PREEMPTION UNDER THE FAIR CREDIT REPORTING ACT

JILL A. CONRAD[*]

I. Introduction

Imagine you find an error on your credit report. Someone has used your identity to open a credit card, ran up huge charges and failed to make any payments, leaving delinquency notes on your credit report. Unsure of what to do, you access the Federal Trade Commission's ("FTC's") website to discover the procedures for fixing the error. The website informs you that you have rights under the Fair Credit Reporting Act ("FCRA" or "the Act") to have both the consumer reporting agency ("CRA") and the provider of the information fix the report.[1] The website tells you to mail both the CRA and the information provider an identity theft report with a letter describing the fraud.[2] You perform this action, including all of the required information in your correspondence. According to the website, this is all you should do and the CRA and information

[*] Student, Boston University School of Law (J.D. 2006).

[1] Federal Trade Commission, *Your National Resource About ID Theft* (2006), *at* http://www.consumer.gov/idtheft/con_resolv.htm#correct.

[2] *Id*.

provider will investigate and fix the fraudulent report.[3] Though it has been a worrisome experience, you feel that the situation has been resolved.

A few months later you request another copy of your credit report to make sure the erroneous information has been removed. You notice the credit card company is still reporting the collection account. You again report the fraud to the credit card company, but they still do not remove the false report from your credit report. The collection account on your credit report causes you to be denied for a mortgage on the new house you were about to buy. The credit card company knows the information may be false, but is refusing to do anything about it, causing you to be harmed. The website indicates the frequency of this situation with the concluding section entitled, "What should I do if I've done everything advised, and I'm still having problems?"[4] This section begins by noting, "[t]here are cases where victims do everything right and still spend *years* dealing with problems related to identity theft."[5] The website advises you to consult with an attorney if you have such a case.[6] Another portion of the FTC's website lists your rights under the FCRA, stating:

> You may seek damages from violators. If a consumer reporting agency, or in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.[7]

Is this an accurate statement of the law? Will suing the credit card company resolve your problem? And what about the harm you incurred because of the fraudulent report?

Though Congress passed the FCRA to protect consumers, whether you may take any action to protect yourself in this situation remains unresolved due to two conflicting provisions in the statute. You may be surprised to learn that in some district courts, you have no remedy against the falsely reporting credit card company and are

---

[3] *Id*.
[4] *Id*.
[5] *Id*. (emphasis added).
[6] *Id*.
[7] Federal Trade Commission, *A Summary of Your Rights Under the Fair Credit Reporting Act* (2006), *at* http://www.ftc.gov/bcp/conline/pubs/credit/fcrasummary.pdf.

left with the sole recourse of asking the FTC to investigate the company. In other courts, you may be denied any claim against the credit card company because they acted *after* they knew the information was false. In yet another district court, you may be able to recover tort damages, but only if you can prove the credit card company meant to harm you. What result did Congress intend and how can the courts interpret the law to reach this result?

In 1968, Congress enacted the FCRA as part of a package of consumer protection legislation.[8] It stated the purpose of this legislation was:

> [t]o safeguard the consumer in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit; by restricting the garnishment of wages; and by creating the National Commission on Consumer Finance to study and make recommendations on the need for further regulation of the consumer finance industry; and for other purposes.[9]

The original statute contained numerous provisions, including Section 1681h, regulating disclosure to consumers, and Section 1681t, discussing the role of state laws in the area of consumer protection. Since the original enactment, Congress has amended the FCRA numerous times.[10]

In 1996, Congress added subsections (b) through (d) to Section 1681t, providing exceptions to Section 1681t(a)'s general allowance of state regulations that are consistent with the FCRA.[11] The exception in subsection (b)(1)(F) has caused a great deal of confusion among the district courts in trying to concurrently read Sections 1681h(e) and 1681t. Multiple interpretations of the interaction of these two sections have emerged. Both Congress and higher courts, which have yet to hear an appeal of one of the cases, have largely ignored the confusion. In 2003, Congress again amended the FCRA.[12] These amendments did not alter Section

---

[8] Pub. L. No. 90-321, 82 Stat. 146 (2003).
[9] *Id*.
[10] *Id*.
[11] 15 U.S.C. § 1681t (2006).
[12] Pub. L. No. 108-159, 117 Stat. 1952 (2003).

1681h, and changed some of the language in Section 1681t. Congress, however, made no mention of the interaction of the two.[13]

A. Section 1681h

Section 1681h regulates disclosures to consumers.[14] This provision requires CRAs to obtain proper identification from consumers who wish to view the information in their credit files.[15] The information must be furnished in written form, unless the consumer requests otherwise.[16] After describing these requirements, the statute imposes a limitation on CRA liability.[17] Section (e) provides,

> Except as provided in 15 U.S.C. §§ 1681n and 1681o, 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 15 U.S.C. § 1681g, 1681h, or 1681m, 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*.[18]

This section therefore prevents consumers from bringing the specified claims against someone who furnishes information to a CRA (a "furnisher") based on the report unless the furnisher put the false information on the report with the intention of harming the consumer.[19]

---

[13] *See id*.
[14] 15 U.S.C. § 1681h (2006).
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*. (emphasis added).
[19] 15 U.S.C. § 1681h.

The language "in the nature of" indicates a non-exhaustive list of prohibited claims,[20] but Sections 1681n and 1681o are expressly excluded from this prohibition.[21] Section 1681n imposes liability on any person who "willfully fails to comply" with the requirements of the FCRA.[22] Section 1681o imposes similar liability when the person fails to comply with the requirements due to negligence.[23] The phrase "information disclosed" refers to Sections 1681g, 1681h, and 1681m.[24] Section 1681g pertains to information on file with the CRAs, the source of such information, and the identities of those who have requested the information.[25] Section 1681h regulates the issuance of information disclosed under Section 1681g.[26] Section 1681m concerns the notice given when a person takes adverse action because of the information contained in a credit report.[27]

Early cases interpreting Section 1681h(e) found that it specifically provided for actions "in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information."[28] Courts saw the limitations set out in Section 1681h(e) as preventing these types of actions only when the plaintiff did not allege or prove malice or willful intent.[29] "In a defamation action pursuant to proper disclosure under the Act, the Act can be said to preempt the state's common law at least to the extent that a qualified immunity exists and the standard of 'malice or willful intent to injure' must be met by complainant to overcome this immunity."[30] Though Congress amended Section 1681h in 1996, it left subsection (e) untouched.[31] In spite of this, courts began to change their interpretation of Section 1681h following the passage of Section 1681t(b).

---

[20] *See id*.
[21] *Id*.
[22] 15 U.S.C. § 1681n (2006).
[23] 15 U.S.C. § 1681o (2006).
[24] 15 U.S.C. § 1681h.
[25] 15 U.S.C. § 1681g (2006).
[26] 15 U.S.C. § 1681h.
[27] 15 U.S.C. § 1681m (2006).
[28] Thornton v. Equifax, Inc., 619 F.2d 700, 703 (8th Cir. 1980).
[29] *Id*.
[30] *Id*. at 704.
[31] *See* 15 U.S.C. § 1681h.

B. Section 1681t

Section 1681t describes the relationship between the FCRA and state laws which regulate consumer credit reporting.[32] It begins with the general statement,

> Except as provided in subsections (b) and (c), this 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 provision of this title, and then *only* to the extent of the inconsistency.[33]

Subsection (b) includes a long list of exceptions to this general rule: state law may not impose any requirements relating to such topics as prescreening consumer reports, the amount of time a CRA can take to respond to disputed information, the information which must appear in reports, the responsibilities of people who furnish information for the reports, or the exchange of information for marketing purposes.[34] The section also includes exceptions for specific state statutes which were already in effect at the time Congress enacted Section 1681t.[35] Subsection (c) prohibits state laws regarding "firm offer of credit or insurance" from interpreting that term in any way other than in accordance with the federal definition in Section 1681a(l).[36] Section 1681t therefore seems to limit preemption through the general rule in subsection (a). However, because of the numerous exceptions in subsections (b) and (c), preemption may be more authorized than limited.[37] In particular, Section 1681t(b)(1)(F) provides,

> No requirement or prohibition may be imposed under the laws of any state with respect to *any*

---

[32] 15 U.S.C. § 1681t.
[33] *Id*. (emphasis added).
[34] *Id*.
[35] *Id*.
[36] 15 U.S.C. § 1681t.
[37] *Id*.

> *subject matter* regulated under 15 U.S.C. § 1681s-2, 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 the date of enactment of the Consumer Credit Reporting Reform Act of 1996); or (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996).[38]

Section 1681s-2 imposes duties on furnishers to report accurate information and to investigate disputed information.[39] Therefore, Section 1681t(b)(1)(F) also seems to restrict state regulation of furnishers.[40] The Massachusetts exemption reads,

> 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.[41]

The excepted California law similarly provides, "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."[42] Both of these statutes parallel the cited federal section, which states that, "[a] person shall not furnish 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."[43] However, Section 1681s-2 goes on to describe numerous other duties of those

---

[38] *Id*. (emphasis added).
[39] 15 U.S.C. § 1681s-2 (2006).
[40] 15 U.S.C. § 1681t.
[41] MASS. GEN. LAWS ch. 93, § 54A(a) (2006).
[42] CAL. CIV. CODE § 1785.25(a) (2006).
[43] 15 U.S.C. § 1681s-2(a)(1)(A).

who furnish information to consumer reporting agencies.[44] Each of these three provisions governs the duty owed to the agencies, rather than to the consumer whose information is being reported. It should also be noted that Congress specifically exempted only small portions of these state laws.[45] Both the Massachusetts and the California statutes contained subsections concerning furnisher liability which Congress did not exempt from the FCRA[46]

Although the first enacted version of the FCRA included Section 1681t, the original language only contained subsection (a), providing that the title did not affect compliance with state laws.[47] In amending the Act in 1996, Congress created the exceptions to the general rule with the addition of subsections (b) and (c).[48] At this time courts began to develop different views of the interaction of the FCRA and state law. In 2003, when Congress again amended the Act, it ignored these conflicting district court views and failed to change Section 1681t(b)(1)(F).[49]

C. Preemption

Congress's authority to regulate consumer reporting agencies comes from Article I, section eight of the Constitution. The Commerce Clause states, "The Congress shall have Power . . . To regulate Commerce . . . among the several States."[50] Since consumer reporting agencies facilitate commerce across the country, their regulation readily fits within the sphere of Congressional authority. This is logical, as consumers engage in transactions outside their home states which may appear on their credit reports. If consumer reporting agencies were subject to different requirements in different states, users of the consumer reports would have difficulties evaluating the information. Without a common reporting structure, the system would fail to be as useful. However, the existence of federal power to regulate an area does not necessarily mean states cannot also enact laws to provide further protection for their citizens.

---

[44] 15 U.S.C. § 1681s-2.
[45] 15 U.S.C. § 1681t.
[46] *See* MASS. GEN. LAWS ch. 93, § 54A(g); CAL. CIV. CODE § 1785.25(g).
[47] 15 U.S.C. § 1681t.
[48] *Id*.
[49] *Id*.
[50] U.S. CONST. art. I, § 8, cl. 3.

As the Supreme Court has stated, "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law."[51] This power is found in the Supremacy Clause, which states "[the] Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[52] Given this clear articulation of federal legislative supremacy, courts have been reluctant to find preemption without clear Congressional intent.

There are, however, three recognized ways in which preemption may occur. The first type is *explicit preemption*, where Congress asserts in a statute regulating an area that state law is preempted. The Court has observed, "[i]t is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms."[53] Second, *field preemption* occurs when Congress has made laws in an area such that there is nothing left for the states to regulate. Courts have rarely recognized this type of preemption. The Supreme Court has only found complete preemption of state law under the Labor Management Relations Act of 1947 and the Employee Retirement Income Security Act.[54] Finally, *conflict preemption* merely prevents states from enacting statutes which are contrary to the federal law. When a federal statute preempts state law, it does not necessarily render every related state law ineffective. The Court has noted, "a state cause of action that seeks to enforce a federal requirement does not impose a requirement that is different from, or in addition to, requirements under federal law."[55] Therefore, state causes of action are not preempted so long as they are "*genuinely* equivalent" to the federal requirements.[56]

---

[51] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2002).
[52] U.S. CONST. art. VI.
[53] Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-204 (1983).
[54] Ben. Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).
[55] Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 448 (2005) (citations omitted).
[56] *Id*. at 454.

II. The Conflicting District Court Views

The District Courts which have heard cases involving the preemption of state law under the FCRA have developed multiple approaches for resolving the issue. Some courts have held that the 1996 amendments to the FCRA rendered Section 1681h(e) useless. Many district courts have found a distinction between whether the state law at issue is a derived from statutory or common law. Other courts used a "temporal approach," finding that the issue turns on when the furnisher of information learns of the possible inaccuracy. Finally, some courts devised their own approaches, or failed to notice the conflict. The following sections provide an outline of these approaches, and use specific cases to illustrate their underlying reasoning.

A. Total Preemption

Under the total preemption approach, courts interpret the specific language in Section 1681t(b)(1)(F) as preempting all state law on the subject.[57] The courts essentially ignore Section 1681h(e) in this analysis. Instead, they focus solely on Section 1681t. Reading through Section 1681t, courts have found subsection (a) to assert a general assumption that the FCRA does not preempt state laws.[58] Then, subsection (b) lists the exceptions to this generalization.[59] Because a specific provision should override a more general provision, the subsection (b) list enumerates when the FCRA does preempt state laws.[60] Since Section 1681t(b)(1)(F) relates to "the responsibilities of persons who furnish information to consumer reporting agencies," no state law can regulate this area.[61] These courts conclude, "[t]he plain meaning of section 1681t(b)(1)(F) . . . expresses Congress's intent to preclude state law claims against furnishers of information, and instead to subject them solely to the FCRA."[62] The courts further support this position with the policy argument that Congress did not intend to have the duties

---

[57] Howard v. Blue Ridge Bank, 371 F. Supp. 2d 1139, 1144 (N.D. Cal. 2005).
[58] *Id*. at 1143.
[59] *Id*. at 1144.
[60] *Id*.
[61] *Id*.
[62] *Id*.

of furnishers and the remedies for violation of those duties vary depending on the state in which the plaintiff filed suit.[63] However, the total preemption approach provides only for preemption of state law claims against furnishers; the FCRA does not preempt state law against CRAs.[64] As such, this limitation does not provide support for the policy argument, as CRAs could still be subject to varying duties in different states.

When Richard Howard found that CRAs had reported inaccurate information on his credit report, based on information a few banks provided, he contacted both the CRAs and the furnishers to dispute the information.[65] After these parties continued to report the information for two years, Howard filed suit in a district court in the Ninth Circuit, alleging both the CRAs and the furnishers violated the FCRA and California law.[66] The furnishers moved to dismiss the claims against them, arguing the claim under the FCRA failed to plead the requisite scienter and the FCRA preempts the state claim.[67] The court granted dismissal of the Section 1681s-2 claim, finding the plaintiff insufficiently alleged the claim.[68] The court gave Howard an opportunity to amend the claim to allege willful violation and support the claim with sufficient facts.[69] The court noted that the Ninth Circuit had recognized a private right of action under Section 1681s-2(b), but not under Section 1681s-2(a).[70] According to the Ninth Circuit, a consumer can bring an action based on a furnisher's violation of its duties after the consumer reported the inaccuracy of the reported information to a CRA.[71] Therefore, the plaintiff in *Howard* could bring this claim.[72]

In addressing the state law claim, the court examined both parties' arguments.[73] The defendant claimed the FCRA preempted the claim.[74] The plaintiff responded that because the state statute was consistent with the FCRA, and simply provided additional state

---

[63] *Id*.
[64] *Id*. at 1145 n.4.
[65] *Id*. at 1141-1142.
[66] *Id*. at 1142.
[67] *Id*. at 1142-1143.
[68] *Id*. at 1143.
[69] *Id*.
[70] *Id*. at 1146.
[71] *Id*.
[72] *Id*.
[73] *Id*. at 1143.
[74] *Id*.

relief, the court should not find preemption.[75] The court examined the language of Section 1681t(b)(1)(F) and found that it preempted any state law providing a remedy against a furnisher of information.[76] After adopting the total preemption approach, the court ruled that the FCRA preempted the plaintiff's claim under California law and dismissed this claim.[77]

B. Temporal Approach

Under the "temporal approach," the decisive factor in the court's determination regarding preemption is the timing of when the furnisher receives information about an inaccuracy.[78] Notice may be from either a CRA or from the consumer.[79] The reasoning behind this approach is that the FCRA only preempts state claims if the furnisher knew or had reason to know the information may not be true.[80] This is based on a limited reading of Section 1681t(b)(1)(F) and its preemption of state laws relating to Section 1681s-2.[81] This narrow reading finds that Section 1681s-2(b) governs the duties of a furnisher only after a CRA has given the furnisher notice of a dispute, and that Section 1681s-2(a) governs these duties only after a consumer notifies the furnisher of a dispute.[82] After a person reports the problem to the furnisher, the furnisher's actions fall within Section 1681s-2, and Section 1681t(b)(1)(F) preempts any state law governing such actions at this time. However, if no one has informed the furnisher of a question about the information, Section 1681s-2 does not apply.[83] Therefore, a state law which regulates the responsibilities of a furnisher prior to its receipt of this notification does not conflict with Section 1681s-2, and Section 1681t(b)(1)(F) does not preempt it.[84] Only Section 1681h(e) can regulate claims brought against a furnisher for actions which took place in this time

---

[75] *Id*.
[76] *Id*. at 1143-1144.
[77] *Id*. at 1144.
[78] Kane v. Guaranty Residential Lending, Inc., 2005 U.S. Dist. LEXIS 17052, *21 (E.D.N.Y. 2005).
[79] *Id*. at *21.
[80] *Id*. at *20.
[81] *Id*.
[82] *Id*. at *22.
[83] *Id*.
[84] *Id*. at *22-23.

period.[85] Thus, a consumer can only bring a cause of action if the consumer meets the requirements of Section 1681h(e) by alleging the furnisher had malice or willful intent to injure the consumer.[86]

In *Kane v. Guaranty Residential Lending, Inc.*, two homeowners refinanced the mortgage on their house through Guaranty Residential Lending, Inc. ("GRL").[87] They made their monthly payments on time, even after the mortgage was assigned to another company and reassigned back to GRL.[88] However, a little over a year after the refinancing, GRL told the Kanes they were in arrears and had defaulted on the loan.[89] The Kanes disputed this, telling GRL they had timely made all of their payments and sent GRL proof of this.[90] GRL maintained that the Kanes were in default, even after the Kanes repeatedly contacted GRL with proof of their payments.[91] GRL then reported the default to CRAs, which added the incorrect information to the Kanes' credit reports.[92] The Kanes were later denied credit due to the error, after which they filed suit against GRL in state court, alleging defamation and irreparable harm.[93] GRL removed the case to federal court and sought dismissal of the suit.[94]

The District Court for the Eastern District of New York, a court within the Second Circuit, analyzed the Kanes' claims under the FCRA.[95] The court defined, "[f]urnishers of information are entities that transmit, to credit reporting agencies, information relating to debts owed by consumers."[96] The court found the defendant met this definition and was therefore subject to the Section 1681s-2(a) and (b) duties of furnishers.[97] The court found the plaintiffs alleged the defendant violated Section 1681s-2(a) which forbids an entity from providing information to a credit reporting

---

[85] *Id*.
[86] *Id*. at *23.
[87] *Id*. at *1.
[88] *Id*. at *2-3.
[89] *Id*. at *3.
[90] *Id*.
[91] *Id*.
[92] *Id*. at *4.
[93] *Id*.
[94] *Id*. at *2.
[95] *Id*. at *5.
[96] *Id*. at *6.
[97] *Id*. at *7.

agency when the consumer has disputed the information.[98] However, the court stated, "[i]t is by now well established that an individual consumer may not bring a cause of action for the violation of Section 1681s-2(a)."[99] Instead, only the identified federal and state officials can enforce that subsection.[100] Therefore, the court ruled the plaintiffs were not entitled to proceed on their claims under Section 1681s-2(a), but should report the issue to the FTC.[101]

The duty of a furnisher of information under Section 1681s-2(b) to investigate questionable information only arises when a credit reporting agency notifies the furnisher of a dispute.[102] "Notice from an individual consumer, in the absence of notice from a credit reporting agency, is insufficient to trigger the duties contained in Subsection (b)."[103] In *Kane*, the court found a private right of action under Section 1681s-2(b), but ruled the right only arises when the duty is triggered.[104] Therefore, the plaintiffs did not satisfy the requirements to bring a cause of action under the FCRA.[105] The court then discussed the plaintiffs' state law claims and preemption under Sections 1681h(e) and 1681t(b)(1)(F), noting, "[t]he Courts of Appeals have not yet weighed in on how these two provisions should be reconciled, and the District Courts have come up with at least three different approaches to applying [these] Sections."[106]

The court stated the FCRA preempted the plaintiffs' claims, but went on to describe the three different approaches.[107] The court found the "total preemption approach" to be attractive if it only considered the language of Section 1681t(b)(1)(F), but noted Congress did not repeal Section 1681h(e), so it should not be rendered meaningless unless no other interpretation was possible.[108] The court found the "temporal approach" attempted to reconcile the two provisions while relying on the canon of construction stating every statutory provision is presumed to have significance.[109] The

---

[98] *Id*. at *8-9.
[99] *Id*. at *9-10.
[100] *Id*. at *10.
[101] *Id*. at *10-11.
[102] *Id*. at *11.
[103] *Id*. at *12.
[104] *Id*.
[105] *Id*. at *14.
[106] *Id*. at *15.
[107] *Id*. at *16.
[108] *Id*. at *19-20.
[109] *Id*. at *20.

court criticized the "statutory approach"[110] for having no basis in the language of Section 1681t(b)(1)(F).[111] The court found the temporal approach to be the best of the options.[112] Since the defendant's alleged actions occurred *after* the plaintiffs gave the defendant notice of the inaccuracy, the FCRA preempted all state law claims.[113] Even if some of the defendant's actions took place prior to the receipt of notice, the court found the plaintiffs had not alleged malice or willful intent, but mere negligence.[114] Therefore, Section 1681h(e) preempted these claims.[115]

C. Statutory Approach

Under the "statutory approach," courts distinguish claims based on state common law from those based on state statutory law.[116] Like the temporal approach, the statutory approach attempts to give meaning to both of the conflicting provisions of the FCRA.[117] The courts focus on the specificity of the language in Section 1681t.[118] One court looked to the dates given in multiple subsections by which certain state laws must have been effective in order to receive exemption from preemption, reasoning that these effective dates indicate Congress intended the section to only apply to state statutes, since state common law does not have a date of enactment.[119] Another court placed emphasis on the Section 1681t(b)(1)(F) exemption for the Massachusetts and California statutes.[120] This court noted Section 1681t(b) contained other exemptions for specified state statutes, but observed the Section did not mention any exemptions for state common law.[121] As such, the

---

[110] *See infra* text at Section II.C.
[111] 2005 U.S. Dist. LEXIS 17052, at *23-24.
[112] *Id*. at *24.
[113] *Id*. at *25.
[114] *Id*. at *26.
[115] *Id*. at *28.
[116] Barnhill v. Bank of America, N.A., 378 F. Supp. 2d 696, 703 (D.S.C. 2005).
[117] *Id*.; DiPrinzio v. MBNA America Bank, N.A., 2005 U.S. Dist. LEXIS 18002, *16-18 (E.D. Pa. 2005).
[118] *Barnhill*, 378 F. Supp. 2d at 703.
[119] Watson v. Trans Union Credit Bureau, 2005 U.S. Dist. LEXIS 7376, *23 (D. Me. 2005).
[120] *Barnhill*, 378 F. Supp. 2d at 703.
[121] *Id*.

court reasoned Congress meant to exclude reference to common law in Section 1681t because Section 1681h(e) already covered such actions.[122] The court found this decision to be consistent with the canon of statutory construction stating when two provisions conflict, the more specific provision should triumph over the general provision.[123] A third court quoted the language of Section 1681(b)(1)(F) restricting its application to "the responsibilities of persons who furnish information."[124] The court then determined this language was too specific to preempt all claims under state law.[125] Instead, the court stated, "section 1681(t)(b)(1)(F) clearly reflects Congress' desire to prohibit all state *statutory* regulations pertaining to the accurate reporting of credit information."[126] Examining the language of Section 1681h(e), which applies the section to actions "in the nature of defamation, invasion of privacy, or negligence,"[127] the court found this limitation "strongly suggests" Congress meant Section 1681h(e) to apply solely to state common law torts.[128] The court then looked at the two sections together, finding it "clear" that Section 1681t(b) covers state statutes and Section 1681h(e) covers state common law.[129] Yet another court found a convincing distinction based on the language of applicability in Section 1681h(e) and the Section 1681t(b)(1)(F) exemption of two state statutes.[130] That court was further persuaded by the general language in 1681t(a) which states, "this 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."[131]

In 1996, Patricia Nelski discovered someone had used her identity to open a telephone account and a credit card.[132] Nelski reported the fraud to the telephone and credit card companies, which told her the error would be fixed.[133] In 1999, Nelski found out the

---

[122] *Id*.
[123] *Id*.
[124] 2005 U.S. Dist. LEXIS 18002, at *19.
[125] *Id*.
[126] *Id*. (emphasis added).
[127] *Id*.
[128] *Id*. at *20.
[129] *Id*.
[130] Nelski v. Ameritech, 2004 Mich. App. LEXIS 1798, *16 (2004).
[131] *Id*. at *17.
[132] *Id.* at *1-2.
[133] *Id*. at *2.

companies continued to report the information on her credit report.[134] After a further failed attempt to have the company stop reporting the false information, Nelski filed suit in state court alleging defamation and FCRA violations.[135] The company removed the FCRA claims to a federal district court in the Sixth Circuit, where the court resolved them.[136] The state trial court granted summary judgment to the defendants on the defamation claim, finding the FCRA preempted the state law claim.[137] On appeal, the court found that the defendants were furnishers of information under the FCRA.[138] After noting the conflict between Section 1681h(e) and Section 1681t(b)(1)(F) and the numerous approaches to resolving this conflict, the court opted for the statutory approach.[139] Following this approach, Section 1681t(b)(1)(F) did not preempt the plaintiff's claim, as the trial court had ruled.[140] Instead, the appellate court applied Section 1681h(e) to settle the preemption question.[141] Because the plaintiff had sufficiently alleged scienter, the court found Section 1681h(e) did not preempt her claim, and remanded the case to the trial court.[142]

In July 1999, First Union issued a joint credit card to Claudia DiPrinzio and her husband.[143] The couple separated two years later, then divorced in April 2002.[144] Soon after the divorce, MBNA, which had purchased the account from First Union, contacted DiPrinzio regarding the amount due on the card.[145] DiPrinzio learned her husband had received a cash advance from the card after their separation without her permission.[146] DiPrinzio informed MBNA of the situation, and refused to pay the balance her ex-husband had accrued.[147] Instead of investigating her claim, MBNA

---

[134] *Id*.
[135] *Id*. at *1-2.
[136] *Id*. at *1.
[137] *Id*.
[138] *Id*. at *4.
[139] *Id*. at *9-17.
[140] *Id*. at *17.
[141] *Id*. at *18.
[142] *Id*.
[143] DiPrinzio v. MBNA America Bank, N.A., 2005 U.S. Dist. LEXIS 18002, *2 (E.D. Pa. 2005).
[144] *Id*.
[145] *Id*.
[146] *Id*.
[147] *Id*. at *3.

continued to demand payment from DiPrinzio.[148] MBNA also furnished negative information about the account to CRAs, omitting the fact that DiPrinzio disputed the account.[149] DiPrinzio then reported the dispute to the CRAs.[150] One CRA asked MBNA about the disputed account, but MBNA stated the information it had reported was accurate.[151] DiPrinzio then filed suit against MBNA in a district court in the Third Circuit, alleging violations of the FCRA, Pennsylvania Consumer Protection Law, and common law negligence.[152] In summary judgment motions, the defendant argued the plaintiff's allegations did not meet the elements of Section 1681h(e) because the omission of the dispute from the report made the report incomplete, instead of false, and the defendant lacked the requisite scienter.[153] The court rejected both of these arguments, and refused to grant summary judgment based on Section 1681h(e).[154]

In rejecting the defendant's next argument, that Section 1681t(b)(1)(F) subsumed Section 1681h(e), the court held their inconsistency should be resolved under the statutory approach.[155] Using this approach, the court found the Pennsylvania Consumer Protection Law claim was based on state statute, and thus was preempted by Section 1681t(b)(1)(F).[156] The section did not preempt the claim of common law negligence, and, accordingly, the court denied summary judgment.[157] Discussing the defendant's motions to limit damages, the court held the plaintiff might be able to recover punitive damages under both the FCRA and Pennsylvania law if the facts adduced at trial justified such damages.[158]

The Barnhills cosigned a car loan with their son in 1996.[159] When he defaulted on the loan, the bank repossessed the car and sold it.[160] The bank next sought to recover the difference in the loan

---

[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] *Id*. at *3-4.
[152] *Id*. at *4.
[153] *Id*. at *9-15.
[154] *Id*. at *15.
[155] *Id*. at *18.
[156] *Id*. at *23.
[157] *Id*.
[158] *Id*. at *23-28.
[159] Barnhill v. Bank of America, N.A., 378 F. Supp. 2d 696, 697 (D. S.C. 2005).
[160] *Id*.

value and the amount recovered from the sale from the Barnhills.[161] In 2002, the Barnhills reached an agreement whereby they would pay the bank for final discharge of the loan.[162] Months after this agreement, the bank informed the Barnhills it would collect on the debt and withdrew funds from the Barnhills' accounts for this purpose.[163] The Barnhills hired an attorney, prompting the bank to return the funds to the accounts.[164] In 2005, three years after the agreement with the bank, another company contacted the Barnhills, stating the bank had assigned the debt to it, and the Barnhills owed it a substantial amount of money.[165] The bank had also notified a CRA multiple times, reporting the Barnhills were late on payments.[166] The Barnhills filed suit against the bank in state court, claiming negligence, libel, and violation of the Fair Debt Collection Practices Act ("FDCPA"), and against the debt collection company, alleging negligence.[167]

The defendants removed the case to a federal court within the Fourth Circuit, where the bank moved to dismiss.[168] The court dismissed the FDCPA claims, finding that the bank was not a "debt collector" under that statute.[169] In analyzing the defendant's allegation that the FDCA preempted the Barnhill's claims, the court noted the three district court approaches to the preemption question.[170] After evaluation of the options, the court chose the statutory approach.[171] Under this approach, the court denied the defendant's motion to dismiss the plaintiffs' claims for libel and negligence which alleged "malice or willful intent to injure."[172] The court found Section 1681h(e) preempted only those claims which did not allege this level of scienter, and dismissed these claims.[173] The court determined the claims which it had not dismissed were solely

---

[161] *Id.*
[162] *Id.*
[163] *Id.*. at 698.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* at 699.
[171] *Id.* at 704.
[172] *Id.* at 704-705.
[173] *Id.* at 705.

state issues, so it remanded the case back to the state court for their resolution.[174]

In 2001, Charles Watson, an incarcerated man, discovered his credit report contained statements that he had requested credit from several sources.[175] Watson notified the CRA that he was not requesting credit from any source, due to his incarceration.[176] Watson requested the addresses of the creditors, which included Cingular, and informed each of the situation.[177] Watson contacted Cingular about the problem, advising them that he could not have opened a wireless telephone account because he was in prison.[178] Nonetheless, Cingular issued credit to the person using Watson's name.[179] In 2003, Cingular continued to report the account as in collection.[180] The CRA removed the information from Watson's report, but in 2004 began reporting it again.[181] Watson then filed suit against the CRA and Cingular in a First Circuit district court, alleging professional negligence for ignoring Watson's dispute, state law negligence for reinstating the information on Watson's credit report, and violation of the FCRA.[182] Cingular moved to dismiss.[183] The court found Watson had a private right of action under FCRA Section 1681s-2(b)(1) for Cingular's violation of its duties as a furnisher,[184] and denied dismissal of this claim.[185] In addressing the defendant's preemption argument, the court decided to apply the statutory approach,[186] reading Watson's complaint as alleging negligence.[187] Because Watson's claims did not meet the scienter requirements of Section 1681h(e), the court dismissed the state law claims.[188]

---

[174] *Id.*
[175] Watson v. Trans Union Credit Bureau, 2005 U.S. Dist. LEXIS 7376, *2 (D. Me. 2005).
[176] *Id.*
[177] *Id.* at *3.
[178] *Id.*
[179] *Id.*
[180] *Id.* at *3-4.
[181] *Id.* at *4.
[182] *Id.* at *7.
[183] *Id.*
[184] *Id.* at *10.
[185] *Id.* at *28.
[186] *Id.* at *23.
[187] *Id.* at *25.
[188] *Id.* at *28.

D. Other Approaches

Other courts have used different approaches to the preemption question. One district court in the Eighth Circuit and another in the Ninth Circuit have decided simply that the FCRA does not preempt all state law claims, but left the question of how to resolve the conflict between Sections 1681t(b)(1)(F) and 1681h(e) unanswered.[189] Similar to both the temporal and statutory approaches, this approach interprets the language of Section 1681h(e) as allowing state claims.[190] Under Section 1681h(e), the FCRA only preempts state claims which do not allege malice or willful intent to injure.[191] Congress's addition of Section 1681t(b)(1)(F) therefore meant to preempt the specified area; it did not provide for complete preemption.[192] Thus, "§ 1681t does not trump §1681h(e)."[193] A district court in the Fourth Circuit held the FCRA only preempts state common law claims based on subject matter under Section 1681t(b)(1)(F) when the state liability is inconsistent with the federal statute.[194]

A Ninth Circuit district court found Section 1681h(e) to be the controlling provision, and therefore held the FCRA does not preempt any state claim which alleges malice or willful intent to injure.[195] This court determined Section 1681h(e) to be the more specific provision, and Section 1681t(b) the general provision.[196] The court pointed to the title of Section 1681t(b), "General exceptions," as support for this conclusion.[197] The court found Section 1681h(e) to be a specific provision because it only preempts actions which do not claim the element of malice or willful intent to injure the consumer.[198] Since a specific provision overrides a more

---

[189] King v. Retailers National Bank, 2005 U.S. Dist. LEXIS 20455, *10 (N.D. Ill. 2005); Reed v. Experian Info. Solutions, Inc., 321 F. Supp. 2d 1109, 1117 (D. Minn. 2004).
[190] 2005 U.S. Dist. LEXIS 20455, at *7-8.
[191] 321 F. Supp. 2d at 1117.
[192] 2005 U.S. Dist. LEXIS 20455, at *8-9.
[193] 321 F. Supp. 2d at 1117.
[194] Shah v. Collecto, Inc., 2005 U.S. Dist. LEXIS 19938, *45 (D. Md. 2005).
[195] Gorman v. Wolpoff & Abramson, LLP, 370 F. Supp. 2d 1005, 1009-1010 (N.D. Cal. 2005).
[196] *Id*. at 1009.
[197] *Id.*
[198] *Id*.

general provision, when a state claim is generally based on subject matter listed in Section 1681t(b), the FCRA only preempts the claim if it fails to allege the specific Section 1681h(e) scienter.[199] Under this reasoning, a consumer can bring an action against a furnisher for violation of state law if the claim alleges the furnisher had malice or willful intent to injure the consumer.[200]

After deciding this, the same court opted to apply the statutory approach to another of the plaintiff's claims.[201] This second claim was a state statutory claim, as opposed to the common law libel claim in the first part of the analysis.[202] The plaintiff alleged a violation of California Civil Code section 1785.25(a), one of the statutes which Section 1681t(b)(1)(F) specifically exempted.[203] The court ruled that though Congress had exempted this provision of the California law, Congress had not exempted the provisions of that law which provide a private right of action to consumers harmed by a violation.[204] Applying this narrow reading, the court held only federal and state officials could pursue an action for violation of the exempted law, and dismissed the plaintiff's claim.[205] The court seemed to ignore its preceding discussion allowing a plaintiff to bring FCRA claims if those claims alleged malice or willful intent to injure.[206] The best way to remedy the conflicting approaches within this opinion, though unrecognized by the court, is to consider the first part of the analysis as applicable only to state common law claims, and the second part applicable to state statutory claims. This is consistent with the statutory approach.

III. Discussion

A determination of whether consumers can bring state law causes of actions against furnishers of information requires an analysis of Section 1681h(e) and Section 1681t(b)(1)(F). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language

---

[199] *Id*. at 1010.
[200] *Id.*
[201] *Id*. at 1011.
[202] *Id*. at 1009-1011.
[203] *Id*. 1011.
[204] *Id.*
[205] *Id.*
[206] *See id*. at 1009-1010.

accurately expresses the legislative purpose."[207] The first step is to determine whether these provisions even apply to such actions and, if so, whether both remain effective. Courts should be reluctant to find an implied repeal of a statutory provision absent Congress explicitly taking such a step.[208] However, the Supreme Court has stated,

> When [Congress] fails to do so expressly, the presumption against implied repeals, like the presumption against pre-emption, can be overcome in two situations: (1) if there is an irreconcilable conflict between the provisions in the two Acts; or (2) if the later Act was clearly intended to 'cover the whole subject of the earlier one.'[209]

If both sections apply to the same action, it must be determined whether they are in actual conflict. If so, the conflict must then be remedied by canons of statutory interpretation, giving weight to the Congressional intent of the FCRA. "The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose."[210]

A. Section 1681t does not Repeal Section 1681h(e)

"It is axiomatic that the starting point in every case involving construction of a statute is the language itself."[211] As previously discussed, Section 1681h(e) states, "no consumer may bring any

---

[207] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (citing Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)). *See also* Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 365 (2002); Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002), quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) ("[for statutory construction, a court] must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 542 (2001) ("Our analysis begins with the language of the statute.").

[208] Branch v. Smith, 538 U.S. 254, 273 (2003).

[209] *Id*. at 285 (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).

[210] Edwards v. Aguillard, 482 U.S. 578, 594 (1987).

[211] Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (citations omitted).

action . . . in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against . . . any person who furnishes information to a consumer reporting agency . . . except as to false information furnished with malice or willful intent to injure such consumer."[212] Section 1681t(b)(1)(F) states, "No requirement or prohibition may be imposed under the laws of any State with respect to any subject matter . . . relating to the responsibilities of persons who furnish information to consumer reporting agencies."[213] In the 1996 amendments to the FCRA, Congress also amended Section 1681h, changing the section title and the substance of subsections (a) and (b).[214] Because the language of Section 1681h(e) remained unchanged when Congress added the exceptions in Section 1681t, and Congress did not amend or repeal the language during later amendments to the Act, it must still be considered effective. This conclusion forecloses the possibility that Congress either forgot about the section when amending the statute, or intended for Section 1681h(e) to be superseded. Had Congress intended to repeal this subsection, it would have done so at the same time that it made amendments to Section 1681h.

Section 1681t does not mention Section 1681h, so the former cannot be read to expressly repeal the latter.[215] Therefore, the only way Congress could have repealed Section 1681h is through implied preemption, either by covering the entire subject matter of the section or by creating an "irreconcilable conflict" between Section 1681h and Section 1681t.[216]

The Sections cover different aspects of Credit Reporting Agency regulation, as the titles indicate:[217] Congress entitled Section 1681h "Conditions and form of disclosure to consumers,"[218] and Section 1681t "Relation to State laws."[219] The implication of these labels is that the two sections are to regulate different aspects of consumer credit law. Though the title to Section 1681t implies it relates to the entire FCRA, it does not appear to cover the whole subject matter of Section 1681h, whose title implies it specifies when

---

[212] 15 U.S.C. § 1681h.
[213] 15 U.S.C. § 1681t.
[214] 15 U.S.C. § 1681h.
[215] *See* 15 U.S.C. § 1681t .
[216] Branch v. Smith, 538 U.S. 254, 285 (2003).
[217] *See* 15 U.S.C. § 1681h; 15 U.S.C. § 1681t.
[218] 15 U.S.C. § 1681h.
[219] 15 U.S.C. § 1681t.

and how CRAs should deal with consumers.[220] Therefore, Congress cannot be said to have annulled Section 1681h under the field preemption theory by exhaustively covering the field of its subject matter with Section 1681t.

The remaining option for Section 1681t to constitute an implied repeal of Section 1681h is for the two sections to be in irreconcilable conflict. For this, the two provisions must be examined to determine whether it is possible for them to be read together. Section 1681h(e) restricts the actions consumers may bring against consumer reporting agencies, users of information, or furnishers of information.[221] Such suits must be based on "false information furnished with malice or willful intent to injure such consumer."[222] This section preempts state common law which would allow such suits without requiring the stated level of intent. Section 1681t(a) provides generally that the FCRA does not render those who furnish information to credit reporting agencies exempt from state laws regarding gathering, distributing, or using consumer information, unless the state law conflicts with part of the Act.[223] If the state law is inconsistent with the FCRA, the federal statute only preempts it to the extent of the inconsistency.[224] This indicates Congressional intent was not to completely preempt the field of regulating credit reporting agencies. This provision must be read alongside Section 1681t(b)(1)(F), which provides the exception for state laws relating to the duties of furnishers.[225] Since both sections provide restrictions on state-based claims, without preempting all state claims, they can be read together and do not seem to be in irreconcilable conflict. Therefore, effect must be given to each of them.

B. Resolving the Conflict

Though not irreconcilable, Section 1681h(e) and Section 1681t(b)(1)(F) do seem to be in conflict. Both sections preempt state laws which allow consumers to bring actions against furnishers of

---

[220] *See id.*; 15 U.S.C. § 1681h.
[221] 15 U.S.C. § 1681h.
[222] *Id.*
[223] 15 U.S.C. § 1681t.
[224] *Id.*
[225] *Id.*

information to CRAs.[226] However, each section preempts a different type of state law, so they may overlap. Since the conflicting subject matter relates to Congressional preemption of state laws, there is an assumption that the resolution should find as little implied preemption as possible: "Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."[227] This presumption is so strongly enforced that it has lead to such holdings as in *Sprietsma v. Mercury Marine*, where the Supreme Court found the express preemption clause of the Federal Boat Safety Act, which preempted "[state or local] law or regulation," did not require preemption of common law claims.[228]

Beginning with the plain meaning of the statutory language, Section 1681h(e) prevents a consumer from bringing an action against a furnisher unless that furnisher maliciously reported false information or intended to harm the consumer.[229] The key language in this section seems to be its application to actions "in the nature of defamation, invasion of privacy, or negligence."[230] Though this language could be interpreted as applying to all state common law actions, a better interpretation is that Congress intended the provision to apply only to claims similar to those enumerated.

Section 1681t(b)(1)(F) preempts state laws regulating the duties of furnishers.[231] This section specifically excludes two state statutes which parallel the cited FCRA provision, Section 1681s-2.[232] Though there are strong similarities between these state laws and the FCRA, this does not seem to indicate that Congress intended to exclude any such similar state statutes. Section 1681t(a) limits

---

[226] 15 U.S.C. § 1681t; 15 U.S.C. § 1681h.

[227] Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 449 (2005) (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). *See also* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 266 (2004) (Souter, J., dissenting) (referring to "the well-established presumption against preemption"); City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 432 (2002) ("when considering pre-emption, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations omitted).

[228] 537 U.S. 51 (2002).

[229] 15 U.S.C. §1681h.

[230] *Id*.

[231] 15 U.S.C. §1681t.

[232] *Id*.

preemption of state law to the extent the state law is inconsistent with the FCRA.[233] However, subsection (b) lists the exceptions to subsection (a), implying the inconsistency language does not apply to Section 1681t(b).[234] Furthermore, if Congress wanted to exclude all state statutes consistent with the FCRA, it could have done so expressly. Therefore, the exclusion in Section 1681t(b)(1)(F) should be read to apply solely to the listed state statutes. The plain meaning of Section 1681t(b)(1)(F) is that a state law cannot impose duties on furnishers.[235]

Next, the context of this section should be considered. Section 1681t(b)(5)(H) reads, "No requirement or prohibition may be imposed under the laws of any State with respect to the conduct required by the specific provisions of § 1681s-2(a)(6)."[236] Section 1681s-2(a)(6) bears the title "Duties of furnishers upon notice of identity theft-related information."[237] It should be noted that this is a subsection of Section 1681s-2, the section which Section 1681t(b)(1)(F) exempts from Section 1681t(a).[238] That Congress added this extra provision specifically exempting one subsection of Section 1681s-2 supports the interpretation that the FCRA does not preempt every state law affecting furnishers with Section 1681t(b)(1)(F).

This view is bolstered by the section's legislative history. In the 2003 amendments, Congress removed a second paragraph from the limitation provisions under Section 1681t(d).[239] Prior to its removal, the paragraph had stated,

> Subsections (b) and (c) do not apply to 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.[240]

---

[233] 15 U.S.C. §1681t.
[234] *See id.*
[235] *Id.*
[236] *Id.*
[237] 15 U.S.C. §1681s-2(a)(6).
[238] 15 U.S.C. §1681t.
[239] *Id.*
[240] *Id.*

This paragraph enumerates one specific type of state law which Congress would have allowed to stand.[241] Congress's removal of this paragraph indicates subsection (b) *can* apply to such state laws. This application causes Section 1681t to preempt these state laws.[242] However, removal of the specifically allowed state statute does not mean that the FCRA preempted all state laws.

When performing statutory analysis, courts have a duty "to construe statutes, not isolated provisions."[243] Therefore, Sections 1681h(e) and 1681t(b)(1)(F) should be read together when determining the preemption question under the FCRA. Based on the language of the two sections, the best reading of Section 1681h(e) allows a consumer to bring an action against a furnisher which is "in the nature of defamation, invasion of privacy, or negligence" and alleges malice or willful intent to injure.[244] Section 1681t(b)(1)(F) then preempts only those state laws which specifically impose requirements or prohibitions on furnishers.[245]

"[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must . . . be considered."[246] Therefore, the remainder of the FCRA should be considered to determine if the above resolution is reasonable. Section 1681g, in describing disclosures to consumers, requires, "[a] consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section . . . a statement that the consumer may have additional rights under State law . . . ."[247] If consumers did not have any rights under state law, this provision would be meaningless. In support of this view, it should also be noted that Congress added this requirement during the 2003 amendments, so it cannot be argued that Congress forgot to repeal it when changing the preemption provision.[248] Instead, the proper reading is that even after the changes to Section 1681t, consumers retain rights under state law.

---

[241] *Id*.
[242] *See id*.
[243] Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995).
[244] *See* 15 U.S.C. § 1681h.
[245] *See* 15 U.S.C. § 1681t.
[246] Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000) (citations omitted).
[247] 15 U.S.C. 1681g.
[248] 108 P.L. 159, 117 Stat. 1952 (2005).

Under this interpretation, a consumer may bring suit under Section 1681h(e) against a furnisher of information based on a claim that the furnisher maliciously provided false information to the CRAs because the consumer is not requiring any additional duty of the furnisher and such a claim would therefore not be covered under Section 1681s-2. This resolution of the two sections would allow consumers to sue furnishers of information as long as the claims met the Section 1681h(e) requirements. Section 1681t(b)(1)(F) would then prevent states from imposing additional duties upon furnishers of information. This approach seems to fit best with the statutory approach described in the district court opinions above.

IV. Conclusion

Since the amendment to Section 1681t in 1996, the Fair Credit Reporting Act's preemption of state law has puzzled the district courts. Prior to that time, Section 1681h(e) allowed consumers to bring actions such as defamation or negligence against people who furnished information to consumer reporting agencies, as long as the furnisher had performed the actions with malice or willful intent to injure the consumer.[249] The new subsection (b) to Section 1681t stated no state law could impose requirements or prohibitions on the duties of furnishers.[250] The question then arose of whether a consumer could bring any state law claim against a furnisher of information, or if the FCRA preempted all state causes of action.

Neither Congress nor a higher court has addressed, let alone resolved, this dilemma. The District Courts have developed three main analytical approaches to the interaction between Sections 1681h(e) and 1681t(b)(1)(F). The total preemption approach holds that Congress's addition of subsection (b) to Section 1681t preempted any state claim against furnishers. But when using an analysis guided by canons of statutory interpretation, Section 1681h(e) should not be found implicitly repealed. Therefore, the total preemption approach should be rejected.

The temporal approach focuses the analysis on when either a CRA or the consumer notified the furnisher of an inaccuracy. This follows from the reasoning that the FCRA only applies when a furnisher knows or should know of the inaccuracy. However, this reading only allows consumers to bring state causes of action based

[249] 15 U.S.C. § 1681h.
[250] 15 U.S.C. § 1681t.

on the furnisher's reporting *prior* to that furnisher's knowledge of the error. Thus, if a furnisher reported the information, knowing it was false and intending to harm the consumer, the consumer would have no state remedy. But, the consumer could bring an action under state law alleging a furnisher maliciously reported false information if the furnisher reported that information *before* knowing it was false. Therefore, the consumer would have no action based on the furnisher's defamation of the consumer, or any injuries resulting from such defamation, since defamation is solely a state claim. This result makes little sense, especially considering the FCRA's purpose of consumer protection. Therefore, this approach should be rejected as well.

For a proper resolution, the two sections should be read to allow both of them to be effective. Under the statutory approach, the decisive factor is whether the state claim is based on state common law or state statutory law. Section 1681h(e) allows consumers to bring suit against those who maliciously furnish false information about their credit to consumer reporting agencies. Section 1681t(b)(1)(F) prevents states from enacting laws which impose additional duties on furnishers of information. Thus, the statutory approach allows the preemption explicit in the FCRA, but complies with the general theory that courts should not be the ones expanding preemption. This balance provides consumers with a cause of action if a furnisher intends to harm them, while not allowing states to capture the regulation of furnishers from the federal government. Accordingly, this note concludes courts should use the statutory approach in deciding future claims against furnishers.