

FCRA AND PREEMPTION OF STATE LAW CLAIMS

With a view toward getting a full measure of justice for debtors who may have been wronged by a violation of the federal Fair Credit Reporting Act (FCRA), attorneys often will add to their pleadings claims under state law arising under the common law (court-made law) or state statutes.

Any time there is such a combination of federal and state causes of action, there is the potential for a defense based on federal preemption—the principle that when Congress passed federal legislation, it meant for such a remedy to take the place of and preclude any state law claims. In two recent cases, courts reached opposite results when this issue arose in lawsuits brought by debtors.

Welcome to My Credit Card

In the first case, the plaintiff's hospitality was punished when his houseguest took his credit card and racked up over \$7,000 in unauthorized charges. Upon discovering this, the plaintiff contacted the bank that had issued the card. The bank acknowledged that the charges had not been authorized and that the plaintiff was not personally liable for them. However, it then proceeded to refer the account to a collection agency.

Among the claims asserted by the plaintiff in the litigation that ensued were claims for libel, credit libel, and violation of a state consumer protection law. The bank's argument that the FCRA prevented these state law claims was rejected by a state supreme court. There are some specific preemption provisions in the FCRA, and one of them applies to the responsibilities of persons who furnish information to consumer reporting agencies. The bank's reliance on this provision for its preemption defense was misplaced.

The bank had been a furnisher of information, but the party to whom it had given that information was not a "consumer reporting agency"; it was instead just a debt collection agency. The agency collected the information on the plaintiff simply for the purpose of collecting an alleged debt, not to enable it to furnish a consumer report to another end user of that information.

You May Not Proceed

In the second case, a major bank allegedly told credit agencies that the plaintiff was behind on payments on a loan, even though the bank knew that she was not. When the plaintiff brought suit in federal court under the FCRA, she added state law causes of action for defamation, invasion of privacy, and negligence. After the FCRA claim had been dismissed for an unrelated reason, a federal appeals court ruled that the plaintiff was also precluded from going forward with her state law claims.

A pertinent provision in the FCRA states that no requirement or prohibition may be imposed under the "laws" of any state, but the lower court read this to refer only to state statutes, not to the common law of a state. The appeals court reversed the lower court. "Laws," as used in the

FCRA provision, must be read to embrace all sources of law, whether derived from the legislature or state court decisions. As the court put it, “what reason would the legislature have had for preempting state statutes regulating information to credit bureaus, while not preempting state common law regulating the same subject?”

THE MYSTERY OF THE OLD BANK ACCOUNT

Keeping track of personal finances can become like detective work when there is scant evidence of items such as an old bank account or a receipt for a safe-deposit box. This situation arises most commonly for executors of estates or for someone who is taking care of financial matters for an ill or elderly friend or relative.

The first job is to determine whether the financial institution is still open, has closed, or has merged with another entity. The Federal Deposit Insurance Corporation (FDIC) maintains “Bank Find,” an online database that allows you to trace the history of any FDIC-insured institution and to find contact information for open institutions.

Once the bank is located, you can ask whether the account is still there in your name or in that of a loved one. For inquiries about someone else’s account, expect to be asked to produce appropriate documents, such as a death certificate, a court appointment as an executor, or a power of attorney or similar directive from a living person.

If the account was classified as abandoned under state law, its contents would have been transferred to the unclaimed property office in the state of the owner’s last known address. You can check to see whether any property is being held by the state by using a website maintained by the National Association of Unclaimed Property Administrators (www.unclaimed.org).

When the account is tracked down, you can collect the assets by presenting satisfactory proof of ownership. If the assets wound up with the state, it is possible that the state will have sold off the assets because of lack of storage space. In that event, in most instances the original owner or heirs would still have the right to claim the proceeds from that sale.