No. 06-17226

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. GORMAN, an individual,

Plaintiff-Appellant,

v.

WOLPOFF & ABRAMSON, LLP,

Defendant,

MBNA AMERICA BANK, N.A.,

Defendant-Appellee.

On Appeal From the United States District Court for the Northern District of California
The Honorable James Ware, Judge Presiding (Case No. CV-04-04507-JW)

PETITION FOR REHEARING AND REHEARING *EN BANC* BY DEFENDANT-APPELLEE MBNA AMERICA BANK, N.A.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, defendant-appellee MBNA America Bank, N.A. states that it is now named FIA Card Services, N.A.

FIA Card Services, N.A. is a wholly-owned subsidiary of NB Holdings Corporation, which is a wholly-owned subsidiary of Bank of America Corporation, which is publicly traded. No publicly held corporation owns 10% or more of the stock of Bank of America Corporation.

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FRAP 35(b)(1) STATEMENT IN SUPPORT OF REHEARING *EN BANC*

Rehearing *en banc* is warranted in this case because the panel's opinion involves two questions of exceptional importance that have widespread implications for banks and other furnishers of consumer credit information to consumer reporting agencies (CRAs) under the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*. The panel decision has unsettled the law by rejecting the views of multiple state appellate courts and federal district courts and has created a large loophole in Congress's carefully balanced approach to private lawsuits.

The two questions warranting rehearing or rehearing *en banc* are:

1. FCRA specifically exempts California Civil Code section 1785.25(a) from its express preemption provision. 15 U.S.C. § 1681t(b)(1)(F)(ii). The first question warranting rehearing is whether this exemption also saves from express or conflict preemption California Civil Code section 1785.31, which authorizes a private right of action for violations of section 1785.25(a).

2. FCRA requires a furnisher of credit information, after it receives a notice from a CRA that there is a "dispute" regarding the information it provided, to "conduct an investigation with respect to the disputed information," 15 U.S.C.

§ 1681s-2(b)(1)(A), and to report the results of that investigation to CRAs "if the investigation finds that the information is incomplete or inaccurate," 15 U.S.C. § 1681s-2(b)(1)(D). The second question warranting rehearing is whether section 1681s-2(b)(1)(D) can be violated if the furnisher does not report to the CRAs that the consumer disputed the information originally provided by the furnisher, even though it was the CRAs that had forwarded the dispute to the furnisher for investigation.

A third question warranting panel rehearing is:

3. Whether plaintiff produced sufficient evidence of causation to withstand summary judgment if, as the panel held, the only cognizable violation of FCRA was the furnisher's failure to report to the CRAs that the consumer disputed the information originally provided by the furnisher.

REASONS WHY REHEARING AND REHEARING *EN BANC* SHOULD BE GRANTED

The panel's unprecedented decision has recognized two private rights of action against furnishers of credit information despite the express language of FCRA to the contrary. By permitting plaintiff-appellant Gorman's suit to proceed against defendant-appellee MBNA America Bank, N.A. under both California and federal law for furnishing (or failing to correct after an investigation) purportedly inaccurate information, the panel has imposed on furnishers burdensome obligations that will grant consumers no benefit whatsoever. The panel's errant opinion must be corrected.

A. Without exception, every federal court and state appellate court that had spoken prior to the panel's decision in this case had held that FCRA preempts the private right of action under California Civil Code section 1785.31 against furnishers of credit information to CRAs. But contrary to every such court, the panel held the opposite, wreaking havoc in a previously settled area of law.

In so doing, the panel for the first time has exposed banks and other furnishers of credit information to California's private right of action.[1]

[1] This sea-change in the law, unsurprisingly, has not gone unnoticed by lawyers seeking new opportunities to sue entities that furnish information to CRAs. *See, e.g.*, Michael Doan, *Creditor Failed to Report Debt as Disputed in California: Can I Sue?* (2009), *available at* http://www.creditlawnetwork.com/creditor-failed-to-report-debt-as-disputed-in-california-can-i-sue/.

The panel's decision is contrary to the plain statutory language of FCRA. When Congress amended FCRA in 1996 to regulate entities that furnish information to CRAs, the amendment specifically exempted from preemption California Civil Code section 1785.25(a)—which regulates the accuracy of information furnished to CRAs—it plainly did not exempt California Civil Code section 1785.31, which created a private right of action to enforce California's statutory obligations. The panel's holding that that private right of action by consumers against furnishers is, nonetheless, exempted from preemption by FCRA is wrong, as each court prior to the panel had recognized, because it ignores the surgical precision used in FCRA's exemption provision.

Moreover, the holding is contrary to Congress's clear purposes. The system of furnishing information to CRAs is voluntary. Knowing that private litigation might deter furnishers from providing information to CRAs at all, Congress erected a shield from consumer suits seeking to enforce many new furnisher obligations under FCRA, instead leaving enforcement of those obligations to federal and state officials only. *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002). The limited obligations that consumers may privately enforce against furnishers, which involve reporting the results of investigations, are triggered by disputes filtered by the CRAs and not direct communications between consumer and furnisher. The panel's decision, if

allowed to stand, will permit California consumers to by-pass that reticulated remedial scheme and privately sue furnishers, thereby frustrating Congress's plain purposes in amending FCRA that the exempted state provision imposing accuracy obligations on furnishers be enforced only by state officials.

B. Further, the panel held that after the CRAs have notified a furnisher of a consumer dispute, and after the furnisher has reasonably investigated that dispute and reported the results to the CRAs, the furnisher may be held liable in a private FCRA lawsuit for not also reporting the existence of the dispute to the CRAs. That mandate is pointless, when it was the CRAs that notified the furnisher of the existence of the dispute in the first place.

The only provision of FCRA requiring furnishers to report consumer disputes to CRAs, 15 U.S.C. § 1681s-2(a)(3), cannot be privately enforced because the statute limits enforcement of that provision to government officials. But the panel effectively created a new consumer cause of action by reading that identical duty into a separate, irrelevant provision that is privately enforceable, 15 U.S.C. § 1681s-2(b). That reading is inconsistent with the statutory text and relies on flawed out-of-circuit precedent.

Rehearing or rehearing *en banc* is needed to undo the panel's errors.

C. Panel rehearing is warranted because there is no evidence establishing causation. Plaintiff did not show that potential creditors would react more

favorably to a credit report revealing that a delinquency was disputed.

A. The Panel's Holding That FCRA Does Not Preempt California's Private Right Of Action By Consumers Against Furnishers Of Credit Information Conflicts With The Decisions Of Other Courts And Disregards Congress's Clear Intent

1. The panel opinion conflicts with every other court that had ruled on the issue at that time, including the California Court of Appeal and well-reasoned district courts

Every court to consider the question prior to issuance of the panel opinion in the instant case had held that FCRA's exemption of California Civil Code section 1785.25(a) from express preemption, *see* 15 U.S.C. § 1681t(b)(1)(F)(ii), does not exempt California Civil Code section 1785.31, which authorizes a private right of action to enforce section 1785.25(a), and, thus, FCRA preempts private suits under section 1785.31.

Specifically, the California Court of Appeal had held in *Liceaga v. Debt Recovery Solutions, LLC*, that FCRA preempts the private right of action under section 1785.31 for violations of California Civil Code section 1785.25(a). 169 Cal.App.4th 901, 909 (2008), *reh'g denied* (Jan. 20, 2009), *petition for review filed*, No. S170308 (Cal. Feb. 6, 2009). Other earlier, unpublished opinions from the same court had reached the same conclusion.[2]

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[2] *See Banga v. World Sav. & Loan Ass'n*, No. A108446, 2006 WL 1467967, *3 (Cal. Ct. App. May 30, 2006); *Potter v. Illinois Student Assistance Comm'n*, No. D042493, 2004 WL 1203156, *4-7 (Cal. Ct. App. June 2, 2004).

Also, the federal district courts sitting in California that had addressed the issue had uniformly and repeatedly reached the same conclusion.[3]

Moreover, the federal district court in Massachusetts had ruled uniformly and repeatedly that FCRA preempts Massachusetts' nearly identical private right of action against furnishers in chapter 93, section 54A(g) of the Massachusetts Annotated Laws, even though the obligation embodied in section 54A(a) is exempted, like California Civil Code section 1785.25(a), from express preemption under section 1681t(b)(1)(F)(i) of FCRA.[4]

The panel opinion in this case upended this consensus. After the panel issued its opinion in this case, a different district of the California Court of Appeal parted ways from *Liceaga* and the earlier unpublished rulings, and relied heavily on the panel's opinion in this case to make the same error and rule that California's

[3] *See Buraye v. Equifax*, No. CV-08-00423, 2008 WL 4352388, *3-4 (C.D. Cal. June 6, 2008); *Drew v. Equifax Info. Servs.*, No. C-07-00726, 2007 WL 2028745, *4 n.3 (N.D. Cal. July 11, 2007); *Hogan v. PMI Mortgage Ins. Co.*, No. C-05-3851, 2006 WL 1310461, *12 (N.D. Cal. May 12, 2006); *Roybal v. Equifax*, 405 F.Supp.2d 1177, 1181 n.5 (E.D. Cal. 2005); *Howard v. Blue Ridge Bank*, 371 F.Supp.2d 1139, 1143-1144 (N.D. Cal. 2005); *Lin v. Universal Card Servs. Corp.*, 238 F.Supp.2d 1147, 1152-1153 (N.D. Cal. 2002); *Quigley v. Pennsylvania Higher Educ. Assistance Agency*, No. C-00-1661, 2000 WL 1721069, *3 (N.D. Cal. Nov. 8, 2000).

[4] *See Leet v. Cellco P'ship*, 480 F.Supp.2d 422 (D. Mass. 2007); *Dawe v. Capital One Bank*, No. 04-40192, 2007 WL 3332810 (D. Mass. Oct. 24, 2007); *Islam v. Option One Mortgage Corp.*, 432 F.Supp.2d 181 (D. Mass. 2006); *Gibbs v. SLM Corp.*, 336 F.Supp.2d 1 (D. Mass. 2004), *aff'd*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005).

private action against furnishers is not preempted by FCRA. *See Sanai v. Saltz*, 170 Cal.App.4th 746 (2009), *reh'g denied*, 2009 WL 388029 (Feb. 18, 2009). Rehearing *en banc* in this case is necessary to restore certainty to a previously settled area of federal-preemption law that is crucial to banks and other furnishers of information to CRAs.

2. The panel incorrectly determined that the California private statutory right of action against furnishers is not expressly preempted by section 1681t(b)(1)(F) of FCRA

The panel concluded that the express preemption provision in section 1681t(b)(1)(F) of FCRA does not preempt the private action under California Civil Code section 1785.31 against furnishers of credit information for violations of section 1785.25(a). This conclusion is contrary to the text and structure of FCRA.

Congress enacted sections 1681s-2 and 1681t(b)(1)(F) of FCRA together in 1996. Section 1681s-2 imposed two sets of duties on furnishers, with subsection (a) involving a duty to provide accurate information and subsection (b) involving duties that arise when notified by a CRA of a dispute. In subsections (c) and (d), Congress specified that FCRA's private rights of action "do not apply to any violation of … subsection (a)" because subsection (a) duties are "enforced exclusively as provided under section 1681s" by "Federal agencies and officials" and "State officials." By contrast, FCRA's private rights of action are available for

alleged violations of subsection (b). 15 U.S.C. § 1681s-2(c)(2); *Nelson*, 282 F.3d at 1060.

Section 1681t(b)(1)(F) of FCRA, in turn, expressly states that it preempts every state "requirement or prohibition … with respect to any subject matter regulated under … section 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 … ; or (ii) with respect to section 1785.25(a) of the California Civil Code."

It is undisputed that section 1681t(b)(1)(F) of FCRA would expressly preempt California Civil Code section 1785.25 in its entirety absent that specific exemption from preemption because section 1785.25 and section 1681s-2 regulate the same "subject matter," relating to the responsibilities of furnishers of information to CRAs. But with surgical precision, Congress exempted a single subsection of the California statute from FCRA preemption, *i.e.*, subsection 1785.25(a), which prohibits furnishing of information that the furnisher "knows or should know" is "incomplete or inaccurate." Congress did not exempt from preemption any other subsection of 1785.25, nor did it exempt the private right of action in California Civil Code section 1785.31.

The panel held that Congress did not need to exempt section 1785.31 from preemption because the private right of action is not, by itself, a "requirement or prohibition," relying on *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), and *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008). But the panel erred by wrenching those words out of the context of those cases and ignoring the surrounding text of section 1681t(b)(1)(F) of FCRA, which preempts every requirement or prohibition "with respect to any subject matter regulated under" section 1681s-2. Section 1681s-2 of FCRA regulates not only the conduct of furnishers but also who can sue for violations of the section's obligations. And it is section 1681s-2(d) that specifically requires that violations of subsection 1681s-2(a) of FCRA "shall be enforced exclusively as provided under section 1681s by the Federal agencies and officials and the State officials identified in section 1681s." Thus, the plain cross-reference in the preemption provision of section 1681t(b)(1)(F) to any subject matter regulated under section 1681s-2 precludes States from authorizing enforcement of any state law regulating the same subject matter as section 1681s-2(a) by anyone other than the federal and state officials specified in FCRA. The legislative history confirms the accuracy of this reading of section 1681t(b)(1) of FCRA. H.R. Rep. No. 103–486, at 55 (1994) (federal preemption extends to "any state law with respect to any subject matter regulated under" the listed provisions).

Contrary to the panel's reasoning (Slip Op. 305), California Civil Code section 1785.25(a) serves a critical role separate from the state statutory private right of action in section 1785.31. In section 1681s(c)(1) of FCRA, Congress authorized the chief law enforcement officer of each State to enforce FCRA "[i]n addition to such other remedies as are provided under State law." That provision preserves the State's authority to bring "whatever actions and remedies may be available under state law" to enforce state law obligations that are not preempted by FCRA either "separately or in conjunction with an action under FCRA." H.R. Rep. No. 103–486, at 54. The California Attorney General has the state authority to enforce California Civil Code section 1785.25(a) against furnishers under the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, 17204, 17206. Congress thus ensured that California Civil Code section 1785.25(a) could be enforced, but exclusively by government officials.

3. The panel ignored that the California private statutory action against furnishers is preempted also by section 1681t(a) of FCRA because it is "inconsistent" with FCRA

In addition, any private right of action under California Civil Code section 1785.31 against furnishers is preempted under section 1681t(a) of FCRA, because such an action is "inconsistent" with FCRA under ordinary conflict preemption principles. The panel opinion went astray by not even considering the conflict between a private action under the state statute and the structure and framework of

FCRA, despite MBNA's contention that the two are "inconsistent." Defendant-Appellees' Br. 48-49.

Section 1681t(a) of FCRA preempts the "laws of any States with respect to the … distribution … of any information on consumers … to the extent that those laws are inconsistent with any provision of [FCRA], and then only to the extent of the inconsistency." State law thus is preempted by section 1681t(a) under ordinary conflict preemption if the state law frustrates the purpose of FCRA, even if it may not be impossible to comply with both FCRA and state law. *Credit Data of Arizona, Inc. v. Arizona*, 602 F.2d 195, 198 (9th Cir. 1979); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (neither express preemption provision nor savings clause negates application of conflict preemption).

Federal courts have repeatedly and uniformly concluded that section 1681t(a) preempts state private rights of action permitting consumers to obtain remedies different from those authorized by FCRA. *See Knudson v. Wachovia Bank, N.A.*, 513 F.Supp.2d 1255, 1260-1261 (M.D. Ala. 2007) (state private rights of action for violations of FCRA obligations that cannot be privately enforced under FCRA are "inconsistent with the FCRA, and preempted under § 1681t(a)"); *Smith v. Equifax Info. Servs., LLC*, 522 F.Supp.2d 822, 825 (E.D. Tex. 2007) ("Since Congress intended the power to obtain injunctive relief to lie solely with the FTC [and state agencies], any state law claim that would provide injunctive

relief to a private litigant would frustrate this purpose and conflict with the [FCRA]."); *Jarrett v. Bank of Am.*, 421 F.Supp.2d 1350, 1353-1354 (D. Kan. 2006) (same); *Poulson v. Trans Union, LLC*, 370 F.Supp.2d 592, 593 (E.D. Tex. 2005) (same).

The private right of action in California Civil Code section 1785.31 to enforce California Civil Code section 1785.25(a) likewise conflicts with FCRA because it frustrates congressional purpose. Congress carefully crafted a scheme to balance enforceable obligations with a desire to protect furnishers from liability *and* the cost of private litigation. S. Rep. No. 104–185, at 49 (1994). Accordingly, Congress expressly and unambiguously restricted lawsuits against furnishers for violations of obligations of section 1681s-2(a) to those brought by certain federal and state officials. *See* 15 U.S.C. § 1681s-2(c)(1), (d). Moreover, even for the limited obligations of section 1681s-2(b) relating to duties of furnishers, where private enforcement is allowed, Congress imposed a "filtering mechanism," *Nelson*, 282 F.3d at 1060, because a furnisher's duties under section 1681s-2(b) are not triggered until the furnisher "receive[es] notice … of a dispute" from a CRA.

California Civil Code section 1785.25(a), like section 1681s-2(a) of FCRA, does not require a consumer to notify a CRA of a dispute. A private action for a violation of that provision is thus patently inconsistent with FCRA, because it circumvents the critical "filtering mechanism" that Congress intended to limit the

nature and number of consumer suits against furnishers. Such a private action therefore is preempted because it would frustrate Congress's purpose and, contrary to that purpose, allow a consumer to dispute the accuracy of information provided by a furnisher to a CRA for the very first time in a lawsuit against the furnisher.

B. The Panel Erred By Ruling That Section 1681s-2(b) Of FCRA Is Violated When A Furnisher Did Not Report To The CRAs What The CRAs Already Advised The Furnisher -- That The Information Is Disputed By The Consumer

The panel erred in holding that furnishers of information may be liable under section 1681s-2(b)(1)(D) of FCRA, which *is* privately enforceable through FCRA's private rights of action, for not reporting to the CRAs that a consumer had disputed information previously provided by the furnisher, even though it was the CRAs that had previously forwarded the dispute to the furnisher for investigation.

The panel's interpretation of section 1681s-2(b) is based on a misreading of the statute and on flawed precedent. If the panel's decision stands, consumers will be permitted to sue a furnisher for failing to tell the CRAs something that they already know, *i.e.* that the consumer disputes certain information that the furnisher has provided to the CRAs.

The purported obligation under section 1681s-2(b) to report a dispute could be triggered only by the furnisher's receipt of a "notice [from a CRA] of a dispute with regard to the completeness or accuracy of any information provided by a [furnisher] to a consumer reporting agency." 15 U.S.C. § 1681s-2(b)(1). When

the furnisher receives such a notice of dispute from the CRAs, the furnisher must "conduct an investigation with respect to the disputed information." *Id.* § 1681s-2(b)(1)(A). After the investigation is concluded, the furnisher must "report the results of the investigation to the consumer reporting agency," *id.* § 1681s-2(b)(1)(C), and if "the investigation finds that the information is incomplete or inaccurate," the furnisher must "report those results to all other consumer reporting agencies to which the person furnished the information," *id.* § 1681s-2(b)(1)(D).

In this case, plaintiff Gorman notified all three national CRAs that he disputed the notation in his credit file that his MBNA account was "charged-off," and all three CRAs then notified MBNA of the dispute. Slip Op. 271-272. Thus, all three CRAs were aware that a dispute existed. Yet the panel opinion holds that MBNA may be held liable for not reporting back to the CRAs the existence of a dispute about which the CRAs had advised MBNA. Such a requirement serves absolutely no purpose, and to permit a private action for damages in such circumstances is senseless.

Furthermore, the text of section 1681s-2(b) does not support the panel's holding. A furnisher's obligation to report that information is disputed is imposed not by section 1681s-2(b), but by section 1681s-2(a)(3), which requires that a furnisher provide to a CRA "notice that such information is disputed by the

consumer" if "the completeness or accuracy of any information furnished … to any consumer reporting agency is disputed to such [furnisher] by a consumer." This requirement serves to advise the CRAs of the existence of the dispute, where the consumer may not have directly notified the CRA. A violation of section 1681s-2(a)(3), however, cannot be privately enforced; it can be enforced only by government officials. *See* 15 U.S.C. § 1681s-2(c), (d). The panel erred in holding that the very different language Congress used in section 1681s-2(b) was intended to impose the same obligation.

Section 1681s-2(b) requires the furnisher to conduct an investigation and report the results of the investigation to the CRAs. "Thus," as one district court has explained, "the question whether [the] defendant … was required to report the dispute is subsumed within the question whether it conducted a reasonable investigation." *Scheel-Baggs v. Bank of Am.*, 575 F.Supp.2d 1031, 1039 (W.D. Wis. 2008). As the panel correctly noted (Slip Op. 288), an investigation need not yield a correct result in order to satisfy section 1681s-2(b)(1)(A). The panel also correctly found that defendant MBNA's investigation satisfied section 1681s-2(b)(1)(A) and that it reported the results of its reasonable investigation to the CRAs. Slip Op. 282, 283, 288. No investigation was needed to determine that plaintiff Gorman had disputed the information that defendant MBNA had furnished to the CRAs because the fact of that dispute by plaintiff Gorman is why

the CRAs had to refer the matter to MBNA for investigation. Yet the panel held that defendant MBNA might be liable under section 1681s-2(b)(1)(D) for failing to report that the information was disputed. Nothing in section 1681s-2(b)(1)(D) authorizes such a claim.

Saunders v. Branch Banking & Trust Co. of Virginia, 526 F.3d 142 (4th Cir. 2008), on which the panel placed primary reliance, was misled by the defendant's concession in that case that the "same standard of accuracy" that applied to claims against CRAs under section 1681e also applied to claims against furnishers under section 1681s-2(b)(1). *Id*. at 148 n.3. But section 1681e imposes a duty on CRAs to use reasonable procedures to ensure "maximum possible accuracy," a phrase that the D.C. Circuit and Fifth Circuit have both held, in cases cited but not discussed by the panel, extends beyond a requirement of "technical accuracy." *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 40 (D.C. Cir. 1984); *accord Sepulvado v. CSC Credit Servs., Inc.*, 158 F.3d 890, 895 (5th Cir. 1998). Thus, relying on that standard to impose an obligation of more than technical accuracy on furnishers is inappropriate in a section 1681s-2(b)(1) case.

C. The Panel Erred In Holding That Plaintiff Submitted Evidence Establishing Causation Under Section 1681s-2(b)(1)(D)

Even if the panel were correct that section 1681s-2(b)(1)(D) could be read to require a furnisher to report to the CRAs that the information is disputed, there is

nothing in the record to establish that any such omission caused injury to plaintiff Gorman.

First, MBNA's alleged failure to report to the CRAs that the information was disputed caused no injury because FCRA provides a consumer an independent, privately enforceable means of ensuring that his dispute is noted on every credit report. Section 1681i provides that if a reinvestigation by a CRA does not resolve a dispute, "the consumer may file a brief statement setting forth the nature of dispute," and whenever such a "statement of dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof." 15 U.S.C. § 1681i(b), (c).

Furthermore, the panel incorrectly concluded that there was evidence of causation in this case. As summarized by the panel (Slip Op. 309), Gorman submitted evidence that "he was refused credit or offered higher than advertised interest rates; the explanations given by the creditors were delinquencies on his credit report; and the only delinquency is the MBNA account." But all that evidence could show is that the *presence of the delinquency* on the credit report may have caused him injury. Yet the panel correctly found (Slip Op. 288) that

MBNA was not required to report the delinquency did not exist. Instead, the panel suggested that, at most, MBNA should have reported to the CRAs that the delinquency was disputed by the consumer. Slip Op. 295 n.18. But Gorman did not proffer any evidence that showed that the *presence of a notation that the delinquency was disputed* on the credit report would have caused potential creditors to treat him better. This omission is fatal to his claim.

CONCLUSION

For the foregoing reasons, Defendant-Appellee MBNA America Bank, N.A. respectfully requests rehearing and rehearing *en banc*, as appropriate.

Respectfully submitted,

s/ Beth S. Brinkmann

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Attorneys for Defendant-Appellee MBNA America Bank, N.A.

Dated: February 25, 2009

CERTIFICATE OF COMPLIANCE
PURSUANT TO NINTH CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Ninth Circuit Rules 35-4(a) and 40-1(a), the foregoing petition for panel rehearing and rehearing *en banc* is proportionately spaced, has a typeface of 14 points, and contains 4,183 words.

s/ Beth S. Brinkmann

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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ADDENDUM A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. GORMAN, an individual, *Plaintiff-Appellant,* v. WOLPOFF & ABRAMSON, LLP; MBNA AMERICA BANK, N.A., *Defendants-Appellees.*	No. 06-17226 D.C. No. CV-04-04507-JW OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
July 17, 2008—San Francisco, California

Filed January 12, 2009

Before: Richard A. Paez and Marsha S. Berzon,
Circuit Judges, and Harold Baer,* District Judge.

Opinion by Judge Berzon

*The Honorable Harold Baer, Jr., Senior United States District Judge for the Southern District of New York, sitting by designation.

COUNSEL

John C. Gorman and Charles J. Stiegler, San Jose, California, for the plaintiff-appellant.

Tomio B. Narita and Jeffrey A. Topor, San Francisco, California, for the defendants-appellees.

OPINION

BERZON, Circuit Judge:

John Gorman tried to buy a satellite television system using his credit card, issued by MBNA America Bank. He was

unsatisfied with the system purchased, and lodged a challenge with MBNA to dispute the charge. Unhappy with MBNA's response, Gorman instituted this lawsuit against MBNA, alleging violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, libel, and violations of Cal. Civ. Code section 1785.25(a). The district court dismissed his California statutory claim and granted MBNA summary judgment on the other causes of action. *Gorman v. Wolpoff & Abramson, LLP* ("*Gorman I*"), 370 F. Supp. 2d 1005 (N.D. Cal. 2005); *Gorman v. Wolpoff & Abramson, LLP* ("*Gorman II*"), 435 F. Supp. 2d 1004 (N.D. Cal. 2006). We affirm in part and reverse in part.

I. BACKGROUND

In December 2002, John Gorman paid for the delivery and installation of a new satellite TV system on a Visa credit card issued by MBNA America Bank ("MBNA"). The charge, $759.70, was posted on his January 2003 credit card statement. According to Gorman, the merchant, Four Peaks Home Entertainment ("Four Peaks"), delivered a used and defective TV system and botched the installation, damaging his house in the process. Gorman told Four Peaks he was refusing delivery of the goods and asked for a refund, but Four Peaks refused to refund the charges unless Gorman arranged to return the TV system. The defective equipment is still in Gorman's possession.[1]

[1]MBNA claims that Four Peaks shipped Gorman new, replacement equipment and that Gorman retains both the defective and replacement equipment. Gorman disputes having received any replacement system. Gorman also claims that he made the merchandise available to Four Peaks for pickup, and that doing so was sufficient to require a refund under Cal. Com. Code section 2602(2)(b) ("If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this division (subdivision (3) of Section 2711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them."). He also testified in his deposition that Four Peaks never sent him pre-paid shipping labels. It is not clear whether he would have shipped the merchandise back had he received such labels.

In February 2003, Gorman notified MBNA that he was disputing the charges and submitted copies of emails between himself and Four Peaks. The attached emails showed that Gorman had informed a Four Peaks representative that the delivered goods were "unacceptable and [were] rejected." He also noted damage from the installation and notified Four Peaks that he "plan[ned] to dispute the credit card charges in their entirety, as the damage exceeds the amount of the charges."

MBNA responded to the dispute notice with a request for additional information from Gorman about the dispute, including proof that the merchandise had been returned. A month passed, and MBNA wrote Gorman again, stating that as he had not responded, it assumed the charge was no longer disputed. Gorman answered that he continued to dispute the charge, and referred MBNA to his original notice of dispute. He did not claim to have returned the equipment, but stated that the merchandise "has been available for the merchant to pick up." MBNA again requested proof that the goods had been returned; Gorman did not reply.

In April 2003, MBNA informed Gorman that it was "unable to assist [him] because the merchandise has not been returned to the merchant." Gorman called an MBNA representative saying, again, that all relevant information was in his original letter. MBNA then contacted Four Peaks, which told MBNA that it had shipped replacement equipment to Gorman but that he had not sent the old equipment back to them.

In July 2003, MBNA again informed Gorman that it could not obtain a credit on his behalf without further information from him. Gorman, who is a lawyer, responded in writing on his law firm's letterhead, stating that MBNA had all the information it needed, that he had left several unanswered messages with MBNA asking to speak with someone about the dispute, and that he would "never" pay the disputed charge.

He further stated that MBNA had violated the Fair Credit Billing Act, that he was "entitled to recover attorneys' fees for MBNA's violation," and that he was offsetting his legal fees against his current account balance and so would make no more payments on the card, for the TV system or anything else.[2] The balance at that time was more than $6,000.[3]

Gorman's letter to MBNA worked, at least temporarily. In August 2003, MBNA removed the Four Peaks charge and related finance charges and late fees from Gorman's credit card bill. Over the next two months, MBNA again contacted Four Peaks, which once more informed MBNA that it would not issue a credit for Gorman's charge until he returned the refused equipment. When MBNA called Gorman, he informed them he had the merchandise and "ha[d] no intention of ever [returning] it." In October, MBNA reposted the charge to Gorman's account.

After he stopped making payments on his card, Gorman claims, he received numerous harassing phone calls. During one of these calls, Gorman alleges, an MBNA representative told him, "We're a big bank. You either pay us or we'll destroy your credit."

In January 2004, MBNA reported Gorman's account to the credit reporting agencies ("CRAs") as "charged-off."[4] Between May 2004 and November 2005, Gorman informed the three major credit reporting agencies (Equifax, Trans-

[2]Gorman has not indicated any specific basis for his fees claim. He refused to answer questions at his deposition about whether these fees were for services he had personally performed, claiming attorney-client and work product privilege. No suit had been filed at the time Gorman claimed entitlement to these fees.

[3]As far as the record reveals, the entire balance remains unpaid.

[4]MBNA also referred the debt to a law firm, Wolpoff & Abramson, for collection. The firm's attempt to collect the debt gave rise to unfair debt collection practices claims in Gorman's complaint. Gorman does not appeal the district court's entry of judgment against him on these claims.

Union, and Experian) that their credit reports included inaccurate information.

As required by federal law, the CRAs sent MBNA notices of dispute containing descriptions of Gorman's complaints (as understood by the CRAs) and asking the bank to verify the accuracy of his account records. MBNA responded by reviewing the account records and notes. After ascertaining that its prior investigation did not support Gorman's claimed dispute, MBNA notified the CRAs that the delinquency was not an error. According to Gorman, MBNA did not notify the CRAs that the charges remained in dispute, and the CRAs did not list the charges as disputed.[5]

Since his credit reports began listing his MBNA account as delinquent, Gorman has been denied credit altogether or offered only high interest rates on at least three occasions. He contends that the MBNA account is the only negative entry on his credit report.

In September 2004, Gorman sued MBNA. The complaint alleges violations of the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x and a California credit reporting law, Cal. Civ. Code section 1785.25(a), and also alleges a claim for libel. Gorman seeks injunctive relief, damages resulting from MBNA's reporting of his account, and damages from lost wages for the time he spent dealing with his credit that he would have otherwise spent billing clients. The district court dismissed Gorman's California statutory claim as preempted and granted MBNA summary judgment on all other claims. Gorman timely appeals.

For the reasons stated below, we affirm in part and reverse

[5]Gorman did not initially supply the district court with his credit reports. In support of his motion to reconsider the district court's summary judgment order, however, Gorman submitted copies of his credit reports, which include no indication that the MBNA account is disputed.

in part the district court's grant of summary judgment on the FCRA claims; we affirm the district court's grant of summary judgment on Gorman's libel claim; and we reverse the district court's dismissal of Gorman's California statutory claim.

II. ANALYSIS

This case comes to us on summary judgment. We review a grant of summary judgement *de novo*. *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 742 (9th Cir. 2004). Summary judgement is appropriate where, "drawing all reasonable inferences supported by the evidence in favor of the non-moving party," the court finds "that no genuine disputes of material fact exist and that the district court correctly applied the law." *Id.* (internal quotation omitted). The non-moving party "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial." *Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23 (1986)).

Questions of statutory interpretation and federal preemption are, of course, reviewed *de novo*. *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1047 (9th Cir. 2007); *Davis v. Yageo Corp.*, 481 F.3d 661, 673 (9th Cir. 2007).

A. Fair Credit Reporting Act Claims

1. Statutory Background

Congress enacted the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x,[6] in 1970 "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 127 S.Ct. 2201, 2205 (2007). As an important means to this end, the Act sought to make "consumer reporting agen-

[6]All references to the FCRA hereafter are to 15 U.S.C.

cies exercise their grave responsibilities [in assembling and evaluating consumers' credit, and disseminating information about consumers' credit] with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). In addition, to ensure that credit reports are accurate, the FCRA imposes some duties on the sources that provide credit information to CRAs, called "furnishers" in the statute.[7] Section 1681s-2 sets forth "[r]esponsibilities of furnishers of information to consumer reporting agencies," delineating two categories of responsibilities.[8] Subsection (a) details the duty "to provide accurate information," and includes the following duty:

> (3) Duty to provide notice of dispute
>
> If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

§ 1681s-2(a)(3).

Section 1681s-2(b) imposes a second category of duties on furnishers of information. These obligations are triggered "upon notice of dispute"— that is, when a person who furnished information to a CRA receives notice from the CRA that the consumer disputes the information. *See* § 1681i(a)(2) (requiring CRAs promptly to provide such notification con-

[7]"The most common . . . furnishers of information are credit card issuers, auto dealers, department and grocery stores, lenders, utilities, insurers, collection agencies, and government agencies." H.R. Rep. No. 108-263, at 24 (2003).

[8]This section was added by the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2413, 110 Stat. 3009-447. Additional amendments, not relevant here, were made by the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952.

taining all relevant information about the consumer's dispute). Subsection 1681s-2(b) provides that, after receiving a notice of dispute, the furnisher shall:

> (A) conduct an investigation with respect to the disputed information;
>
> (B) review all relevant information provided by the [CRA] pursuant to section 1681i(a)(2) . . . ;
>
> (C) report the results of the investigation to the [CRA];
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other [CRAs] to which the person furnished the information . . . ; and
>
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1) . . . (i) modify . . . (ii) delete [or] (iii) permanently block the reporting of that item of information [to the CRAs].

§ 1681s-2(b)(1). These duties arise only after the furnisher receives notice of dispute from a CRA; notice of a dispute received directly from the consumer does not trigger furnishers' duties under subsection (b). *See id.*; *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059-60 (9th Cir. 2002).

The FCRA expressly creates a private right of action for willful or negligent noncompliance with its requirements. §§ 1681n & o; *see also Nelson*, 282 F.3d at 1059. However, § 1681s-2 limits this private right of action to claims arising under subsection (b), the duties triggered upon notice of a dispute from a CRA. § 1681s-2(c) ("Except [for circumstances

not relevant here], sections 1681n and 1681o of this title do not apply to any violation of . . . subsection (a) of this section, including any regulations issued thereunder."). Duties imposed on furnishers under subsection (a) are enforceable only by federal or state agencies.[9] *See* § 1681s-2(d).

Gorman alleges that MBNA violated several of the FCRA "furnisher" obligations. We hold that some of the alleged violations survive summary judgment and some do not.

2. MBNA's "investigation" upon notice of dispute

Gorman's first allegation is that MBNA did not conduct a sufficient investigation after receiving notice from the CRAs that he disputed the charges, as required by § 1681s-2(b)(1)(A). As Gorman's claim arises under subsection (b), it can be the basis for a private lawsuit. *See Nelson*, 282 F.3d at 1059-60. We must decide (1) whether § 1681s-2(b)(1)(A) requires a furnisher to conduct a "reasonable" investigation, and if so, (2) whether a disputed issue of material fact exists as to the reasonableness of MBNA's investigation.

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[9]*Nelson* explained the likely reason for allowing private enforcement of subsection (b) but not subsection (a) as follows:

> Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished. Hence, Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental bodies. But Congress did provide a filtering mechanism in § 1681s-2(b) by making the disputatious consumer notify a CRA and setting up the CRA to receive notice of the investigation by the furnisher. *See* 15 U.S.C. § 1681i(a)(3) (allowing CRA to terminate reinvestigation of disputed item if CRA "reasonably determines that the dispute by the consumer is frivolous or irrelevant"). With this filter in place and opportunity for the furnisher to save itself from liability by taking the steps required by § 1681s-2(b), Congress put no limit on private enforcement under §§ 1681n & o.

Nelson, 282 F.3d at 1060.

a. Must an Investigation be Reasonable?

[1] The text of the FCRA states only that the creditor shall conduct "an investigation with respect to the disputed information." § 1681s-2(b)(1)(A). MBNA urges that because there is no "reasonableness" requirement expressly enunciated in the text, the FCRA does not require an investigation of any particular quality; *any* investigation into a consumer's dispute — even an entirely unreasonable one — satisfies the statute.

[2] This court has not addressed MBNA's contention about the FCRA's investigation requirement.[10] But, MBNA made — and lost — the same argument before the Fourth Circuit. *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 429-31 (4th Cir. 2004). Concluding that the statute includes a requirement that a furnisher's investigation not be unreasonable, the Fourth Circuit first noted that the plain meaning of the term "investigation" is a " 'detailed inquiry or systematic examination,' " which necessarily "requires some degree of careful inquiry." *Id.* at 430 (quoting *Am. Heritage Dictionary* 920 (4th ed. 2000)). Second, the Fourth Circuit reasoned that because the purpose of the provision is "to give consumers a means to dispute — and, ultimately, correct — inaccurate information on their credit reports," *id.* at 430-31, a "superficial, *un*reasonable inquir[y]" would hardly satisfy Congress' objective. *Id.* at 431. The Seventh Circuit, without discussing the issue, has also found an implicit reasonableness requirement. *See Westra v. Credit Control of Pinellas*, 409 F.3d 825, 827 (7th Cir. 2005) ("Whether a defendant's investigation [pursuant to § 1681s-2(b)(1)(A)] is reasonable is a factual question normally reserved for trial."); *see also Johnson*, 357 F.3d at 430 n.2 ("[D]istrict courts that have considered the

[10]District courts in this circuit have assumed that § 1681s-2(b)(1)(A) requires a reasonable investigation. *See, e.g.*, *Smith v. Ohio Sav. Bank*, No. 2:05-cv-1236, 2008 WL 2704719, at *2 (D. Nev. July 7, 2008); *Thomas v. U.S. Bank, N.A.*, No. CV 05-1725, 2007 WL 764312, at *4 (D. Or. Mar. 8, 2007).

issue have consistently recognized that the creditor's investigation must be a reasonable one." (citing cases)).

[3] The Fourth Circuit's reasoning in *Johnson* is entirely persuasive. By its ordinary meaning, an "investigation" requires an inquiry likely to turn up information about the underlying facts and positions of the parties, not a cursory or sloppy review of the dispute. Moreover, like the Fourth Circuit, we have observed that "a primary purpose for the FCRA [is] to protect consumers against inaccurate and incomplete credit reporting." *Nelson*, 282 F.3d at 1060. A provision that required only a cursory investigation would not provide such protection; instead, it would allow furnishers to escape their obligations by merely rubber stamping their earlier submissions, even where circumstances demanded a more thorough inquiry. MBNA counters by pointing to § 1681i(a)(1)(A), which provides, in relevant part (with emphasis added):

> [I]f the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a *reasonable reinvestigation* to determine whether the disputed information is inaccurate . . . .

Thus, MBNA argues, Congress specified a "reasonable" investigation in another part of the statute, and purposely chose not to do so for furnishers of information.

It is most often the case that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation and citation omitted). But we should be careful not to read too much into the apparent

disparity in language upon which MBNA relies. Where, as here, there are convincing alternative explanations for a difference in statutory language, the presumption applies with much less force. *See Field v. Mans*, 516 U.S. 59, 67-69 (1995) ("Without more, the [negative] inference might be a helpful one. But [where] there is more . . . the negative pregnant argument should not be elevated to the level of interpretive trump card.").

As we have noted, the term "investigation" on its own force implies a fairly searching inquiry. It is thus likely that, if anything, the "reasonable" qualifier with regard to *re*investigations by CRAs signals a *limitation* on the CRAs' duty, not an expansion of it beyond what "investigation" itself would signal. And, indeed, the statute goes on to spell out the CRA's investigative duty in some detail, requiring, inter alia, that the CRA provide notification of the dispute within five business days of receipt of notice of a dispute. The furnisher's investigation obligation under § 1681 is triggered by receiving the CRA notification, required as a central aspect of the CRA's own investigation, and includes the obligation to "report the results of [its] investigation to the [CRA]." § 1681s2-(b)(1)(C). In other words, the CRA's "reasonable reinvestigation" consists largely of triggering the investigation by the furnisher. It would make little sense to deem the CRA's investigation "reasonable" if it consisted primarily of requesting a superficial, unreasonable investigation by the furnisher of the information.

[4] Nevertheless, MBNA urges that "Congress intended to impose a more rigorous duty of investigation on CRAs than on furnishers of information." But MBNA does not tell us why Congress would mandate shoddy or superficial furnisher investigations, not calculated to resolve or to explain the actual disagreement or to aid in the CRA's "reasonable reinvestigation." Indeed, as the statute recognizes, the furnisher of credit information stands in a far better position to make a thorough investigation of a disputed debt than the CRA does

on reinvestigation. With respect to the accuracy of disputed information, the CRA is a third party, lacking any direct relationship with the consumer, and its responsibility is to "*re*investigate" a matter once already investigated in the first place. § 1681i(a)(1) (emphasis added). It would therefore make little sense to impose a more rigorous requirement on the CRAs than the furnishers. Instead, the more sensible conclusion is that, if anything, the "reasonable" qualifier attached to a CRA's duty to reinvestigate limits its obligations on account of its third-party status and the fact that it is repeating a task already completed once. Requiring furnishers, on inquiry by a CRA, to conduct at least a reasonable, non-cursory investigation comports with the aim of the statute to "protect consumers from the transmission of inaccurate information about them." *Kates v. Crocker Nat'l Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985).

[5] We thus follow the Fourth and Seventh Circuits and hold that the furnisher's investigation pursuant to § 1681s-2(b)(1)(A) may not be unreasonable.

b. MBNA's Investigation was Reasonable

[6] As discussed, a furnisher's obligation to conduct a reasonable investigation under § 1681s-2(b)(1)(A) arises when it receives a notice of dispute from a CRA. Such notice must include "all relevant information regarding the dispute that the [CRA] has received from the consumer." § 1681i(a)(2)(A). It is from this notice that the furnisher learns the nature of the consumer's challenge to the reported debt, and it is the receipt of this notice that gives rise to the furnisher's obligation to conduct a reasonable investigation. Accordingly, the reasonableness of the furnisher's investigation is measured by its response to the specific information provided by the CRA in the notice of dispute. The pertinent question is thus whether the furnisher's procedures were reasonable in light of what it learned about the dispute from the description in the CRA's notice of dispute. *See Westra*, 409 F.3d at 827 ("[The furnish-

er's] investigation in this case was reasonable given the scant information it received regarding the nature of [the consumer's] dispute.").

MBNA received four notices of dispute regarding Gorman's account. Gorman argues that the district court erred in granting summary judgment as to the reasonableness of MBNA's investigation in response to these notices because triable issues of fact remain. We have held that "summary judgment is generally an inappropriate way to decide questions of reasonableness because 'the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment.' " *In re Software Toolworks Inc.*, 50 F.3d 615, 621 (9th Cir. 1994) (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976)). However, summary judgment is not precluded altogether on questions of reasonableness. It is appropriate "when only one conclusion about the conduct's reasonableness is possible." *Id.* at 622; *see also Westra*, 409 F.3d at 827. We thus consider the sufficiency of MBNA's investigation with respect to each of the notices.

i. "Claims Company will Change"

[7] In a notice of dispute received May 13, 2004, TransUnion provided the following information concerning Gorman's MBNA account: "Claims company will change. Verify all account information." The notice provided no further information about the nature of the dispute. In response to this notice, MBNA "review[ed] the account notes to determine whether MBNA had agreed to delete any charges or to modify the account information in any way." It concluded that "[n]o such commitment had been made." MBNA's review of the account information provided by TransUnion did reveal "some minor differences." As a result, MBNA submitted updated address, date of birth, and account delinquency information to TransUnion.

[8] The cursory notation, "[c]laims company will change," provided no suggestion of the nature of Gorman's dispute with Four Peaks. We conclude therefore that a jury could not find MBNA's response unreasonable. MBNA reasonably read the vague notice as indicating that MBNA had previously agreed to change certain account information. MBNA's review of its internal account files to determine whether any such agreement had been reached was all that was required to respond reasonably to this notice of dispute. The account notes reveal that MBNA had communicated with Four Peaks several times and do not reveal any agreement by MBNA to credit those charges, or any others. MBNA could not have reasonably been expected to undertake a more thorough investigation of the Four Peaks incident based on the scant information contained in this notice.

ii. "Fraudulent Charges"

MBNA received two notices disputing "fraudulent charges" on Gorman's account. A notice of dispute from Experian, dated May 18, 2004, stated: "Consumer claims account take-over fraudulent charges made on account. Verify Signature provide complete ID." In response to this notice, MBNA "verif[ied] that the name, address, date of birth and social security number reported by Experian matched the information that was contained in MBNA's records concerning the account." It also "review[ed] the account notes and check[ed] with the fraud department to determine whether there had ever been a fraud claim submitted with respect to the account." Because the identification information matched and no fraud claim had been submitted, MBNA reported to Experian that the information it previously reported was accurate and requested that Experian tell Gorman to contact MBNA if he suspected fraud.

MBNA received another dispute notice from TransUnion, dated November 29, 2005, that listed two disputes: (1) "Disputes present/previous Account Status History. Verify accord-

ingly;" (2) "Consumer claims account take-over fraudulent charges made on account. Verify Signature provide or confirm complete ID." MBNA conducted the following inquiry:

> [V]erif[ied] that the account history that was being reported matched the account history data in MBNA's records, including the balance, the amount past due, the high credit and credit limit for the account. . . . [V]erif[ied] that the name, address, date of birth and social security number reported by TransUnion matched the information that was contained in MBNA's records concerning the account. . . . [R]eview[ed] the account notes and check[ed] with the fraud department to determine whether there had ever been a fraud claim submitted with respect to the account.

Because this investigation did not reveal that any information was inaccurate, MBNA verified the information previously submitted to TransUnion.

[9] Neither notice identified the nature of Gorman's dispute as centering on the Four Peaks charge or indicated that the dispute concerned rejection of the goods charged for. Indeed, the notices did not describe the fraudulent transactions in any detail; they were silent as to the approximate date of the charges, their amount, and the identity of the merchant. Moreover, Gorman has never contended that the disputed charges were initially unauthorized or were the result of identity theft, as the dispute notices indicated. Not surprisingly, MBNA's review of its internal account notes showed no evidence of fraudulent activity, and all previous account data reported by the CRAs matched MBNA's records. We conclude that, as in the case of the first notice of dispute, MBNA could not reasonably have been expected to investigate Gorman's challenge to the Four Peaks charge based on the vague and

inaccurate information it received from the CRAs in these notices.[11]

iii. "Promised Goods/Services Not Delivered"

One notice of dispute did provide more accurate and specific information relating to Gorman's dispute with MBNA. A December 2004 notice from Experian stated: "Claims inaccurate information. Did not provide specific dispute. Provide complete ID and verify account information." The notice further provided, in a section for "FCRA Relevant Information": "PROMISED GOODS/SERVICES NOT DELIVERED. I

[11]Gorman complains that he had no control over the information the CRAs gave MBNA, and that MBNA should have asked the CRAs for more detail on Gorman's complaints. But Gorman's letters to the CRAs do not provide much more detail concerning his dispute than the CRAs' description to MBNA. Two of the dispute notices were prompted by letters from Gorman to the CRAs stating:

> MBNA posted certain fraudulent credit card charges to a former VISA account in or about early 2003. I timely notified MBNA that the charges were disputed and should be removed from my account yet MBNA failed to removed [sic] them and is wrongfully claiming that my account is delinquent. No money is owed to MBNA. Moreover, MBNA has been repeatedly advised by me, both orally and in writing, that the debt is disputed but is unlawfully refusing to note the existence of the dispute on my credit record.

The November 2005 dispute notice was prompted by an on-line complaint form filled out by Gorman stating: "I have never made a late payment," and "Fraudulent charges were made on my account."

It is the duty of the CRA — not the furnisher — to ensure that the furnisher has all relevant information about the dispute. *See* § 1681i(a)(2)(A) (the CRA's notice to furnisher "shall include all relevant information regarding the dispute that the agency has received from the consumer . . . ."). Moreover, as it is not hard to see why the CRAs interpreted Gorman's messages as they did, MBNA likely would have interpreted them in the same way had it obtained them, and so would have made the same, limited investigation.

TIMELY DISPUTED THE CHARGES UNDER THE TIL ACT."[12] In response to this notice, MBNA

> review[ed] its records to confirm that all of the account information that was being reported by Experian matched MBNA's records. MBNA also reviewed the account notes to determine if any dispute submitted by Gorman concerning the account had been resolved in his favor. Since the reported information matched the information in MBNA's records, and because the prior investigation of the charge with Four Peaks Entertainment had not been resolved in favor of Gorman, MBNA verified all the information that it had reported about the account as accurate.

[10] Unlike the other three notices of dispute, the December 2004 notice contained enough information to alert MBNA to the specific nature of Gorman's actual claim: the reported debt was not owed because he had not received the goods he was promised. Simply verifying that the basic reported account data matched MBNA's internal records may not have been a reasonably sufficient investigation of this particular dispute.

But MBNA's investigation was more thorough than simply a review of bare account data. The review of internal records revealed that MBNA had previously investigated the Four Peaks charge and that the dispute had not been resolved in Gorman's favor.

Nevertheless, Gorman claims that a jury could still find MBNA's efforts unreasonable, because it failed to *re*investigate the dispute. As an initial matter, there is no evidence that MBNA's original investigation of the Four Peaks incident

[12]This is likely referring to the Truth in Lending Act, Pub. L. No. 90-321, Title I, 82 Stat. 146 (1968) (codified at 15 U.S.C. § 1601 *et seq.*).

was deficient or unreliable.[13] MBNA contacted both Gorman and Four Peaks several times as part of the investigation. Its requests that Gorman provide more information were met with refusals to supply additional information or no response at all. MBNA's correspondence with Four Peaks also evidences a diligent attempt to ascertain the validity of the charges. For example, MBNA asked about Goman's opportunity to return the merchandise and was told that Gorman received shipping labels to return the merchandise.

[11] Importantly, the CRA notice of dispute that triggered MBNA's duty to investigate did not identify any reason to doubt the veracity of the initial investigation. Furthermore, the notice of dispute did not provide any new information that would have prompted MBNA to supplement the initial investigation with any additional procedures or inquiries.

[12] We agree that "[w]hether a reinvestigation conducted by a furnisher in response to a consumer's notice of dispute is reasonable . . . depends in large part on . . . the allegations provided to the furnisher by the credit reporting agency." *Krajewski v. Am. Honda Fin. Corp.*, 557 F. Supp. 2d 596, 610 (E.D. Pa. 2008). Without any indication in the allegations that the initial investigation lacked reliability or that new information was available to discover, MBNA's decision not to repeat a previously-conducted investigation cannot have been unreasonable. Congress could not have intended to place a burden on furnishers continually to reinvestigate a particular transaction, without any new information or other reason to doubt the result of the earlier investigation, every time the consumer disputes again the transaction with a CRA because the investi-

[13]The reasonableness of MBNA's initial investigation is not directly before us. That investigation was conducted before MBNA reported Gorman's account to the CRAs. To the extent that it is governed by the FCRA at all, it falls under § 1681s-2(a)(1), the duty of furnishers to provide accurate information to CRAs. Although MBNA is required under § 1681s-2(a)(1) to provide accurate information, Gorman cannot enforce that obligation in a private cause of action. *See* § 1681s-2(c), (d).

gation was not resolved in his favor. Thus, although reliance on a prior investigation *can* be unreasonable, *cf. Bruce v. First U.S.A. Bank, Nat'l Ass'n*, 103 F. Supp. 2d 1135, 1143-44 (E.D. Mo. 2000) (concluding that a furnisher's investigation was not necessarily reasonable when an initial investigation was deficient for, among other reasons, failing to contact the consumer), that was not the case here.

Gorman disputes this conclusion, insisting that under the Fourth Circuit's opinion in *Johnson*, it is per se unreasonable for a furnisher to rely solely on internal account records when investigating a consumer dispute. Gorman misreads *Johnson*, which recognized that the reasonableness of an investigation depends on the facts of the particular case, most importantly the CRA's description of the dispute in its notice. *See Johnson*, 357 F.3d at 431 (noting that confining the investigation to internal computer notes was not necessarily reasonable *in light of* the specificity of the description of the dispute in the notice).

In *Johnson*, the CRA's notice to MBNA read: "CONSUMER STATES BELONGS TO HUSBAND ONLY;" "WAS NEVER A SIGNER ON ACCOUNT. WAS AN AUTHORIZED USER." *Id.* at 429. The underlying facts were that Johnson's future husband opened an MBNA credit card account. Some years later, after they were married, Johnson's husband filed for bankruptcy, and MBNA told Johnson she was responsible for the balance, maintaining that she was a co-applicant, and therefore a co-obligor, on the account. *Johnson*, 357 F.3d at 428-29. Johnson argued that she was merely an authorized user. *Id.*

In response to the notice to the CRAs, MBNA only confirmed Johnson's identifying information and confirmed that its internal computer system indicated she was the sole responsible party on the account. *Id.* at 431. At no time did MBNA try to ascertain whether Johnson's information — that

she had not signed the application form — was correct. The Fourth Circuit held this investigation unreasonable:

> The MBNA agents also testified that, in investigating consumer disputes generally, they do not look beyond the information contained in the CIS [MBNA's internal computer system] and never consult underlying documents such as account applications. Based on this evidence, a jury could reasonably conclude that MBNA acted unreasonably in failing to verify the accuracy of the information contained in the CIS.

Id.

[13] In contrast to *Johnson*, in Gorman's case MBNA did review all the pertinent records in its possession, which revealed that an *initial* investigation had taken place in which MBNA contacted both Gorman and the merchant. Thus, unlike in *Johnson*, MBNA had — albeit earlier — gone outside its own records to investigate the allegations contained in the CRA notice, and on reading the notice, did consult the relevant information in its possession. *Johnson* does not indicate that a furnisher has an obligation to repeat an earlier investigation, the record of which is in the furnisher's records.

We emphasize that the requirement that furnishers investigate consumer disputes is procedural. An investigation is not necessarily unreasonable because it results in a substantive conclusion unfavorable to the consumer, even if that conclusion turns out to be inaccurate.

[14] In short, although "reasonableness" is generally a question for a finder of fact, summary judgment in this case was appropriate.

3. MBNA's failure to provide notice of dispute

Gorman next argues that MBNA failed to notify the CRAs that he continued to dispute the delinquent charges on his account. He contends that in reporting the delinquency without also reporting his ongoing dispute, MBNA violated its obligations under 12 C.F.R. § 226.13,[14] and thus furnished "incomplete or inaccurate" credit information in violation of the FCRA. MBNA neither concedes nor disputes that it was so obligated,[15] but argues on summary judgment that the statute does not permit Gorman to raise this claim. Also, in the alternative, MBNA contends that Gorman did not submit enough evidence to show whether his credit reports included a notice that the delinquency was disputed or whether MBNA did not so notify the CRAs. We must decide (1) whether the failure to notify the CRAs that the delinquent debt was disputed is actionable under § 1681s-2(b), and if so, (2) whether Gorman introduced sufficient evidence on summary judgment to show that MBNA so notified the CRAs.

a. Gorman's Claim is Actionable

[15] If a consumer disputes the accuracy of credit information, the FCRA requires furnishers to report that fact when reporting the disputed information. Section 1681s-2(a)(3) pro-

[14]This requirement is imposed by Regulation Z, promulgated pursuant to the Truth in Lending Act, 15 U.S.C. § 1601 *et seq*. The regulation provides that, if a consumer timely disputes a charge with a creditor but the creditor concludes that the charge is valid, the creditor "[m]ay not report that an amount or account is delinquent because the amount due . . . remains unpaid, if the creditor receives [within a specific time period] further written notice from the consumer that any portion of the billing error is still in dispute, unless the creditor also . . . [p]romptly reports that the amount or account is in dispute." 12 C.F.R. § 226.13(g)(4).

[15]Gorman does not bring a claim under either Regulation Z or the pertinent section of the Truth in Lending Act. We therefore need not decide whether in this case MBNA violated its obligations under those provisions.

vides: "If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer." As noted, however, the statute expressly provides that a claim for violation of this requirement can be pursued only by federal or state officials, and not by a private party. § 1681s-2(c)(1) ("Except [for circumstances not relevant here], sections 1681n and 1681o of this title [providing private right of action for willful and negligent violations] do not apply to any violation of . . . subsection (a) of this section, including any regulations issued thereunder."); *see also Nelson*, 282 F.3d at 1059. Thus, Gorman has no private right of action under § 1681s-2(a)(3) to proceed against MBNA for its initial failure to notify the CRAs that he disputed the Four Peaks charges.

[16] Gorman does have a private right of action, however, to challenge MBNA's subsequent failure to so notify the CRAs after receiving notice of Gorman's dispute under § 1681s-2(b). In addition to requiring that a furnisher conduct a reasonable investigation of a consumer dispute, § 1681s-2(b) also requires a creditor, upon receiving notice of such dispute, to both report the results of the investigation *and*, "if the investigation finds that the information is incomplete or inaccurate, report those results" to the CRAs. § 1681s-2(b)(1)(C), (D). Gorman argues that MBNA's reporting of the Four Peaks charge and delinquency, without a notation that the debt was disputed, was an "incomplete or inaccurate" entry on his credit file that MBNA failed to correct after its investigation. As this claim alleges that obligations imposed under § 1681s-2(b) were violated, it is available to private individuals.

[17] The Fourth Circuit has recently held that after receiving notice of dispute, a furnisher's decision to continue reporting a disputed debt without any notation of the dispute

presents a cognizable claim under § 1681s-2(b). *See Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 150 (4th Cir. 2008). In *Saunders*, a consumer alleged that he incurred late fees and penalties as a result of a creditor's own admitted accounting errors; the creditor, Branch Banking & Trust (BB&T), refused to waive the fees, and the consumer responded by withholding payments on the loan. *Id.* at 145-46. BB&T reported the loan to the CRAs as "in repossession status," and, after suffering adverse credit decisions, the consumer contacted the CRAs to report the dispute. *Id.* at 146. The CRAs sent a notice of dispute to BB&T, triggering its obligations to investigate and verify the accuracy of the reported information under § 1681s-2(b)(1). BB&T responded by updating the consumer record to reflect that it had written off the debt as uncollectible, but failed to indicate that the consumer still disputed the validity of the obligation. *Id.* The consumer brought suit under § 1681s-2(b) and a jury found that BB&T had violated its obligations.

The Fourth Circuit affirmed. The court reasoned that in enacting § 1681s-2(b)(1)(D), "Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for omissions that render the reported information misleading." *Id.* at 148. Although the report may have been "technically accurate" in the sense that it reflected the consumer's failure to make any payments on the loan, the court noted that it had previously held that "a consumer report that contains technically accurate information may be deemed 'inaccurate' if the statement is presented in such a way that it creates a misleading impression." *Id.* (citing *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415-16 (4th Cir. 2001)). The Fourth Circuit went on to note that a consumer's failure to pay a debt that is not really due "does not reflect financial irresponsibility," and thus the omission of the disputed nature of a debt could render the information sufficiently misleading so as to be "incomplete or inaccurate" within the meaning of the statute. *Id.* at 150. *Saunders* went on to reject the contention that Congress

meant to exempt furnishers of information from private liability by placing the initial obligation to report disputes in subsection (a), stating that "[n]o court has ever suggested that a furnisher can excuse its failure to identify an inaccuracy when reporting pursuant to § 1681s-2(b) by arguing that it should have *already* reported the information accurately under § 1681s-2(a)." *Id.* at 149-50.

[18] This reasoning is persuasive. Like *Saunders*, several other courts have held that a credit entry can be "incomplete or inaccurate" within the meaning of the FCRA "because it is patently incorrect, or because it is misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." *Sepulvado v. CSC Credit Servs., Inc.*, 158 F.3d 890, 895 (5th Cir. 1998); *see also Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 40 (D.C. Cir. 1984) ("Certainly reports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer . . . ."). As the Fourth Circuit observed, holding otherwise would create a rule that, as a matter of law, an omission of the disputed nature of a debt never renders a report incomplete or inaccurate. *See Saunders*, 526 F.3d at 150. Not only might such a rule intimidate consumers into giving up bona fide disputes by paying debts not actually due to avoid damage to their credit ratings, but it also contravenes the purpose of the FCRA, to protect against "unfair credit reporting methods." *See* 15 U.S.C. § 1681(a)(1).

Holding that there is a private cause of action under § 1681s-2(b) does not mean that a furnisher could be held liable on the merits simply for a failure to report that a debt is disputed. The consumer must still convince the finder of fact that the omission of the dispute was "misleading in such a way and to such an extent that [it] can be expected to have an adverse effect." *Saunders*, 526 F.3d at 150 (quotation omitted). In other words, a furnisher does not report "incomplete or inaccurate" information within the meaning of § 1681s-2(b) simply by failing to report a meritless dispute, because

reporting an actual debt without noting that it is disputed is unlikely to be materially misleading. It is the failure to report a bona fide dispute, a dispute that could materially alter how the reported debt is understood, that gives rise to a furnisher's liability under § 1681s-2(b). *Cf. id.* at 151 ("[W]e assume, without deciding that a furnisher incurs liability under § 1681s-2(b) only if it fails to report a meritorious dispute.").

[19] It is true, as we have said, that a furnisher's initial failure to comply with this requirement is not privately enforceable. But as the Fourth Circuit noted, this does not excuse the furnisher's failure to correct the omission after investigating pursuant to § 1681s-2(b). *See Saunders*, 526 F.3d at 150. The purpose of § 1681s-2(b) is to require furnishers to investigate and verify that they are in fact reporting complete and accurate information to the CRAs after a consumer has objected to the information in his file. *See Johnson*, 357 F.3d at 431 ("[Congress] create[d] a system intended to give consumers a means to dispute—and, ultimately, correct—inaccurate information on their credit reports."). A disputed credit file that lacks a notation of dispute may well be "incomplete or inaccurate" within the meaning of the FCRA, and the furnisher has a privately enforceable obligation to correct the information after notice. § 1681s-2(b)(1)(D). We thus conclude that the statute permits Gorman to bring his claim regarding MBNA's failure to report the charge still disputed.

b. Evidentiary Challenges

MBNA argues that summary judgment is nevertheless appropriate on this claim because Gorman failed to introduce sufficient admissible evidence that (1) his credit reports lacked a notation that the Four Peaks debt was disputed and (2) MBNA failed to report the account as disputed in this respect to the CRAs.

Gorman did not submit his credit reports to the district

court until after the court issued its summary judgment order.[16] We ordinarily will not consider on appeal "[p]apers submitted to the district court *after* the ruling that is challenged." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). We need not decide, however, whether the credit reports are properly before us, because Gorman has submitted other admissible evidence that creates a triable issue of fact as to whether his credit reports lacked a notice of dispute.

[20] Gorman previously stated in his declaration that he had reviewed many of his personal credit reports, and that none of them included a notice that he disputed the delinquent charges. This statement is admissible evidence. Gorman has personal knowledge, having seen the reports. The evidence is not inadmissible hearsay, as Gorman does not rely on the credit reports for the truth of the matter asserted therein; in fact, as he notes, he disputes the truth of their contents. Instead, Gorman offers them to prove that no statement noticing the dispute was made. "If the significance of an offered statement lies solely in the fact that it was made . . . the statement is not hearsay." *United States v. Dorsey*, 418 F.3d 1038, 1044 (9th Cir. 2005) (quoting Fed. R. Evid. 801 advisory committee's note). He thus submitted sufficient evidence for a jury to conclude that his credit reports contained no notice of dispute.

[21] There is also sufficient evidence from which a jury could infer that MBNA did not notify the CRAs that the debt was disputed. Gorman himself has no personal knowledge of what MBNA actually submitted to the CRAs in response to its investigations.[17] However, the dispute verification forms

[16]Gorman submitted the credit reports in support of his motion for leave to file a motion for reconsideration.

[17]The only evidence he submitted was his sworn declaration that MBNA "report[ed] my account as delinquent *without indicating that some or all of the debt was disputed by the account holder*." Gorman Decl. ¶ 12, Apr. 12, 2006. But Gorman provided no indication that he had personal knowledge of the contents of MBNA's report.

MBNA returned to the CRAs contained no notice that the debt was disputed; rather, they indicated that the information previously provided was "accurate as reported." Yet, MBNA's review of Gorman's account notes revealed that he continued to dispute the debt even after MBNA concluded its initial investigation and reposted the Four Peaks charges. Moreover, according to MBNA's witness's declaration, MBNA told the CRAs that all of the information reported on Gorman's account was accurate, and Gorman has produced sufficient evidence that no notice of dispute appeared on the credit reports. Gorman has thus submitted sufficient evidence to create an issue of fact concerning whether MBNA failed to inform the CRAs, in response to the dispute notice, that Gorman still disputed the debt.

[22] In sum, we hold that any investigation under § 1681s-2(b)(1)(A) must be reasonable; that any reasonable trier of fact would conclude that MBNA's investigation was reasonable; that § 1681s-2(b) permits Gorman to bring his claim that MBNA failed to inform the CRAs that the information about his delinquency was "incomplete or inaccurate" after investigating the December 2004 notice from the CRAs; and that Gorman has submitted sufficient evidence to survive summary judgment on this claim.[18]

B. Libel Claim

Gorman also advanced a state law libel claim on which the

[18]Because the district court held that there was no private right of action under § 1681s-2(b), it did not reach the merits of Gorman's claim. *Gorman II*, 435 F. Supp. 2d at 1008-09. On appeal, MBNA's arguments as to this claim are only that there is no private right of action, and, in the alternative, that Gorman has failed to introduce admissible evidence that MBNA failed to report the debt as disputed. We do not go beyond the arguments made, and so conclude only that Gorman can go forward with his claim, having produced admissible evidence that MBNA failed to report the debt as disputed. We take no position as to whether MBNA's failure to report the debt as disputed violated § 1681s-2(b).

district court made two rulings. On MBNA's motion to dismiss, the court held that the FCRA did not preempt Gorman's libel claim because he alleged malice or willful intent to injure, satisfying the requirements of § 1681h(e). *Gorman I*, 370 F. Supp. 2d at 1009-10. MBNA contests this conclusion. The district court granted MBNA's motion for summary judgment on the libel claim however, holding that Gorman failed to submit evidence creating a disputed issue of material fact with respect to malice or willful intent. *Gorman II*, 435 F. Supp. 2d at 1009-10. Gorman appeals this ruling.

1. Preemption

The preemption question presents a difficult issue of first impression. The difficulty arises from the interaction of two provisions of the FCRA. Section 1681h governs the "[c]onditions and form of disclosure to consumers," disclosures that CRAs are required or permitted to make under other sections of the Act. Section 1681h(e) sets forth, in relevant part, the following "[l]imitation of liability" (with emphasis added):

> Except as provided in sections 1681n and 1681o of this title, 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 section 1681g,[19] 1681h,[20] or 1681m[21] of this title or based on infor-

[19]Section 1681g addresses "[d]isclosures to consumers." It provides in detail the information CRAs must disclose to consumers, the rights of consumers to obtain credit reports and scores and to dispute information in credit reports, and the information that must be made available to identity theft victims and mortgage applicants.

[20]Section 1681h, as noted above, deals with the "[c]onditions and form" of these disclosures.

[21]Section 1681m addresses the duties of "users of consumer reports." In

> mation 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*

Section 1681t addresses more generally the FCRA's "[r]elation to State laws." In general, the FCRA does not preempt any state law "except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency." § 1681t(a). But this general rule has several exceptions, added in 1996, including the following:

> 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).

§ 1681t(b)(1)(F).[22] No changes were made to § 1681h(e) with these amendments.

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essence, it imposes certain responsibilities on persons who take adverse actions based on credit reports or another source of information about a person's credit, or who make solicitations on the basis of credit reports.

[22]The parties assume that, if § 1681t(b)(1)(F) applies, it bars Gorman's libel claim. We note, however, that the application of that section to any

Although § 1681t(b)(1)(F) appears to preempt all state law claims based on a creditor's responsibilities under § 1681s-2, § 1681h(e) suggests that defamation claims can proceed against creditors as long as the plaintiff alleges falsity and malice. Attempting to reconcile the two sections has left district courts in disarray. The district court in this case held that § 1681h(e), the more specific preemption provision, trumped the more general preemption provision of § 1681t(b)(1)(F).[23] *Gorman I*, 370 F. Supp. 2d at 1009-10 (citing *Gordon v. Greenpoint Credit*, 266 F. Supp. 2d 1007, 1013 (S.D. Iowa 2003)). Other district courts have followed different approaches. Some have concluded that the later-enacted § 1681t(b)(1)(F) effectively repeals the earlier preemption provision, § 1681h(e). *Jaramillo v. Experian Info. Solutions*,

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given common law claim is not self-evident. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Supreme Court discussed whether a preemption provision containing the same "No requirement or prohibition . . . shall be imposed" language applied to some, but not all, common law claims. A plurality of the Court analyzed the question as follows: "we ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." *Id.* at 523-24 (alterations in original). *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying a " 'presumption against the pre-emption of state police power regulations' to support a narrow interpretation of such an express [statutory] command."). Assuming this is the right inquiry, libel law probably entails a "prohibition . . . with respect to" what a furnisher of information can report to a CRA. We do not decide the question, however, given our conclusion that Gorman has not presented sufficient evidence to state a libel claim.

[23]We note that both provisions are specific in different ways: § 1681t(b)(1)(F) is specific as to the target of suits, governing requirements placed on furnishers of information; § 1681h(e) is specific as to the nature of the claim, permitting certain common law claims if falsity and malice is shown. So, in some sense, both provisions are "specific." But § 1681h(e) may be more specific for preemption purposes, because the tension is the nature of the claims preempted, and § 1681h(e) specifies certain claims that can be brought.

Inc., 155 F. Supp. 2d 356, 361 (E.D. Pa. 2001) (footnote omitted) (the "total preemption" approach). Attempting to give meaning to both sections, other courts have observed that § 1681t(b)(1)(F) relates to "any subject matter regulated under section 1681s-2," the section which regulates the responses of furnishers to notices of dispute. Hence, these courts apply a "temporal approach," holding that "causes of action predicated on acts that occurred *before* a furnisher of information had notice of any inaccuracies are not preempted by § 1681t(b)(1)(F), but are instead governed by § 1681h(e)." *Kane v. Guar. Residential Lending, Inc.*, 2005 WL 1153623, at *8 (E.D.N.Y. May 16, 2005).

Gorman advocates a still different "statutory" analysis, under which "t(b)(1)(F) preempts only state law claims against credit information furnishers brought under state statutes, just as 1681h(e) preempts only state tort claims." *Manno v. Am. Gen. Fin. Co.*, 439 F. Supp. 2d 418, 425 (E.D. Pa. 2006) (describing the approach).[24] Finally, MBNA argues that § 1681h(e) is not a broad preemption provision at all, but simply a "grant of protection for statutorily required disclosures." (quoting *McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 814 (W.D. Ky. 1999)). But, of course, granting entities immunity from state law tort suits in exchange for

[24]Support for this view rests on the proposition that "Congress seems to have been most concerned with protecting credit information furnishers from state statutory obligations inconsistent with their duties under the FCRA." *Manno*, 439 F. Supp. 2d at 425. Section 1681t(b)(1)(F) exempts two specific state statutes from preemption, suggesting, some courts say, that Congress "had state statutes in mind." *Id.* Other subsections of § 1681t also exempt state statutes; none addresses common law claims. Yet, this distinction does not appear in the text of the statute. In fact, "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Cipollone*, 505 U.S. at 521 (1992) (plurality opinion) (second alteration in original); *see also Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1008 (2008) (adopting this position for a majority of the Court).

making required disclosures is just another way of saying that certain state law claims are preempted.[25]

In the end, we need not decide this issue. As we conclude below, even if Gorman could bring a state law libel claim under § 1681h(e), and such a claim were not preempted by § 1681t(b)(1)(F), he has not introduced sufficient evidence to survive summary judgment on this claim.

2. Evidence

[23] Under California law, "[l]ibel is a false and unprivileged publication . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45. Even if Gorman's libel claim is not preempted by § 1681t(b)(1)(F), it is still subject to § 1681h(e), and so he must prove, in addition to the common law elements of libel, that the information was "false" and "furnished with malice or willful intent to injure."

[24] The FCRA does not define the appropriate standard for "malice." The two circuits that have interpreted § 1681h(e) have applied the standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), requiring the publication be made "with knowledge that it was false or with

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[25] *McAnly* offers one reason why Congress may have chosen to preempt such state law claims:

> Since various parts of the federal statute require consumer reporting agencies and information users to disclose information to consumers under certain circumstances, this section guarantees that the agencies or users cannot be sued for those required disclosures under state tort law. It makes sense that acts required to be done by the FCRA are immunized from state tort liability.

77 F. Supp. 2d at 814-15. However illuminating this explanation may be, it does not help resolve the apparent conflict between §§ 1681h(e) and 1681t(b)(1)(F).

reckless disregard of whether it was false or not." *See Morris v. Equifax Info. Servs., LLC*, 457 F.3d 460, 471 (5th Cir. 2006); *Thornton v. Equifax, Inc.*, 619 F.2d 700, 705 (8th Cir. 1980). Under *New York Times*, to show "reckless disregard," a plaintiff must put forth "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also Morris*, 457 F.3d at 471 (applying *St. Amant*). We agree with the courts that have adopted the *New York Times* standard for purposes of § 1681h(e), and so apply it here.

Gorman's libel claim is based on two pieces of information reported by MBNA: the underlying debt itself and the reporting of the debt without a notation that it was disputed.

As to the debt itself, there is no evidence that MBNA knew the debt was false or acted with reckless disregard as to its falsity. As an initial matter, the bulk of the delinquent debt — about $5,000 — derives from non-disputed credit card purchases, unrelated to the disputed Four Peaks charge. Gorman contends that he does not owe these charges, claiming an offset for his attorneys' fees incurred in the dispute over the Four Peaks debt. But he has presented no authority whatever supporting his entitlement to these fees, nor any evidence that these fees are reasonable. Absent any evidence or colorable argument that this portion of the debt to MBNA was invalid, no reasonable jury could find that MBNA acted maliciously in reporting this portion of the debt to the CRAs.

Gorman has also failed to introduce sufficient evidence of malice with respect to the remaining portion of the debt, the roughly $750 disputed Four Peaks charge. Even assuming that the debt was indeed invalid, we cannot say that a reasonable jury could conclude that MBNA acted with "reckless disregard" as to the invalidity of the debt.[26]

[26]We do not decide whether the debt related to the Four Peaks charge is valid, as the question is not before us.

MBNA conducted an investigation into Gorman's dispute in which it contacted both Gorman and Four Peaks. As a result of the investigation, it initially agreed to remove the charges, reinstating them only after learning that Gorman had failed to return the merchandise. The remaining controversy involves a legal and factual disagreement between Gorman and Four Peaks.[27] MBNA did not act recklessly by failing to wade through this complex legal and factual debate. *See Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1069 (9th Cir. 1992) (concluding that a furnisher does not act with malice when it takes "reasonable steps to verify the information" in its credit report). That it reposted the debt in reliance on Four Peaks's version rather than resolving the dispute in Gorman's favor does not demonstrate that MBNA "entertained serious doubts as to the truth of [its] publication." *St. Amant*, 390 U.S. at 731.

Additionally, even if MBNA violated its obligations to report that Gorman disputed the debt, this failure does not render the information that was reported "false" so as to support a libel claim meeting the § 1681h(e) malice standard. The obligation to report a disputed debt is a protective regulatory requirement imposed by the FCRA. § 1681s-2(a)(3); *see also* 12 C.F.R. § 226.13. Any failure by MBNA to meet this requirement may render its reporting deficient under the statute, but it does not render the information MBNA did furnish maliciously or wilfully false. So long as the creditor has a good faith reason for believing that the debt is in fact owed,

[27]Gorman's essential claim is that in rejecting the goods and making them available to Four Peaks for pickup, he has done all that is required under California law. *See* Cal. Com. Code § 2602 ("If the buyer has before rejection taken physical possession of the goods . . . he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them."). Four Peaks claimed to have sent Gorman pre-paid shipping labels for the defective merchandise's return, but insisted that Gorman would have to pay to return the replacement equipment it claims to have sent. Gorman insists that he did not receive any replacement merchandise or shipment labels and, in any event, he refuses to pay any shipping costs.

reporting the debt without reporting the dispute does not convey "false" information "with malice or willful intent to injure the consumer." *See Francis v. Dun & Bradstreet, Inc.*, 4 Cal. Rptr. 2d 361, 364 (Ct. App. 1992) (holding that a defamation claim cannot be sustained for truthful information in a credit report, even if the information reported supports misleading inferences).

Gorman has offered no evidence that MBNA seriously doubted that the debt was owed, or that MBNA believed Gorman had a meritorious dispute. The record suggests instead that MBNA investigated the debt and determined that it was valid. Despite its conclusion, MBNA may still have faced a regulatory obligation to report the continuing dispute, but its failure to do so was not malicious.

[25] Gorman's sole evidence of MBNA's malice or intent to injure is the statement in his declaration that an MBNA representative told him, during a collection call, "We're a big bank. You either pay us or we'll destroy your credit." But this incident does not evidence a knowledge on MBNA's part that the debt was not valid. In the context of other evidence in the record — including Gorman's refusal to pay *any* of his credit card bill because of supposed attorneys' fees owed him by MBNA — there is no basis for concluding that MBNA issued that threat knowing no debt was due or recklessly disregarding the invalidity of the debt.

[26] As Gorman cannot state a claim for libel consistent with the *limited* exception contained in § 1681h(e) of the FCRA, we affirm the district court's grant of summary judgment to MBNA on Gorman's libel claim.

C. California Civil Code § 1785.25(a)

[27] Finally, Gorman brings a claim under Cal. Civ. Code section 1785.25(a), which 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.

Section 1681t(b)(1)(F), the FCRA's preemption provision, expressly exempts *this subsection* — Cal. Civ. Code section 1785.25(a) — from its general exclusion of state law claims on matters governed by § 1681s-2.[28]

On MBNA's motion to dismiss, the district court nevertheless held the California statutory claim preempted, because the private right of action to enforce Cal. Civ. Code section 1785.25(a) is found in other sections not specifically exempted from the federal preemption provision, namely, Cal Civ. Code sections 1785.25(g)[29] and 1785.31.[30] Because these

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[28]As noted above, § 1681t(b)(1)(F) 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).

The Massachusetts statute sets forth procedures to ensure accuracy of information reported to consumer reporting agencies.

[29]Section 1785.25(g) provides:

> A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with those provisions.

[30]Section 1785.31 provides that "[a]ny consumer who suffers damages as a result of a violation of this title by any person may bring an action" to recover damages.

specific sections were not excluded from the preemption section of the FCRA, the district court concluded, violations of Cal. Civ. Code section 1785.25(a) could only be enforced by federal or state officials. *Gorman I*, 370 F. Supp. 2d at 1010-11.

We do not find the district court's reasoning persuasive. As an initial matter, the court did not cite any provision of California law authorizing enforcement of section 1785.25(a) by state officials. *Lin v. Universal Card Services Corp.*, 238 F. Supp. 2d 1147 (N.D. Cal. 2002), on which the district court relied, similarly fails to identify authorization for enforcement by state officials. Such authorization may reside elsewhere in California law, but if it does, it almost surely lies in provisions also not specifically excluded by the FCRA preemption provision. The district court's analysis would thus lead to the conclusion that Congress explicitly retained the portions of the California statutory scheme that create obligations, without leaving in place any enforcement mechanism. This would be an unlikely result at best.[31]

[31]In *Islam v. Option One Mortgage Corp.*, 432 F. Supp. 2d 181 (D. Mass. 2006), the court examined the Massachusetts provision, Mass. Gen. Law 93 § 54A(a), that is also excluded from § 1681t(b)(1)(F). As with the California statute, the FCRA explicitly identifies the portion of the Massachusetts statute that creates the reporting obligations for furnishers, but does not expressly mention the section that provides for private enforcement. *Id.* at 185-86. The court held that absent any evidence that state officials were authorized to enforce this provision, the construction urged by the district court here could not stand: "it is absurd to conclude that Congress would have explicitly excepted [Mass. Gen. Law 93 § 54A(a)] while not leaving an enforcement mechanism." *Id.* at 189. Finding that the parties stipulated to the Attorney General's authority, however, *Islam* held the private state claim preempted. *Id.*

The *Islam* court also felt itself constrained by the First Circuit's affirmance of *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1 (D. Mass. 2004), *aff'd*, *Gibbs v. SLM Corp.*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005), which also construed § 1681t(b)(1)(F) as preempting private causes of action under the Massachusetts statute, and was summarily affirmed by the First Circuit without analysis. As we engage in more thorough statutory construction analysis, we reach a different conclusion.

[28] Moreover, the district court construed the statutory exception in isolation, disregarding the affirmative preemption language of the statute that "*[n]o requirement or prohibition* may be imposed" with respect to subjects regulated under § 1681s-2. (emphasis added). Neither Cal. Civ. Code section 1785.25(g) nor section 1785.31 impose a "requirement or prohibition." Rather, these sections merely provide a vehicle for private parties to enforce other sections, which *do* impose requirements and prohibitions. In other words, Congress had no need to include these enforcement provisions in the § 1681t(b)(1)(F) exception to save the California statutory scheme from preemption, because those provisions were not preempted by the affirmative language of the preemption provision. By the plain language of the statute, therefore, these sections are not preempted by § 1681t(b)(1)(F).

MBNA argues that this plain reading of the statute is foreclosed by the Supreme Court's decision in *Cipollone*. Interpreting the phrase "any requirement or prohibition" in the Federal Cigarette Label and Advertising Act, a majority of the *Cipollone* Court held that common law damages actions can impose "requirement[s] or prohibition[s]," because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." 505 U.S. at 521 (plurality opinion) (citation omitted).[32] But, as the court later made clear in a majority opinion relying on the *Cipollone* plurality's discussion on this point, it is not the common law *enforcement mechanisms* that are requirements or prohibitions, but the "common law *duties*" underlying such actions. *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1008 (2008) (emphasis added). As *Riegel* went on to explain, again relying

[32]Although only a plurality of the Court signed onto the portion of the opinion containing this specific language, a majority of justices adopted the position that the language "requirement or prohibition" sweeps broadly enough to encompass state common-law rules. *See Cipollone*, 505 U.S. at 548-49 (Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part).

on the *Cipollone* plurality, "common-law liability is premised on the existence of a *legal duty*, and a tort judgment therefore establishes that a defendant has violated a state-law *obligation*." *Id*. (quoting *Cipollone*, 505 U.S. at 522) (emphasis added). Thus, a "requirement" is "a rule of law that must be obeyed," *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005), whether it arises from common law principles enforceable in damages actions or in a statute. But the damages remedy itself is not a "requirement or prohibition."

Here, it is Cal. Civ. Code section 1785.25(a), and only section 1785.25(a), that imposes legal duties — "rule[s] of law that must be obeyed" — on furnishers of information. Congress explicitly saved this section from preemption in the FCRA. Private enforcement of these obligations does not impose "requirement[s] or prohibition[s]" but, instead, provides enforcement mechanisms for "requirement[s] or prohibition[s] imposed separately. Sections 1785.25(g) and 1785.31 do not impose any additional standards "designed to be . . . potent method[s] of governing conduct and controlling policy," *Riegel*, 128 S.Ct. at 1008, 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) and saved in the FCRA. *See Bates*, 544 U.S. at 445.

MBNA's argument that Congress's desire for uniformity and consistency compels an alternative construction is also unpersuasive in this context. MBNA maintains that the FCRA preemption provision evidences a desire for uniform credit reporting obligations, and that the California statute was saved only because it was not inconsistent with obligations imposed by the federal statute. The legislative history surrounding § 1681t(b)(1)(F) is murky, but there is evidence that the statutory scheme, which establishes national requirements and preempts most state regulation, was motivated at least in part by a desire for uniformity of reporting obligations. *See* S. Rep. No. 103-209, at 7 (1993) ("Recognizing the national

scope of the consumer reporting industry and the benefits of uniformity, the Committee bill includes provisions preempting state law in several key areas of the FCRA."). It is also true that the excepted state law provisions are largely consistent with obligations imposed in the FCRA; indeed, the requirements imposed in the California and Massachusetts laws appear, in nearly identical fashion, in § 1681s-2(a).[33]

The only real inconsistency arises between the private enforcement provisions of the California and Massachusetts statutes and § 1681s-2(c) and (d), which prohibit private enforcement of the obligations under § 1681s-2(a). But this is an inconsistency that does not offend the purported goal of uniformity of credit reporting obligations. The enforcement sections do not impose inconsistent or conflicting obligations on furnishers of information; as we have noted, they impose *no* such requirements or prohibitions at all. As such, 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.

Moreover, exempting specific state statutes from preemption is very unusual in federal statutes. To suppose Congress would do so for little or no purpose — as would be the case

[33]*Compare* Cal. Civil Code section 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."), *and* Mass. Gen. Law 93 § 54A(a) ("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."), *with* § 1681s-2(a)(1)(A) ("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.").

if the private cause of action under California law were preempted — is simply not plausible. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) ("The saving clause assumes that there are some significant number of . . . cases to save.").

[29] 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 Cal. Civ. Code section 1785.25(a) is not preempted by the FCRA.

D. Evidence of Causation/Damages

Finally, MBNA proposes an alternative ground on which to affirm all claims: that Gorman failed in the summary judgment proceedings to submit admissible evidence of causation or damages. In *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069-70 (9th Cir. 2008), this court found sufficient evidence of causation and damages to survive summary judgment where:

> Dennis [the plaintiff] testified that he hoped to start a business and that he diligently paid his bills on time for years so that he would have a clean credit history when he sought financing for the venture. The only blemish on his credit report in April 2003 was the erroneously reported judgment. According to Dennis, that was enough to cause several lenders to decline his applications for credit, dashing his hopes of starting a new business. Dennis also claims that Experian's error caused his next landlord to demand that Dennis pay a greater security deposit.

[30] Here, Gorman submitted evidence that he was refused credit or offered higher than advertised interest rates; the explanations given by the creditors were delinquencies on his credit report; and the only delinquency is the MBNA account.

Gorman maintains that he had to borrow money at inflated interest rates, and that he lost wages from the time spent dealing with his credit problems. Under *Dennis*, this is sufficient to establish causation and damages.

III. CONCLUSION

For the foregoing reasons, we AFFIRM in part and REVERSE in part the district court's order.

ADDENDUM B

TITLE 15 - COMMERCE AND TRADE
CHAPTER 41 - CONSUMER CREDIT PROTECTION
SUBCHAPTER III - CREDIT REPORTING AGENCIES

§ 1681s. Administrative enforcement

(a) Enforcement by Federal Trade Commission

(1) Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C. 45 (a)] and shall be subject to enforcement by the Federal Trade Commission under section 5 (b) thereof [15 U.S.C. 45 (b)] with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter.

(2) **(A)** In the event of a knowing violation, which constitutes a pattern or practice of violations of this subchapter, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this subchapter. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s–2 (a)(1) of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State

branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813 (s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s–2 (c) of this title, damages for which the person would, but for section 1681s–2 (c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators

The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending

If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this subchapter that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required

A State may not bring an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s–2 (c) of this title, unless—

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable

In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s–2 (c) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(e) Regulatory authority

(1) The Federal banking agencies referred to in paragraphs (1) and (2) of subsection (b) of this section shall jointly prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraphs (1) and (2) of subsection (b) of this section, and the Board of Governors of the Federal Reserve System shall have authority to prescribe regulations consistent with such joint regulations with respect to bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies.

(2) The Board of the National Credit Union Administration shall prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraph (3) of subsection (b) of this section.

(f) Coordination of consumer complaint investigations

(1) In general

Each consumer reporting agency described in section 1681a (p) of this title shall develop and maintain procedures for the referral to each other such agency of any consumer complaint received

by the agency alleging identity theft, or requesting a fraud alert under section 1681c–1 of this title or a block under section 1681c–2 of this title.

(2) Model form and procedure for reporting identity theft

The Commission, in consultation with the Federal banking agencies and the National Credit Union Administration, shall develop a model form and model procedures to be used by consumers who are victims of identity theft for contacting and informing creditors and consumer reporting agencies of the fraud.

(3) Annual summary reports

Each consumer reporting agency described in section 1681a (p) of this title shall submit an annual summary report to the Commission on consumer complaints received by the agency on identity theft or fraud alerts.

(g) FTC regulation of coding of trade names

If the Commission determines that a person described in paragraph (9) of section 1681s–2 (a) of this title has not met the requirements of such paragraph, the Commission shall take action to ensure the person's compliance with such paragraph, which may include issuing model guidance or prescribing reasonable policies and procedures, as necessary to ensure that such person complies with such paragraph.

TITLE 15 - COMMERCE AND TRADE
CHAPTER 41 - CONSUMER CREDIT PROTECTION
SUBCHAPTER III - CREDIT REPORTING AGENCIES

§ 1681s–2. Responsibilities of furnishers of information to consumer reporting agencies

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

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.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if—

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

(C) No address requirement

A person who clearly and conspicuously specifies to the consumer an address for notices referred to in subparagraph (B) shall not be subject to subparagraph (A); however, nothing in subparagraph (B) shall require a person to specify such an address.

(D) Definition

For purposes of subparagraph (A), the term "reasonable cause to believe that the information is inaccurate" means having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.

(2) Duty to correct and update information

A person who—

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

(B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate,

shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

(3) Duty to provide notice of dispute

If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

(4) Duty to provide notice of closed accounts

A person who regularly and in the ordinary course of business furnishes information to a consumer reporting agency regarding a consumer who has a credit account with that person shall notify the

agency of the voluntary closure of the account by the consumer, in information regularly furnished for the period in which the account is closed.

(5) Duty to provide notice of delinquency of accounts

(A) In general

A person who furnishes information to a consumer reporting agency regarding a delinquent account being placed for collection, charged to profit or loss, or subjected to any similar action shall, not later than 90 days after furnishing the information, notify the agency of the date of delinquency on the account, which shall be the month and year of the commencement of the delinquency on the account that immediately preceded the action.

(B) Rule of construction

For purposes of this paragraph only, and provided that the consumer does not dispute the information, a person that furnishes information on a delinquent account that is placed for collection, charged for profit or loss, or subjected to any similar action, complies with this paragraph, if—

(i) the person reports the same date of delinquency as that provided by the creditor to which the account was owed at the time at which the commencement of the delinquency occurred, if the creditor previously reported that date of delinquency to a consumer reporting agency;

(ii) the creditor did not previously report the date of delinquency to a consumer reporting agency, and the person establishes and follows reasonable procedures to obtain the date of delinquency from the creditor or another reliable source and reports that date to a consumer reporting agency as the date of delinquency; or

(iii) the creditor did not previously report the date of delinquency to a consumer reporting agency and the date of delinquency cannot be reasonably obtained as provided in clause (ii), the person establishes and follows reasonable procedures to ensure the date reported as the date of delinquency precedes the date on which the account is placed for collection, charged to profit or loss, or subjected to any similar action, and reports such date to the credit reporting agency.

(6) Duties of furnishers upon notice of identity theft-related information

(A) Reasonable procedures

A person that furnishes information to any consumer reporting agency shall have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency under section 1681c–2 of this title relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information.

(B) Information alleged to result from identity theft

If a consumer submits an identity theft report to a person who furnishes information to a consumer reporting agency at the address specified by that person for receiving such reports stating that information maintained by such person that purports to relate to the consumer resulted from identity theft, the person may not furnish such information that purports to relate to the consumer to any consumer reporting agency, unless the person subsequently knows or is informed by the consumer that the information is correct.

(7) Negative information

(A) Notice to consumer required

(i) In general

If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 1681a (p) of this title furnishes negative information to such an agency regarding credit

extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.

(ii) Notice effective for subsequent submissions

After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 1681a (p) of this title with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.

(B) Time of notice

(i) In general

The notice required under subparagraph (A) shall be provided to the customer prior to, or no later than 30 days after, furnishing the negative information to a consumer reporting agency described in section 1681a (p) of this title.

(ii) Coordination with new account disclosures

If the notice is provided to the customer prior to furnishing the negative information to a consumer reporting agency, the notice may not be included in the initial disclosures provided under section 1637 (a) of this title.

(C) Coordination with other disclosures

The notice required under subparagraph (A)—

(i) may be included on or with any notice of default, any billing statement, or any other materials provided to the customer; and

(ii) must be clear and conspicuous.

(D) Model disclosure

(i) Duty of Board to prepare

The Board shall prescribe a brief model disclosure a financial institution may use to comply with subparagraph (A), which shall not exceed 30 words.

(ii) Use of model not required

No provision of this paragraph shall be construed as requiring a financial institution to use any such model form prescribed by the Board.

(iii) Compliance using model

A financial institution shall be deemed to be in compliance with subparagraph (A) if the financial institution uses any such model form prescribed by the Board, or the financial institution uses any such model form and rearranges its format.

(E) Use of notice without submitting negative information

No provision of this paragraph shall be construed as requiring a financial institution that has provided a customer with a notice described in subparagraph (A) to furnish negative information about the customer to a consumer reporting agency.

(F) Safe harbor

A financial institution shall not be liable for failure to perform the duties required by this paragraph if, at the time of the failure, the financial institution maintained reasonable policies and procedures to comply with this paragraph or the financial institution reasonably believed that the institution is prohibited, by law, from contacting the consumer.

(G) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Negative information

The term "negative information" means information concerning a customer's delinquencies, late payments, insolvency, or any form of default.

(ii) Customer; financial institution

The terms "customer" and "financial institution" have the same meanings as in section 6809 of this title.

(8) Ability of consumer to dispute information directly with furnisher

(A) In general

The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly prescribe regulations that shall identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer.

(B) Considerations

In prescribing regulations under subparagraph (A), the agencies shall weigh—

(i) the benefits to consumers with the costs on furnishers and the credit reporting system;

(ii) the impact on the overall accuracy and integrity of consumer reports of any such requirements;

(iii) whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of any such dispute; and

(iv) the potential impact on the credit reporting process if credit repair organizations, as defined in section 1679a (3) of this title, including entities that would be a credit repair organization, but for section 1679a (3)(B)(i) of this title, are able to circumvent the prohibition in subparagraph (G).

(C) Applicability

Subparagraphs (D) through (G) shall apply in any circumstance identified under the regulations promulgated under subparagraph (A).

(D) Submitting a notice of dispute

A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to such person at the address specified by the person for such notices that—

(i) identifies the specific information that is being disputed;

(ii) explains the basis for the dispute; and

(iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.

(E) Duty of person after receiving notice of dispute

After receiving a notice of dispute from a consumer pursuant to subparagraph (D), the person that provided the information in dispute to a consumer reporting agency shall—

(i) conduct an investigation with respect to the disputed information;

(ii) review all relevant information provided by the consumer with the notice;

(iii) complete such person's investigation of the dispute and report the results of the investigation to the consumer before the expiration of the period under section 1681i (a)(1) of this title within which a consumer reporting agency would be required to complete its action if the consumer had elected to dispute the information under that section; and

(iv) if the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the person furnished the inaccurate information of that determination and provide to the agency any correction to that information that is necessary to make the information provided by the person accurate.

(F) Frivolous or irrelevant dispute

(i) In general

This paragraph shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including—

(I) by reason of the failure of a consumer to provide sufficient information to investigate the disputed information; or

(II) the submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the person or through a consumer reporting agency under subsection (b) of this section, with respect to which the person has already performed the person's duties under this paragraph or subsection (b) of this section, as applicable.

(ii) Notice of determination

Upon making any determination under clause (i) that a dispute is frivolous or irrelevant, the person shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the person.

(iii) Contents of notice

A notice under clause (ii) shall include—

(I) the reasons for the determination under clause (i); and

(II) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(G) Exclusion of credit repair organizations

This paragraph shall not apply if the notice of the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in section 1679a (3) of this title, or an entity that would be a credit repair organization, but for section 1679a (3)(B)(i) of this title.

(9) Duty to provide notice of status as medical information furnisher

A person whose primary business is providing medical services, products, or devices, or the person's agent or assignee, who furnishes information to a consumer reporting agency on a consumer shall be considered a medical information furnisher for purposes of this subchapter, and shall notify the agency of such status.

(b) Duties of furnishers of information upon notice of dispute

(1) In general

After receiving notice pursuant to section 1681i (a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall—

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i (a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting

to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly—

(i) modify that item of information;

(ii) delete that item of information; or

(iii) permanently block the reporting of that item of information.

(2) Deadline

A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 1681i (a)(1) of this title within which the consumer reporting agency is required to complete actions required by that section regarding that information.

(c) Limitation on liability

Except as provided in section 1681s (c)(1)(B) of this title, sections 1681n and 1681o of this title do not apply to any violation of—

(1) subsection (a) of this section, including any regulations issued thereunder;

(2) subsection (e) of this section, except that nothing in this paragraph shall limit, expand, or otherwise affect liability under section 1681n or 1681o of this title, as applicable, for violations of subsection (b) of this section; or

(3) subsection (e) of section 1681m of this title.

(d) Limitation on enforcement

The provisions of law described in paragraphs (1) through (3) of subsection (c) of this section (other than with respect to the exception described in paragraph (2) of subsection (c) of this section) 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.

(e) Accuracy guidelines and regulations required

(1) Guidelines

The Federal banking agencies, the National Credit Union Administration, and the Commission shall, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title, and in coordination as described in paragraph (2)—

(A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and

(B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).

(2) Coordination

Each agency required to prescribe regulations under paragraph (1) shall consult and coordinate with each other such agency so that, to the extent possible, the regulations prescribed by each such entity are consistent and comparable with the regulations prescribed by each other such agency.

(3) Criteria

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall—

(A) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

(B) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

(C) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to assure the accuracy and integrity of information furnished to consumer reporting agencies; and

(D) examine the policies and processes that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.

TITLE 15 - COMMERCE AND TRADE
CHAPTER 41 - CONSUMER CREDIT PROTECTION
SUBCHAPTER III - CREDIT REPORTING AGENCIES

§ 1681t. Relation to State laws

(a) In general

Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter 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 subchapter, and then only to the extent of the inconsistency.

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State—

(1) with respect to any subject matter regulated under—

(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;

(B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 1681m (d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(F) 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);

(G) section 1681g (e) of this title, relating to information available to victims under section 1681g (e) of this title;

(H) section 1681s–3 of this title, relating to the exchange and use of information to make a solicitation for marketing purposes; or

(I) section 1681m (h) of this title, relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996);

(3) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 1681g of this title, or subsection (f) of section 1681g of this title relating to the disclosure of credit scores for credit granting purposes, except that this paragraph—

(A) shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on December 4, 2003) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);

(B) shall not apply with respect to sections 5–3–106(2) and 212–14.3–104.3 of the Colorado Revised Statutes (as in effect on December 4, 2003); and

(C) shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance;

(4) with respect to the frequency of any disclosure under section 1681j (a) of this title, except that this paragraph shall not apply—

(A) with respect to section 12–14.3–105(1)(d) of the Colorado Revised Statutes (as in effect on December 4, 2003);

(B) with respect to section 10–1–393(29)(C) of the Georgia Code (as in effect on December 4, 2003);

(C) with respect to section 1316.2 of title 10 of the Maine Revised Statutes (as in effect on December 4, 2003);

(D) with respect to sections 14–1209(a)(1) and 14–1209(b)(1)(i) of the Commercial Law Article of the Code of Maryland (as in effect on December 4, 2003);

(E) with respect to section 59 (d) and section 59 (e) of chapter 93 of the General Laws of Massachusetts (as in effect on December 4, 2003);

(F) with respect to section 56:11–37.10(a)(1) of the New Jersey Revised Statutes (as in effect on December 4, 2003); or

(G) with respect to section 2480c (a)(1) of title 9 of the Vermont Statutes Annotated (as in effect on December 4, 2003); or

(5) with respect to the conduct required by the specific provisions of—

(A) section 1681c (g) of this title;

(B) section 1681c–1 of this title;

(C) section 1681c–2 of this title;

(D) section 1681g (a)(1)(A) of this title;

(E) section 1681j (a) of this title;

(F) subsections (e), (f), and (g) of section 1681m of this title;

(G) section 1681s (f) of this title;

(H) section 1681s–2 (a)(6) of this title; or

(I) section 1681w of this title.

(c) "Firm offer of credit or insurance" defined

Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 1681a (l) of this title shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations

Subsections (b) and (c) of this section do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996.

LEXSTAT CAL CIV CODE 1785.25

*** THIS SECTION IS CURRENT THROUGH THE 2009 SUPPLEMENT ***
(ALL 2008 LEGISLATION)

CIVIL CODE
Division 3. Obligations
Part 4. Obligations Arising from Particular Transactions
Title 1.6. Consumer Credit Reporting Agencies Act
Chapter 3.5. Obligations of Furnishers of Credit Information

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Civ Code § 1785.25 (2009)

§ 1785.25. Incomplete, inaccurate or disputed information; Closed or delinquent accounts information

(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.

(b) A person who (1) in the ordinary course of business regularly and on a routine basis furnishes information to one or more consumer credit reporting agencies about the person's own transactions or experiences with one or more consumers and (2) determines that information on a specific transaction or experience so provided to a consumer credit reporting agency is not complete or accurate, shall promptly notify the consumer credit reporting agency of that determination and provide to the consumer credit reporting agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the consumer credit reporting agency complete and accurate.

(c) So long as the completeness or accuracy of any information on a specific transaction or experience furnished by any person to a consumer credit reporting agency is subject to a continuing dispute between the affected consumer and that person, the person may not furnish the information to any consumer credit reporting agency without also including a notice that the information is disputed by the consumer.

(d) A person who regularly furnishes information to a consumer credit reporting agency regarding a consumer who has an open-end credit account with that person, and which is closed by the consumer, shall notify the consumer credit reporting agency of the closure of that account by the consumer, in the information regularly furnished for the period in which the account is closed.

(e) A person who places a delinquent account for collection (internally or by referral to a third party), charges the delinquent account to profit or loss, or takes similar action, and subsequently furnishes information to a credit reporting agency regarding that action, shall include within the information furnished the approximate commencement date of the delinquency which gave rise to that action, unless that date was previously reported to the credit reporting agency. Nothing in this provision shall require that a delinquency must be reported to a credit reporting agency.

Cal Civ Code § 1785.25

(f) Upon receiving notice of a dispute noticed pursuant to subdivision (a) of Section 1785.16 with regard to the completeness or accuracy of any information provided to a consumer credit reporting agency, the person that provided the information shall (1) complete an investigation with respect to the disputed information and report to the consumer credit reporting agency the results of that investigation before the end of the 30-business-day period beginning on the date the consumer credit reporting agency receives the notice of dispute from the consumer in accordance with subdivision (a) of Section 1785.16 and (2) review relevant information submitted to it.

(g) A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with those provisions.

LEXSTAT CAL CIV CODE § 1785.31

*** THIS SECTION IS CURRENT THROUGH THE 2009 SUPPLEMENT ***
(ALL 2008 LEGISLATION)

CIVIL CODE
Division 3. Obligations
Part 4. Obligations Arising from Particular Transactions
Title 1.6. Consumer Credit Reporting Agencies Act
Chapter 4. Remedies

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Civ Code § 1785.31 (2009)

§ 1785.31. Damages

(a) Any consumer who suffers damages as a result of a violation of this title by any person may bring an action in a court of appropriate jurisdiction against that person to recover the following:

(1) In the case of a negligent violation, actual damages, including court costs, loss of wages, attorney's fees and, when applicable, pain and suffering.

(2) In the case of a willful violation:

(A) Actual damages as set forth in paragraph (1) above:

(B) Punitive damages of not less than one hundred dollars ($100) nor more than five thousand dollars ($5,000) for each violation as the court deems proper;

(C) Any other relief that the court deems proper.

(3) In the case of liability of a natural person for obtaining a consumer credit report under false pretenses or knowingly without a permissible purpose, an award of actual damages pursuant to paragraph (1) or subparagraph (A) of paragraph (2) shall be in an amount of not less than two thousand five hundred dollars ($2,500).

(b) Injunctive relief shall be available to any consumer aggrieved by a violation or a threatened violation of this title whether or not the consumer seeks any other remedy under this section.

(c) Notwithstanding any other provision of this section, any person who willfully violates any requirement imposed under this title may be liable for punitive damages in the case of a class action, in an amount that the court may allow. In determining the amount of award in any class action, the court shall consider among relevant factors the amount of any actual damages awarded, the frequency of the violations, the resources of the violator and the number of persons adversely affected.

Cal Civ Code § 1785.31

(d) Except as provided in subdivision (e), the prevailing plaintiffs in any action commenced under this section shall be entitled to recover court costs and reasonable attorney's fees.

(e) If a plaintiff brings an action pursuant to this section against a debt collector, as defined in subdivision (c) of Section 1788.2, and the basis for the action is related to the collection of a debt, whether issues relating to the debt collection are raised in the same or another proceeding, the debt collector shall be entitled to recover reasonable attorney's fees upon a finding by the court that the action was not brought in good faith.

(f) If a plaintiff only seeks and obtains injunctive relief to compel compliance with this title, court costs and attorney's fees shall be awarded pursuant to *Section 1021.5 of the Code of Civil Procedure.*

(g) Nothing in this section is intended to affect remedies available under *Section 128.5 of the Code of Civil Procedure.*