Can the law be that unclear? 9th Circuit and California courts reach opposite conclusions on FCRA preemption of the CCRAA

By Scott J. Hyman*

Three appellate courts recently reached different conclusions regarding whether California's Consumer Credit Reporting Agencies Act allows a private right of action against furnishers of credit information to credit reporting agencies.

In *Liceaga v. Debt Recovery Solutions, L.L.C.*, 169 Cal. App. 4th 901 (2008), California's First District Court of Appeal held that the CCRAA afforded no private right of action because the Fair Credit Reporting Act preempts it. *Liceaga* was the first California appellate decision to address the issue, although federal district courts had reached the same conclusion, including the following:

- *Gorman v. Wolpoff & Abramson, LLP*, 370 F. Supp. 2d 1005 (N.D. Cal. 2005).
- *Roybal v. Equifax*, 405 F. Supp. 2d 1177 (E.D. Cal. 2005).
- *Lin v. Universal Card Services Corp.*, 238 F. Supp. 2d 1147 (N.D. Cal. 2002).
- *Quigley v. Pennsylvania Higher Educ. Assistance Agency*, 2000 WL 1721069 (N.D. Cal. 2000).

The First Court of Appeal explained that the FCRA's exemption of the regulatory part of California's CCRAA (Civ. Code § 1785.25(a)) from preemption did not exempt the liability and private right of action provisions from preemption (Civ. Code § 1785.31). Thus, the CCRAA's private enforcement mechanism remained preempted by the FCRA.

Soon after, the 9th U.S. Circuit Court of Appeals reached the exact opposite conclusion. In *Gorman v. Wolpoff & Abramson, LLP*, No. 06-17226 (9th Cir. 01/12/09), the 9th Circuit held that FCRA does not preempt Civil Code § 1785.25(a) of the CCRAA and its private enforcement provisions "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 Cal. Civ. Code section 1785.25(a) is not preempted by the FCRA."

Then, on the heels of the *Gorman* decision, California's Second District Court of Appeal in *Sanai v. Saltz*, B198217 and B202787 (Cal. Ct. App. 01/26/09) declined to follow *Liceaga*. "The trial court found the *Lin* court's analysis 'perfectly persuasive.' Like the 9th Circuit, we do not," wrote the *Sanai* court.

This federalism and multi-appellate, district-induced inconsistency renders a credit furnisher's liability solely dependent on the court in which a furnisher is sued. This result conflicts with the congressional desire of structural uniformity in credit reporting laws where, as the 9th Circuit wrote in *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002), "Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished."

Why the inconsistency?

Section 1681s-2 of the FCRA regulates furnishers, and is subdivided into two subsections. Subsection s-2(a) prohibits furnishers from reporting inaccurate information, and requires furnishers to correct and update information and notify credit bureaus of a dispute. But, no private right of action lies for violation of Section s-2(a). (15 USC § 1681s-2(d); *see also Nelson, supra*, at 1060 ("Congress limited the enforcement of the duties imposed by Section 1681s-2(a) to governmental bodies.")

The FCRA also preempts all state laws regulating credit furnishers. (15 USC § 1681t(b)) But, it exempts from preemption one part of the CCRAA, California Civil Code § 1785.25(a). (15 USC § 1681t(b)(1)(F)(ii)) Section 1785.25(a), by itself, provides no private right of action; it only requires a furnisher to provide accurate information. Private enforcement of the CCRAA is authorized under two other CCRAA provisions, which are not excluded from the FCRA's pre-emption. (Civil Code §§ 1785.25(g), 1785.31). Thus, the FCRA allows California to regulate furnishers under section 1785.25(a), but still preempts California's private enforcement mechanism. Without the benefit of sections 1785.25(g) or 1785.31, a litigant has no private right of action to bring suit for a violation of Section 1785.25(a). *Liceaga* agreed; *Gorman* and *Sanai* did not.

Now what?

This paradox can be resolved. The California statute predated its federal equivalent, and the duties imposed under Section 1785.25(a) are consistent with the FCRA. Allowing a private right of action under Sections 1785.25(g) and 1785.31, however, is inconsistent with the FCRA. Accordingly, Congress exempted the former from preemption but not the latter two subsections.

Moreover, the *Lin* and *Quigley* preemption decisions pre-date Congress' recent revisions to FCRA; Congress offered no clarification or suggestion that *Lin* and *Quigley* wrongly interpreted the FCRA's preemptive reach.

With the California Court of Appeal decisions, California trial courts may choose between conflicting decisions. Federal district courts, on the other hand, must follow *Gorman*. Unfortunately, where a furnisher stands on liability under the CCRAA depends literally on where the furnisher sits — an outcome completely opposite of the congressional intent to establish uniform credit reporting laws. ❑

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