entirely on the furnisher to investigate the dispute."[47]

Furnishers are no better. Instead of doing an actual investigation, the furnisher often times engages in a circular "data conformity" review simply assuring that what is in furnisher's system is what is being reported on the credit report.[48] In July 2010, the CFPB's regulations governing furnishers (the "Furnisher Rule") became effective which required furnishers to consider "all relevant information provided by the consumer" with a dispute.[49] In 2013, the CFPB reiterated this obligation, releasing a bulletin stating that it "expects every furnisher to review and consider 'all relevant information' relating to the dispute, including documents that the [consumer reporting agency] includes with the notice of dispute or transmits during the investigation, and the furnisher's own information with respect to the dispute."[50] The CFPB has also brought numerous action against credit furnishers for failing to report correctly and respond appropriately to disputes.[51]

Student loan servicers, in particular, have come under scrutiny for their credit reporting practices.

In 2015, the NCRAs and 31 states entered into a settlement that resolved claims brought by the states that the NCRAs were violating the FCRA in various ways, including by failing to adequately monitor furnishers. Under the terms of that settlement, the NCRAs are required to monitor furnishers and create a working group to "further actionable data quality and accuracy initiatives."[52] The settlement further requires that the NCRA provide to the states information and statistics concerning furnisher dispute metrics, and a description of any actions taken by the NCRAs in response to those metrics. Per the NCRAs, upon request the NCRAs are required to provide the states a list of problematic furnishers.

Student loan servicers, in particular, have come under scrutiny for their credit reporting practices. In a supervisory report, the CFPB's examiners found that some student loan servicers lack rudimentary guardrails to ensure that the information they put into the credit reporting system accurately reflects the circumstances of their borrowers, including:

- Policies and procedures that do not reference one another so that it is difficult to determine which policy or procedure applies;
- Policies and procedures that do not contemplate record retention, internal controls, audits, testing, third party vendor oversight, or the technology used to furnish information to NCRAs;

- Policies and procedures that lack sufficient detail on employee training.[53]

In 2017, the CFPB sued Navient alleging that, among nearly a dozen violations of law pled in its complaint, Navient violated the FCRA and the CFPB's Furnisher Rule. In particular the CFPB alleged that Navient "misreported information to consumer reporting agencies about thousands of borrowers who were totally and permanently disabled, including veterans whose total and permanent disability was connected to their military service, by making it appear as if those borrowers had defaulted on their student loans when they had not, damaging their credit."[54] The lawsuit remains ongoing. California, Illinois, Washington, and Pennsylvania authorities have brought similar lawsuits against Navient.[55] The California action in particular alleges that Navient improperly reported loan discharges due to total and permanent disability of the borrower as defaults.[56]

As noted above, the very large furnishing error committed by student loan servicer Great Lakes was not the only large-scale misreporting that occurred following the enactment of the CARES Act. According to newly released government records, several other Education Department contractors mishandled the implementation of the CARES Act's credit protections, damaging the credit of student loan borrowers in tens of thousands of previously undisclosed cases.[57] No federal or state regulators appear to have brought enforcement actions in response to these widespread errors and it remains unclear whether the Department of Education took any action to direct restitution to affected consumers.

There have also been hundreds of individual FCRA lawsuits filed by consumers in the past few years alleging inaccurate reporting of student loans.[58] Despite these enforcement efforts, inaccurate credit reporting remains a persistent and all-too-common issue and credit furnishers remain a significant part of the problem.[59] To understand why inaccurate reporting persists requires a discussion of the Fair Credit Reporting Act and its limitations.

The FCRA's Regulation of Furnishers

Since it originally passed the FCRA, Congress sporadically and infrequently has attempted to strengthen the FCRA to address ongoing and persistent issues in credit reporting. But these efforts have fallen short of what is required, and some changes, especially with respect to preemption, have harmed consumers. There is still an unacceptable level of inaccuracies in credit reporting and little accountability for those entities that violate the FCRA. The FCRA, at present, is inadequate to hold the credit reporting industry accountable for violations of the FCRA, especially as it comes to furnishers. To fully appreciate the issue requires a brief summary of the FCRA and its regulation of furnishers.

The FCRA did not Regulate Furnishers When Passed in 1970

The Fair Credit Reporting Act was originally enacted in 1970. Congress found that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system."[60]

As enacted in 1970, the entities regulated by the statute were the consumer reporting agencies and users of credit reports. Furnishers were not affirmatively regulated by the statute, except to bar certain common law claims against furnishers for credit reporting as preempted ("Specific Preemption Provision"). Specifically, the statute provided:

> [N]o 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 section 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.[61]

In addition to the above limitation on common law claims, the FCRA as passed in 1970 contained a limited general preemption provision ("General Preemption Provision") setting forth that the FCRA "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, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency."[62] Thus, Congress, when originally enacting the FCRA, contemplated that states would be able to pass laws regulating credit reporting.

Congress Amends the FCRA to Strengthen Remedies and Regulate Furnishers but Also Severely Restricts Private Enforcement and Limits States' Ability to Regulate

Under the remedies provided by the statute as passed in 1970, a consumer could bring a lawsuit for their actual damages, and attorneys' fees and costs for violations of the FCRA.[63] Indeed, Congress intended that private enforcement be the primary method of policing the credit reporting industry's compliance with the FCRA.[64] But the Act did not work as well as intended. A major reason for the Act's ineffectiveness was due to difficulties in providing redress to harmed consumers. Damages due to inaccurate credit reports were hard to prove in litigation and the awards in FCRA cases many times consisted only of nominal damages.[65] Twenty years after the passage of the FCRA, studies showed that forty-eight percent of consumer credit reports contained errors, and twenty percent contained errors serious enough to cause denials of credit.[66]

Congress thus significantly amended the FCRA in 1996. The amendments included providing that for willful violations of the FCRA, a plaintiff could seek statutory damages of $100 to $1000 in lieu of seeking actual damages.[67] The statutory damages remedy also facilitated private class action cases as individual issues of damages no longer precluded class certification.[68]

The 1996 amendments also for the first time regulated furnishers.[69] Among other things, furnishers are prohibited from furnishing "any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate."[70] Further, furnishers could not provide any information about a consumer if "the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and the information is, in fact, inaccurate."[71]

Additionally, the 1996 amendments specified that if a CRA receives a dispute about a tradeline, the CRA is required to relay that dispute information the furnisher.[72] Furnishers are then required to "conduct an investigation of disputed information," "review all relevant information provided by the consumer reporting agency," and correct the information if it is inaccurate or cannot be verified.[73]

Congress, however, also imposed significant restrictions on enforcement of these provisions. Importantly, a consumer cannot sue a furnisher for duties set forth in § 1681s-2(a), that is, knowingly reporting inaccurate information.[74] The consumer must first make a dispute with the consumer reporting agency, and then can sue the furnisher if the furnisher fails to conduct a reasonable investigation of the disputed information, i.e., the duties set forth in § 1681s-2(b). Moreover, the statute provides a further "limitation on enforcement" that provides that the duties under § 1681s-2(a) "shall be enforced exclusively as provided under section 1681s of this title by the Federal agencies and officials and the State officials identified in section 1681s of this title."[75]

Congress also revised the FCRA's General Preemption Provision to temporarily preempt all state laws relating to "responsibilities of persons who furnish information," while saving two states' laws (California and Massachusetts) that were already in effect at the time the amendments were passed.[76] As relevant here, the statute now provides:

> No requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply--
>
> **(i)** with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
>
> **(ii)** with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996).[77]

Congress, however, anticipated that states would eventually have a role again in regulating furnishers. The 1996 amendments included a sunset provision for the General Preemption Provision, stating that preemption would not apply "any provision of State law (including any provision of a state constitution) that (A) is enacted after January 1, 2004; (B) states explicitly that the provision is intended to supplement this title; and (C) gives greater protection to consumers than is provided under this title."[78]

Unfortunately for consumers, nearly a decade later Congress stripped out this sunset in 2003 amendments to the FCRA due to fears from industry that absent preemption, states would "enact differing additional requirements" than the national standards set forth in the FCRA.[79]

In the Wake of the 1996 Amendments to the FCRA, the Courts have Further Narrowed Borrowers' Access to Justice Under State Law

After the 1996 amendments, the scope of the FCRA's preemption for furnishers has been the subject of many judicial decisions. First, the interaction between the Specific and General Preemption Provision has caused some divided opinions among courts with courts taking various approaches regarding how to reconcile the two provisions. Some courts have held that the timing of when the furnisher knew of the inaccuracy mattered and other have held that the FCRA's General Preemption Provision only preempts statutory claims.[80] The view among the Courts of Appeal, however, is one of total preemption. In other words, "[§] 1681h(e) [the Specific Preemption Provision] preempts some state claims that could arise out of reports to credit agencies; § 1681t(b)(1)(F) [the General Preemption Provision] preempts more of these claims."[81] Based on these appellate decisions, any attempts to bring common law claims, such as defamation, against furnishers for providing information to the credit bureaus are unlikely to be successful.

Further, even though the FCRA explicitly saves from preemption enumerated California and Massachusetts statutes regulating furnishers, federal courts in both Massachusetts and California interpreted § 1681t(b)(1)(F) as preempting the separate statutory sections of California and Massachusetts law that provided consumers with private rights of action to enforce the provisions saved from preemption.[82] In effect, in the years after the 1996 amendments, there were many judicial decisions that found the FCRA created an absolute bar to private enforcement against furnishers, even where a plain language reading of the statute appeared to leave the door open for California and Massachusetts consumers.

The court elaborated that private rights of action "do not impose any additional standards designed to be potent methods of governing conduct and controlling policy, nor do these sections require furnishers to obey any additional rules of law."

In *Gorman v. Wolpoff & Abramson, LLP*, however, the Ninth Circuit rejected this line of reasoning, and found that the FCRA did not preempt California's private right of action to enforce the California Consumer Reporting Agency Act (CCRAA).[83] The *Gorman* court noted that § 1681t(b) only forbids "requirement[s]" or "prohibition[s]" imposed by states.."[84] The court found that the statutory provision providing a right of action did not impose separate requirements or prohibitions but "merely provide a vehicle for private parties to enforce other sections, which *do* impose requirements and prohibitions."[85] The court elaborated that private rights of action "do not impose any additional standards designed to be potent methods of governing conduct and controlling policy, nor do these sections require furnishers to obey any *additional* rules of law. The rules that must be obeyed already exist in the reporting obligations specified by section 1785.25(a) of the CCRAA and saved in the FCRA."[86] In addressing the defendant's concerns regarding the need for national standards, the court stated "the enforcement provisions do not add to a patchwork of confusing obligations with which a furnisher must struggle to comply. They instead allow for additional avenues through which consumers can ensure that furnishers are complying with the obligations Congress specifically meant to impose."[87] The court concluded "because the plain language of the preemption provision does not apply to private rights of action, and because the likely purpose of the express exclusion was precisely to permit private enforcement of these provisions, we hold that the private right of action to enforce California Civil Code section 1785.25(a) is not preempted by the FCRA."[88]

While *Gorman* makes clear that California law can be enforced against furnishers, despite *Gorman,* Massachusetts courts continue to find claims under Massachusetts law to be preempted because the private right of action provision was not explicitly enumerated in § 1681t(b)(1)(F).[89] Further, the overwhelming majority of

Americans lack any meaningful remedies against furnishers for providing inaccurate credit information to the credit bureaus in the first instance.

The FCRA Does not Provide Adequate Remedies Against Furnishers

The limitations of the FCRA have not escaped criticism. As noted by one federal judge, the FCRA's restrictions on pursuing claims against furnishers limit the value of the statute:

> [The FCRA] is of little value to ordinary consumers, in part due to the fact that it is hopelessly complex—the statute is drafted in hyper-technical language and includes a sufficient number of internal cross-references to make even the most dedicated legal practitioner consider a change in career. But the FCRA's substance is even more troubling than its complex form. The statute includes numerous provisions that limit consumers' ability to enforce its mandates either by explicitly barring private actions or by imposing such burdensome procedural requirements that no layperson could possibly be expected to comply.[90]

The FCRA's limitations are especially acute when attempting to hold furnishers accountable for misreporting.

The FCRA Provides a Free Pass to Furnishers

The FCRA provides furnishers with a free pass if they misreport a tradeline. Thus, furnishers have little incentive to ensure that their reporting is accurate in the first instance. As discussed above, furnishers can only be sued under the FCRA by a consumer only after the consumer has disputed the relevant error with the credit bureau, the credit bureau has passed the dispute to the furnisher, and the furnisher has failed to conduct a reasonable investigation to correct the inaccurate reporting. The understandable instinct of many consumers is to dispute the error directly with the furnisher. But notices sent directly to the furnishers are insufficient to be able to bring a claim under the FCRA.[91] Thus, a consumer could dispute inaccurate reporting for years directly with the furnisher, but if the furnisher fixes the report after receiving notice from the credit bureau or if the consumer fails to dispute the error with the credit bureau, the consumer is often left with no redress, even if there has been substantial and lasting harm.

The requirement that a consumer must dispute with the credit bureau before bringing a claim arguably also limits the ability of a consumer to initiate a class action on behalf of a class of similarly situated consumers. Even if a furnisher has systemically misreported credit information on thousands of consumers, the furnisher can argue that only those consumers that disputed the information to the credit bureau are entitled to recovery and that the furnisher's investigation as to each dispute would have to be reviewed in order to determine liability.

These limitations are detrimental, particularly given that class actions have been effective drivers of consumer-friendly reforms across the market. Private class actions against credit bureaus have led to significant changes in credit reporting practices. For example, one class action led to a fundamental overhaul of how the NCRAs report debts that are included in consumer bankruptcies.[92] Most recently, private class action lawsuits lead to the NCRAs agreeing to completely cease reporting tax lien and civil judgment reporting.[93] FCRA class actions have also led to substantial reforms in criminal background screening and provided relief to millions of consumers.[94] The perceived inability to bring class actions against furnishers is a substantial enforcement gap.

These limitations are detrimental, particularly given that class actions have been effective drivers of consumer-friendly reforms across the market.

Private litigants are further hampered because injunctive relief for private litigants may be unavailable under the FCRA, despite seemingly contrary interpretations from the Supreme Court and Congress. The Supreme Court has held that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."[95] Nevertheless, various courts opinions have found that the FCRA does not provide private litigants with ability to seek injunctive relief.

The FCRA explicitly provides that injunctions are available when the government (either state or federal) brings suit, 15 U.S.C. § 1681s, but the statute does not mention the availability of injunctive relief in §§ 1681o or 1681n which provide remedies for private lawsuits. Based on the inclusion of injunctive relief for public enforcers and the absence of any mention of injunctive relief for private parties, courts, including the Fifth Circuit Court of Appeals, have held that Congress intended not to permit private litigants to obtain injunctive relief.[96] However, in the alternative, the Sixth Circuit, in declining to reach the question, noted that whether injunctive relief is available to private litigants under the FCRA is "is not free from doubt."[97] Contradicting the Fifth Circuit's holding, there is also some legislative history to indicate that in 1970, Congress understood the FCRA to be authorizing injunctive relief.[98] However, at present, the lack of access to injunctive relief as a remedy prevents a consumer from obtaining a court order requiring inaccurate reporting to cease and further hinders the ability for a consumer to obtain any systemic relief.

These restrictions, combined with preemption, have largely limited private enforcement of furnishers of credit information to individual lawsuits for damages. This has left the federal and state governments as the only enforcers with the ability to obtain any programmatic or widespread relief against furnishers. These agencies have limited resources and public enforcement actions are largely limited to those most egregious actors. Further, state actions for violations of certain furnishing requirements are limited. A state can bring an action for damages only after the furnisher has violated an injunction.[99] While the CFPB has brought various actions against credit furnishers, there are thousands of companies that furnish credit information, and there is little indication individual private lawsuits under the FCRA and the CFPB's or FTC's actions alone are sufficient to meaningfully ensure that credit furnishers comply with their obligations.

The FCRA Limits the Ability of States to Protect Their Citizens from Harms Caused by Credit Reporting Problems

State efforts to narrowly tailor credit protections under state law, particularly where servicers' conduct is affirmatively regulated and changes to furnishing practices are merely a byproduct of this regulation, can succeed despite the preemption provisions of the FCRA.

In the face of widespread credit reporting and furnishing problems, state lawmakers have tried to protect their citizens and fill in some of these enforcement gaps.

For instance, in recent years, states have enacted sweeping laws in an attempt to regulate student loan servicers, including with regard to credit reporting. For example, Washington prohibits student education loan servicers from "[p]roviding inaccurate information to a credit bureau, thereby harming a student education loan borrower's creditworthiness, including failing to report both the favorable and unfavorable payment history of the student education loan."[100] California requires student loan servicers to apply "a partial payment in a manner that minimizes late fees and negative credit reporting."[101] Under Illinois law, when a borrower has a dispute the student loan servicer, the "servicer shall take reasonable steps to prevent negative credit reporting with respect to the borrower's or cosigner's account while the dispute is under review" among other requirements."[102] Other states have passed laws with similar requirements.[103] As discussed in the recommendations below, state efforts to narrowly tailor credit protections under state law, particularly where servicers' conduct is affirmatively regulated and changes to furnishing practices are merely a byproduct of this regulation, can succeed despite the preemption provisions of the FCRA.

The preemption issue is not limited to student loan legislation. For instance, the 1996 FCRA amendments also modified the provisions of the FCRA about how long certain criminal record information could appear on consumer reports, with the amended provisions allowing criminal convictions to be reported in perpetuity.[104] In response, various states passed laws after the amendments, including Colorado and Texas, limiting the temporal scope for which convictions can be reported.[105] These laws are most likely preempted.

Similarly, other states, including Maine and Texas have recently passed laws to protect their citizens limit the reporting of medical debt. Maine's statute provides in part "[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." [106] Texas law provided that consumer reporting agencies could not report "a collection account with a medical industry code, if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim[.]"[107] Courts, however, have found these laws to be preempted by the FCRA as well.[108]

In short, the FCRA's preemption provisions are severely limiting the ability of states to protect their citizens, and rendering null state laws that were passed to alleviate the harms caused by credit reporting.

Recommendations

The most straightforward way to fix the issues with the FCRA is through a congressional amendment to scale back preemption, allow private enforcement of § 1681s-2(a), explicitly provide for injunctive relief, and strengthen other aspects of the FCRA. But even short of amendment, there are other potential avenues for greater regulation of credit furnishers, and student loan servicers in particular.

- **The CFPB or the FTC should clarify that a consumer may submit a dispute not only on their behalf, but for systemic issues, on behalf of all similarly situated consumers.** If the consumer has reason to believe that there is a systemic issue and provides the basis for that belief in his dispute to the consumer reporting agency, the furnisher should be required to determine as part of its investigation whether there is a systemic issue and conduct the appropriate investigation and correct any inaccurate reporting on behalf of all affected consumers. Such representative disputes are fairly common in consumer law. For example, state consumer fraud statutes that require a consumer to send a notice prior to suit generally allow a consumer to the send a pre-suit notice on behalf of a putative class.[109] If the furnisher fails to correct the issue, the consumer should be able to sue the furnisher under the FCRA for violations of 15 U.S.C. 1681s-2(b) on behalf of the consumer and the putative class of similarly situated individuals subject to the same misreporting.

- **The CFPB should issue guidance or engage rulemaking regarding the consequences of a furnisher's failure to investigate systemic problems with credit furnishing.** Under § 1681s-2(b)(1), a furnisher is required to "conduct an investigation with respect to the disputed information" when it receives notice from a consumer reporting agency. Similarly, the FCRA and the CFPB's Furnisher Rule similarly require that a furnisher who receives a direct dispute from a consumer must "conduct a reasonable investigation with respect to the disputed information."[110] As part of such an investigation, the CFPB could make clear that if an inaccuracy is found, the furnisher must also to take steps to do a root cause analysis to ensure that the furnishing issue is not systemic or adversely affecting other consumers who may not have disputed. A failure of a furnisher to investigate and correct systemic issues underlying an individual dispute should be strong evidence of a willful violation of the statute, and serve as the basis for punitive damages or civil penalties in subsequent lawsuits or enforcement actions.

- **The CFPB or FTC should make clear that consumers may seek injunctive relief under the FCRA.** The decisions holding that consumers are unable to seek injunctive relief under the FCRA rely merely on negative inferences in the statutory language of the FCRA. Such reasoning conflicts with the Supreme Court's holding in *Califano,* that the Court retains the ability to issue injunctions unless Congress makes the "clearest command" to prohibit such relief. There is no such command in the FCRA. To restore consumers' access to injunctive relief as a remedy, the CFPB or the FTC should issue guidance or engage in rulemaking to clarify that Injunctive relief is available to private litigants under the FCRA.

- **The CFPB should make clear that a consumer complaint about the accuracy of information appearing on a credit report whether submitted to the Bureau or any other federal or state regulator constitutes a dispute under the FCRA.** Since 2012, the CFPB has accepted complaints from individual consumers related to credit reporting and, as described above, these complaints represent the largest category of consumer complaints in any consumer financial market covered by the CFPB. The terms of participation in the CFPB's consumer complaint system require firms, including furnishers and NCRAs, to determine and address the root cause of complaints submitted by consumers—a practice that may also be required by other regulators. Given the increasing reliance by consumers on the Bureau's Consumer Response system and the potential for consumer complaints to drive systemic changes to furnishers' or NCRAs' business practices, the CFPB should ensure that any credit reporting dispute is relayed to the NCRA's regardless of whether the consumer specifies a NCRA In the dispute. The CFPB should also update Regulation V to clarify that these complaints when submitted to the NCRAs trigger the NCRAs requirement under § 1681i(a)(2) to alert the furnisher, and thus would constitute a dispute under the FCRA, § 1681s-2(b). If a furnisher fails to correct inaccurate information identified in a consumer complaint, the consumer should be able to sue the furnisher under the FCRA for violations of 15 U.S.C. 1681s-2(b) on behalf of the consumer and the putative class of similarly situated individuals subject to the same misreporting.

- **States can enact statutes that seek to touch on credit furnishing, but advocates and policymakers must carefully consider preemption.** As seen above, many states have passed laws that involve credit reporting, in particular student loan servicing. It is likely that attempts to enforce those laws will face a preemption challenge. But simply because a statute mentions credit reporting does not mean that it is preempted under the FCRA. For example, California's requirement student loan servicers apply "a partial payment in a manner that minimizes late fees and negative credit reporting" does not impose any "requirements or prohibitions" on subject matters regulated by § 1681s-2 of the FCRA. The statute regulates how student loan servicers are to apply partial payments. It does not prescribe what credit bureaus must report, rather it offers credit protection to borrowers that flow from the affirmative regulation of specific servicing practice. The CFPB and FTC should consider amicus practice regarding the limited reach of FCRA preemption if these laws are challenged.

- **State enforcement authorities should look to enforce the FCRA.** FCRA violations are persistent and widespread. The FCRA empowers state officials to enforce the FCRA, including for violations unavailable to be enforced by private consumers, such as the duties on furnishers set forth § 1681s-2(a). 15 U.S.C. § 1681s(c). While there are limitations on bringing damages actions, injunctive relief is valuable and can provide relief for consumers beyond the borders of one state. Under the 2015 multi-state settlement, the NCRAs are required to provide the states with information regarding problematic furnishers, and the FCRA specifically states are allowed to use any authorized investigatory powers to determine whether FCRA violations are occurring.[111]

- **The Department of Education should vest borrowers with private enforcement rights via its contracts with student loan servicers.** The Department of Education's contracts with student loan servicers should restate current law, specifying that the loan servicer will comply with the FCRA's furnishing requirements and the CFPB's Furnisher rule.[112] These contracts should also establish that consumers are third party beneficiaries to this contractual provision. Any violation of these provisions with respect to a consumer's account would be a breach of contract enforceable by the consumer. Breach of contract claims should not subject to preemption because a contract is a voluntary undertaking and the duty imposed is not by state law but by the contract.[113]

Endnotes

[1] *See* Pub. L. No. 116–136 (2020) Section 3513(b).

[2] *See* Pub. L. No. 116–136 (2020) Section 3513(d).

[3] Readers should note that Great Lakes Educational Loan Services, Inc. (Great Lakes) is a subsidiary of Nelnet Inc., the parent company of both Great Lakes and Nelnet Servicing, LLC. Taken together, these businesses make Nelnet, Inc. the largest servicer of student loans and the largest furnisher of student loan credit information in the nation. See Nelnet, Our Businesses (accessed May 20, 2021), https://nelnetinc.com/businesses/.

[4] *Sass v. Great Lakes Educational Loan Services, Inc.,* Case No. 3:20-cv-3424-EMC, Declaration of Jill Leitl ¶¶6-9 (N.D. Cal. July 17, 2020)(ECF No. 48-1.); Michael Stratford, Emergency Relief Screw-Up Hits 5 Million Student Loan Borrowers, Politico (May 21, 2020) https://www.politico.com/news/2020/05/20/emergency-releif-student-loan-272334.

[5] U.S. Department of Education, Statement from the Chief Operating Officer of the Office of Federal Student Aid (May 21, 2020), https://twitter.com/FSACOO/status/1263614517759692801?s=20.

[6] Student Borrower Protection Center, Adding Insult to Injury (April 2021) (describing widespread noncompliance with CARES Act by various student loan servicers).

[7] *See generally* Chi Chi Wu, National Consumer Law Center, Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports (Jan. 2009) ("Automated Injustice").

[8] *See generally* CFPB, Key Dimensions and Processes in the U.S. Credit Reporting System (Dec. 2012), Section 3.1.1, p. 15, https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

[9] 12 C.F.R. § 1022.41.

[10] 15 U.S.C. §§ 1681-1681x.

[11] *Id.*

[12] *Id.*

[13] *See generally* Chi Chi Wu, National Consumer Law Center, Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports (Jan. 2009) ("Automated Injustice").

[14] *See, e.g., Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 268 (5th Cir. 2000).

[15] 15 U.S.C. § 1681t.

[16] Consumer Financial Protection Bureau, Payment Amount Furnishing & Consumer Reporting at 5 https://files.consumerfinance.gov/f/documents/cfpb_quarterly-consumer-credit-trends_report_2020-11.pdf.

[17] *See infra*, p. 8.

[18] For further discussion *see infra*, p. 15.

[19] *See* CFPB, Key Dimensions and Processes in the U.S. Credit Reporting System*, supra* n. 8.

[20] CFPB, Consumer Response Annual Report: January 1 – December 31, 2020 at 23 (March 2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf.

[21] *Id.*

[22] IBIS*World*, Credit Bureaus & Rating Agencies Industry in the US- Market Research Report (Mar. 9, 2021), https://www.ibisworld.com/united-states/market-research-reports/credit-bureaus-rating-agencies-industry/ (noting industry has grown at annual rate of 6.8% and industry revenues are $14.4 billion.)

[23] CFPB, *Data Point: Credit Invisibles* 9, 12 (2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

[24] National Consumer Law Center, "The Latest on Metro 2: A Key Determinant as to What Goes Into Consumer Reports (Oct. 17, 2018), https://library.nclc.org/latest-metro-2-key-determinant-what-goes-consumer-reports.

[25] *Id.*

[26]CDIA, Metro 2 Format for Credit Reporting (Accessed May 25, 2021, https://www.cdiaonline.org/resources/furnishers-of-data-overview/metro2-information/.

[27] CFPB, Payment Amount Furnishing & Consumer Reporting at 5 https://files.consumerfinance.gov/f/documents/cfpb_quarterly-consumer-credit-trends_report_2020-11.pdf.

[28] CFPB, CFPB Data Point: Becoming Credit Visible (June 2017), https://files.consumerfinance.gov/f/documents/BecomingCreditVisible_Data_Point_Final.pdf.

[29] *Id.*

[30] CFPB, Consumer Response Annual Report at 73 (Mar. 2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf.

[31] CFPB, *Key Dimensions and Processes in the U.S. Credit Reporting System,* supra note 8.

[32] VantageScore, About VantageScore (Accessed May 25, 2021), https://vantagescore.com/company/about-vantagescore.

[33] CFPB, *Key Dimensions and Processes in the U.S. Credit Reporting System,* supra note 8.

[34] Credit Karma, VantageScore vs. FICO: What's the difference? (Accessed May 24, 2021), https://www.creditkarma.com/advice/i/vantagescore-vs-fico#:~:text=Credit%20Karma%20provides%20VantageScore%C2%AE,your%20scores%20are%20based%20on.

[35] 15 U.S.C. § 1681c(a).

[36] Fair Isaac Corporation, What is a Payment History (accessed May 25, 2021). https://www.myfico.com/credit-education/credit-scores/payment-history.

[37] VantageScore vs. FICO, supra note 34.

[38]Fed. Trade Comm'n, Report to Congress under Section 319 of the Fair and Accurate Transactions Act of 2003, at 25 (2012), available at https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.

[39] CFPB, Consumer Response Annual Report at 8 (Mar. 2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf.

[40] CFPB, Consumer Response Annual Report at 26 (Mar. 2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf.

[41] 15 U.S.C. § 1681i.

[42] Chi Chi Wu National Consumer Law Center, Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports at 14-16 (Jan. 2009).

[43] *Id.*

[44] Chi Chi Wu, Michael Best, & Sarah Bolling Mancini, National Consumer Law Center, Automated Injustice Redux at 9 (Feb. 2019).

[45] Automated Injustice at 17-20.

[46] Automated Injustice at 17-24.

[47] CFPB, Supervisory Highlights: Consumer Reporting Special Edition (Winter 2017), https://files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf.

[48] Automated Injustice Redux at 14-15; *Myers v. Am. Educ. Servs.*, No. 1:18-CV-144, 2021 WL 859538, at *7 (S.D. Ohio Mar. 8, 2021) (finding that furnisher violated the FCRA when all it did to investigate "was compare the requested data on the ACDV form to its own internal records".)

[49] 12 C.F.R. § 1022.43(e)(2).

[50] CFPB Bulletin 2013-09 (Sept. 4, 2013).

[51] *See, e.g.,* Consent Order, *In the Matter of DriveTime Automotive Group, Inc. and DT Acceptance Corp.*, File No. 2014-CFPB-0017 (CFPB Nov. 19, 2014) Consent Order*, In Re State Farm Bank*, FSB File No. 2018-BCFP-0009 (B.C.F.P. Dec 6, 2018), Consent Order, *In re. Santander Consumer USA Inc.*, FSB File No. 2020-BCFP-0027 (B.C.F.P. Dec. 22, 2020), https://files.consumerfinance.gov/f/documents/cfpb_santander-consumer-usa-inc_consent-order_2020-12.pdf.

[52] Assurance of Voluntary Compliance § IV.H. A copy of the Assurance of Voluntary Compliance can be found on the Ohio Attorney General's website, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2015-05-20-CRAs-AVC.aspx.

[53] CFPB, Supervisory Highlights at 18 (winter 2016).

[54] CFPB v. Navient Corp., 3:17-cv-00101-RDM (M.D. Pa. January 18, 2017).

[55] *Washington v. Navient Corp.,* (King. Cty. Sup. Ct.); *Illinois v. Navient Corp.*, 2017-cg-761 (Cook. Cty.); *Pennsylvania v. Navient Corp.* 3-17-cv-01814 (M.D. Pa.); *California v. Navient Corp.*, Case No. CGC-18-567732 (San. Fran. Cty. Sup. Ct.)

[56] California v. Navient Corp., Case No. CGC-18-567732, First Am. Comp. ¶¶ 93-99 (San. Fran. Cty. Sup. Ct. Oct. 16, 2018).

[57] Student Borrower Protection Center, Adding Insult to Injury (April 2021) (describing widespread noncompliance with CARES Act by various student loan servicers).

[58] Since 2017, a Westlaw search of federal court docket filings and "Fair Credit" returns 184 results for Navient, 68 results for Great Lakes, 165 results for Pennsylvania Higher Education Assistance Agency (d/b/a American Education Services or Fedloan Servicing), 87 results Nelnet (d/b/a Nelnet Servicing or Firstmark Servicing), 34 results for Sallie Mae and 16 results Conduent (formerly Affiliated Computer Services or ACS, and for a period, Xerox Education Services or XES). These results, while not exact, suggest that student loan servicers have been sued hundreds of times over the past five years for alleged violations of the Fair Credit Reporting Act. The search results are most likely both overinclusive and underinclusive. The Westlaw docket search can miss some lawsuits especially those removed from state court. The same case can also return more than one result if the case number changed throughout the litigation such as due to a transfer or a change in presiding judge.

[59] Automated Injustice at 2 ("Part of the problem is that some furnishers (creditors or other companies that supply information to the credit bureaus) still conduct pro forma, perfunctory investigations into credit reporting disputes and ignore CFPB guidance to consider critical documents and information.").

[60] 15 U.S.C. § 1681(a)(1).

[61] 15 U.S.C. § 1681h(e).

[62] Public Law 91-509 (OCT. 26, 1970) 84 Stat. 1136, codified at 15 U.S.C. § 1681t.

[63] 15 U.S.C. § 1681o; 15 U.S.C. § 1681n.

[64] Alexandra P. Everhart Sickler, (Un)Fair Credit Reporting Act, 28 Loy. Consumer L. Rev. 238, 261 (2016); S. REP. 103-209, at 6. (quoting testimony of FTC's Director of Credit Practices "because the statute was designed to be largely self-enforcing, the capacity of consumers to bring private actions to enforce their rights under the statute is at least equally important").

[65] Lawrence D. Frenzel, Fair Credit Reporting Act: The Case for Revision, 10 Loy. L.A. L. Rev. 409, 429-30 (1977)

[66] Hearing before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance, and Urban Affairs, 102d Cong. 12 (1991) (Serial No. 102-45).

[67] 15 U.S.C. § 1681n; Consumer Credit Reporting Reform Act of 1996 (Public Law 104- 208, the Omnibus Consolidated Appropriations Act, for Fiscal Year 1997, Title II, Subtitle D, Chapter 1).

[68] *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (noting that statutory damages remedies allow for easier certification of classes).

[69] Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act at 2-3 (2011)

[70] 15 U.S.C. § 1681s-2(a)(1)(A)

[71] 15 U.S.C. § 1681s-2(a)(1)(B)

[72] 15 U.S.C. § 1681i(a).

[73] 15 U.S.C. § 1681s-2(b).

[74] 15 U.S.C. § 1681s-2(c).

[75] 15 U.S.C. § 1681s-2(d).

[76] 15 U.S.C. § 1681t

[77] 15 U.S.C. § 1681t(b)(1)(F). The Massachusetts and California statutory sections exempted from preemption are very similar to § 1681s-2(a). Mass. Gen. Laws Ann. ch. 93, § 54A ("Every person who furnishes information to a consumer reporting agency shall follow reasonable procedures to ensure that the information reported to a consumer reporting agency is accurate and complete. No person may provide information to a consumer reporting agency if such person knows or has reasonable cause to believe such information is not accurate or complete."); Cal. Civ. Code § 1785.25(a) ("A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate.")

[78] Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009.

[79] H.R. Rep. No. 108-263, at 24 (2003).

[80] Jill A. Conrad, Preemption Under the Fair Credit Reporting Act, 25 Annual Review of Banking & Financial Law 579, 588-98 (2006) (describing different approaches).

[81] *Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011); *see also Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 48 (2d Cir. 2011) (following *Purcell*); *Scott v. First S. Nat'l Bank*, 936 F.3d 509 (6th Cir. 2019) (same).

[82] *See, e.g.*, *Quigley v. Pennsylvania Higher Educ. Assistance Agency*, No. C00-1661CRB, 2000 WL 1721069, at *3 (N.D. Cal. Nov. 8, 2000) ("Civil Code section 1785.31 provides a private right of action for any person who suffers damages from a violation of the California Consumer Credit Act. Cal. Civ. Code § 1785.31(a). Subsection (g) and section 1785.31, however, are not included in the FCRA's exception to its preemption provision. That provision only exempts California Civil Code section 1785.25(a). Thus, based on a plain reading of the FCRA, any private right of action under the California Civil Code based on the wrongful acts of a "furnisher of information" is preempted by the FCRA."); *Leet v. Cellco P'ship*, 480 F. Supp. 2d 422, 433 (D. Mass. 2007) ("While the FCRA expressly exempts § 54A(a) from its preemptive reach, it includes no such exemption for § 54A(g)—the provision that creates a private cause of action for violations of § 54A(a).[6] In the Court's view, the absence of express language exempting § 54A(g) from the FCRA's preemption provision is fatal.")

[83] *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009); See also Cal. Civ. Code § 1785.25.

[84] *Id.* at 1171.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 1172.

[88] *Id.* at 1172-73.

[89] *Logan v. Bank of Am., N.A.*, No. 19-CV-11483, 2020 WL 1245124, at *5 (D. Mass. Mar. 16, 2020) (where the FCRA exempts Section 54A(a), but not Section 54A(g), preemption applies to private rights of action under the [Massachusetts credit reporting law].")

[90] *Burrell v. DFS Servs., LLC*, 753 F. Supp. 2d 438, 444 (D.N.J. 2010).

[91] *Id. at* 448-89.

[92] *White v. Experian Info. Sols., Inc.*, Case No. 05-cv-10170, ECF No. 338 (C.D. Cal. Aug. 8, 2019).

[93] *See Clark v. Trans Union, LLC,* Case No. 3:15-cv-00391 (E.D. Va.); *Clark v. Experian Info. Sols., Inc.*, No. 3:16-cv-00032 (E.D. Va.); *Thomas. v. Equifax Info. Servs., LLC*, Case No. 3:18-cv-00684-MHL (E.D. Va.).

[94] *See, e.g., Roe v. IntelliCorp Records, Inc.*, No. 12-cv-2288 (N.D. Ohio Nov. 12, 2013) (ECF No. 124) (providing $18 million dollars for consumers subjected to inaccurate reports and prohibiting defendant from selling "instant" background checks); *Thomas v. Backgroundchecks.com*, No. 3:13-cv-029 (E.D. Va. Feb. 20, 2015) (ECF No. 78) (providing $18 million dollars for consumers subjected to inaccurate reports and mandating improvement to defendant's processes); *Ernst v. Sterling Infosystems, Inc.*, No. 1:12-cv-8794 (S.D.N.Y. Jan. 9, 2015) (ECF No. 139) (providing $4.75 million for consumers with obsolete information on their background checks and requiring changes to processes for filtering out old information).

[95] *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

[96] *See, e.g.*, *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) ("We hold that the affirmative grant of power to the FTC to pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC.").

[97] *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 709 (6th Cir. 2009).

[98] This legislative history is set out in response to a dismiss in a case filed by a consumer seeking to get his background report corrected. *Cleary v. CoreLogic Rental Property Solutions, LLC*, Case No. 2:170cv014158 (E.D. Mich. Apr. 13, 2018)(ECF No. 15 at 15-19) (discussing legislative history).

[99] Although this report focuses on lowering procedural barriers to relief for private litigants, the FCRA also imposes procedural barriers to public enforcement by states. 15 U.S.C. 1681s(c)(5).

[100] Wash. Rev. Code Ann. § 31.04.027.

[101] Cal. Civ. Code § 1788.102.

[102] 110 Ill. Comp. Stat. Ann. 992/5-65.

[103] Va. Code Ann. § 6.2-2610; Conn. Gen. Stat. Ann. § 36a-850; 19 R.I. Gen. Laws Ann. § 19-33-12; Me. Rev. Stat. tit. 9-A, § 14-108.

[104] 15 U.S.C. § 1681c(a)(5).

[105] *Simon v. Directv, Inc.*, No. 09CV00852PABKLM, 2010 WL 1452853, at *3 (D. Colo. Mar. 19, 2010) (finding Coloardo law limiting reporting of convictions to be preempted by FCRA); Tex. Bus. & Comm. Code § 20.05(4) (limiting reporting of conviction information).

[106] 10 Me. Rev. Stat. Ann. § 1310-H(4).

[107] Tex. Bus. & Comm. Code 20.05(a)(5).

[108] *Consumer Data Indus. Ass'n v. Frey*, 495 F. Supp. 3d 10 (D. Me. 2020); *Consumer Data Indus. Ass'n v. Texas Through Paxton*, No. 1:19-CV-00876-RP, 2020 WL 4208248 (W.D. Tex. July 22, 2020).

[109] *See, e.g., McLellan v. Fitbit, Inc.*, No. 3:16-CV-00036-JD, 2018 WL 2688781, at *3 (N.D. Cal. June 5, 2018) (describing pre-suit demand letter sent on behalf of a class).

[110] 15 U.S.C. § 1681s-2(a)(8)(E)(i); 12 C.F.R. 1022.43(e)(1).

[111] 15 U.S.C. § 1681s(c)(3).

[112] Readers should note that this is not an exhaustive list of steps the Department of Education can take to use its contracting authority to preserve access to justice for student loan borrowers and restrict contractors' ability to raise defenses in private litigation and public enforcement actions. For further discussion, see Student Borrower Protection Center, Protect Student Borrowers: How Washington Can End Trump-Era Obstruction and Demand Justice in 2021 and Beyond (2020), https://protectborrowers.org/wp-content/uploads/2021/01/Trump_Obstruction.pdf.

[113] There is a split among courts whether the FCRA preempts breach of contract claims. *See Spencer v. Nat'l City Mortg.*, 831 F. Supp. 2d 1353, 1364 (N.D. Ga. 2011) (discussing authority before concluding the FCRA does not preempt breach of contract claims).