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Preventing Preemption: Finding Freedom for States to Protect Their Citizens' Personal History Information

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PREVENTING PREEMPTION: FINDING SPACE FOR STATES TO REGULATE CONSUMERS' CREDIT REPORTS

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I. INTRODUCTION

The recent Great Recession soiled the credit reports of many Americans. Furthermore, advances in database technology have allowed employers and others wider access to comprehensive information about consumers, sometimes significantly narrowing the opportunities those consumers might have for employment, credit, housing, or insurance. These results have inspired some state legislatures to revise their credit reporting statutes to ameliorate the percussive effects of the economic crisis on their citizens' credit records. However, state lawmakers must navigate the thicket of the federal Fair Credit Reporting Act's preemption provisions if they are to create legislation that will be effective rather than impotent. This article analyzes these provisions alongside recent Supreme Court decisions about preemption. The article then provides both a theory of the intersection of state and federal credit reporting laws and describes the space remaining for state legislatures to create preemption-proof, or at least preemption-resistant, credit reporting provisions that can fairly balance the concerns of individuals and those who want access to their background information.

Below, Part II describes some recent legislative efforts in protecting consumers' financial and criminal record information. Following, Part III describes the framework of federal preemption generally, and analyzes the Supreme Court's recent preemption decisions that are relevant to these information protection laws. Part IV describes the Fair Credit Reporting Act's provisions that may overlap state legislative activity, along with its specific preemption provisions, and analyzes the vulnerability of various state credit reporting provisions to preemption. The article then maps out strategies for states to employ to preemption-proof their legislation, offering survival strategies for states to use to maximize the effects of their state information-protection laws.

II. STATES' REGULATION OF DISCLOSURE OF CONSUMER FINANCIAL AND CRIMINAL RECORD INFORMATION

Nearly every state regulates how consumers' financial and criminal record information may be collected and disclosed; these are, in essence, reputation-protecting provisions. However, given recent developments in the economy and data technology, this may be a suitable time to adjust these laws to better balance the privacy interests of consumers against the information interests of employers, banks, and insurance companies.

The Great Recession inflicted tremendous damage to credit records by causing widespread unemployment and depressing housing values, putting great stress on the ability of many to repay debts.¹ Those defaults and delays in payment have been duly

¹ A study by the Fair Isaac Corporation concluded that about 50,000,000 people

amassed by the consumer reporting agencies that publish credit reports about consumers and compute their credit scores. Employers that see this information may be less likely to hire those hurt by economic blows, and landlords less likely to rent, insurers less likely to insure (or be willing to insure, but at elevated premiums).

Aside from the economic environment, advances in data technology have increased our ability to view public records across the country, leading many to be marked by visible criminal records incurred even decades ago, records that many might have thought they'd surpassed.² In addition, medical costs have continued to accelerate, and medical debt has not only spoiled many otherwise solid credit reports, but it has also led to a significant number of bankruptcies.³ Finally, the crime of identity theft has increased as data breaches have become more common, exposing sensitive financial information to thieves, who can then poison their victims' credit reports.⁴

suffered a decline of more than 20 points in one of the company's credit score measures. Rachel Bell, *Recession Causes FICO Score Swings*, available at <http://bankinganalyticsblog.fico.com/2011/10/recession-causes-fico-score-swings.html>. Credit scores then largely rebounded in the subsequent two years. *Id.*; see also *Credit Scores Drop During Recession: Are You Worried about Your Score?* (July 12, 2010) (noting that 25% of Americans had a credit score of 599 or lower, in contrast to a historical norm of 15%), available at <http://abcnews.go.com/WN/credit-scores-drop-millions-americans-recession-world-news/story?id=11142553>; National Employment Law Project, *Barriers Facing the Long-Term Unemployed: Statement of the National Employment Law Project before the U.S. Senate Committee on Health, Education, Labor and Pensions* 8 (Dec. 6, 2011) (reporting that bankruptcy filings rose 23% between 2008 and 2010), available at http://www.nelp.org/page/-/UI/2011/Owens_Testimony_Barriers_Unemployed_12-2011.pdf?nocdn=1; Jeremy Simon, *U.S. Economic Recession Shifted FICO Credit Scores* (Sept. 27, 2011) (showing annual increases in the percent of the population with poor credit scores from 2006-2009, when they gradually began to improve).

² See Dara N. Lee, *The Digital Scarlet Letter: The Effect of Online Criminal Records on Crime* Figure 1. Timing of Online Criminal Records, 1990-2008 (May 2011) (showing a gradual increase in states making available criminal records online over the course of 1990-2008, finishing with 25 states).

³ Kate Santich, *Bills Can Bankrupt Insured*, ORLANDO SENTINEL July 31, 2011 at A1; Sara R. Collins, Ruth Robertson, Tracy Garber, and Michelle M. Doty, *The Commonwealth Fund, Insuring the Future, Current Trends in Health Coverage and the Effects of Implementing the Affordable Care Act, "Millions Are Struggling to Pay Medical Bills,"* at <http://www.commonwealthfund.org/Charts/Report/2012-Biennial-Survey-Insuring-the-Future/Problems-with-Medical-Bills-or-Accrued-Medical-Debt-Highest-Among-Adults-with-Low-Moderate-Incomes.aspx> (reporting that in 2012 75 million adults struggled with medical debt).

⁴ See Lisa Gerstner, *What You Need to Know About Identity Theft*, CHI. TRIB., May 19, 2013, at Money & Real Estate; Zone C; p. 12 (reporting that more than 12.6 million people suffered identity theft in 2012, an increase of nearly 8% from

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State legislators can ameliorate the effects of some of these historical events on their constituents' opportunities, curbing the impact of old credit, criminal, medical, and identity theft problems. However, for such record-enhancing provisions to have their intended impact, the drafters must carefully navigate the express preemption provisions staked throughout the Fair Credit Reporting Act, the federal statute governing the creation and use of credit reports.⁵ Furthermore, drafters must simultaneously consider the Supreme Court's present stance on express and implied preemption. Below are discussed some of the richest opportunities for legislatures to rebalance the interests of credit report users against the economic recovery of consumers. These include employers' use of credit reports, criminal record information, medical debt information, and identity theft content.

A. Employer Checks of Credit Reports

After creditors themselves, employers may be the most visible and obvious users of consumer credit reports and similar background checks, reviewing them to peer into the past financial and other decisions of both current employees and applicants in order to choose and place their workers. According to a survey by the Society for Human Resource Management, in 2012 approximately 34 percent of employers said that they conduct credit background checks on some potential applicants, and another 13 percent conduct them for all.⁶

However, such information may unfairly damage an individual's prospects in a few ways. First, credit and other background checks can be surprisingly inaccurate; a recent report by the Federal Trade Commission to Congress disclosed that 21% of credit reports have some sort of error in them, and 5.2% have one or more serious errors.⁷ This single digit rate deceives – when applied against millions of reports, the number of consumers injured by mendacious reports is disquieting.⁸ Furthermore, even when a credit report

2011).

⁵ 15 U.S.C. §§ 1681-1681x (2012). The preemption provisions are found in 15 U.S.C. § 1681t.

⁶ Soc. for Hum. Res. Mgmt., *Background Checking – The Use of Credit Background Checks in Hiring Decisions* (2012), *available at* <http://www.shrm.org/research/surveyfindings/articles/pages/creditbackgroundchecks.aspx>.

⁷ Federal Trade Comm'n, *Report to Congress under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2012) (reporting a rate of serious errors of 5.2%).

⁸ *See* Prepared Remarks of Richard Cordray, Director of the Consumer Fin. Protection Bureau, Credit Reporting Field Hearing (July 16, 2012), <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray>

is accurate, it may blacklist otherwise qualified and competent candidates from a job if it incorporates information that may unduly grab the attention of its audience.

Several states perceive such reports to unfairly impede employment, and in response they have enacted provisions designed to protect employees and job applicants from the scrutiny of a credit report check. California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Nevada, Oregon, Vermont, and Washington have all passed credit history cloaking measures.⁹ Guam has also passed such a provision.¹⁰ Other states have considered such provisions though without yet passing them.¹¹

The adopted measures typically prevent employers or others from using a credit report in offering employment.¹² Such restrictions far exceed those imposed by the FCRA, which permits employers to obtain an employee or applicant's credit report so long as the target has consented.¹³

The history of Maryland's law is typical; the bill's sponsor introduced it to assist "blue-collar workers having trouble making ends meet, so that they don't have one more hurdle to overcome."¹⁴ A poor credit score, said the sponsor, does not reveal the person's ability to perform the job: "Having bad credit does not make someone a bad person Costly medical problems, a messy divorce, and many other understandable reasons to have poor credit have nothing to do with one's ability to do a good job."¹⁵ Though the business and credit reporting communities opposed the bill when it had previously been considered,¹⁶ the bill eventually passed in 2011 as the effects of the recession wore on.¹⁷

[on-credit-reporting/](#) (stating that every year 3 billion credit reports are issued).

⁹ CAL. CIV. CODE § 1785.20.5 and CAL. LAB. CODE § 1024.5 (2013); COLO. REV. STAT. ANN. § 8-2-126 (2013); 7 COLO. CODE REGS. §§ 1103-4:1-1103-4:12; CONN. GEN. STAT. ANN. § 31-51tt (2013); DEL. CODE ANN. tit. 19 § 711(g); HAW. REV. STAT. § 378-2(a)(8) (2013); 820 ILL. COMP. STAT. 70/5-70/30 (2013); ME. REV. STAT. ANN. tit. 26 § 600-A; MD. CODE ANN. LAB. & EMP. § 3-711 (2013); Nevada S.B. 127, amending ch. 713 (effective October 1, 2013); OR. REV. STAT. § 659A.320 (2013); VT. STAT. ANN. tit. 21, § 495i (2013); WASH. REV. CODE ANN. § 19.182.010 (2013).

¹⁰ 22 GUAM PUB. L. 33-35 (2015) (2015); § 5201(h) (West, WestlawNext).

¹¹ *See, e.g.*, H. 233, 85th Gen. Ass. (Iowa 2013); S. 80, 188th Gen. Ct. (Mass. 2013); A. 1799, 236th Sess. (N.Y. 2013); A. 2148, 236th Sess. (N.Y. 2013); S. 699, 108th Sess. (Tenn. 2013); H.B. 2532, 81st Sess. (W. Va. 2013).

¹² *See infra* text accompanying notes 19 to 30.

¹³ 15 U.S.C. § 1681b(b) (2012).

¹⁴ Laura Basset, *Maryland Lawmaker Reintroduces Bill to Ban Credit Checks in Hiring Process*, http://www.huffingtonpost.com/2011/01/26/maryland-job-applicant-fairness-act_n_814154.html.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The bill, 2011 Maryland Laws Ch. 28 (S.B. 132) (H.B. 87), was passed on April 12, 2011.

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Though employers may insist that credit reports aid their decisions, empirical data has not established a material link between an employee’s credit record and that employee’s job performance, notwithstanding the widespread practice of checking credit reports by employers. In considering its bill, the Oregon legislature elicited testimony from an employee of one of the major credit reporting agencies TransUnion, learning that the agency did not have any evidence that an employee’s credit history correlated with subsequent job performance, casting doubts on the validity of such a check.¹⁸

These credit history cloaking laws have some common features. In general, the statutes apply to similar types of information – a report that contains information about the applicant’s credit history.¹⁹ Typically, they forbid employers from acting on the contents of a credit report – that is, discriminating on the basis of credit information.²⁰ The strictest laws prohibit employers from even *obtaining* a report.²¹ Connecticut has the weakest prohibition; it merely bars employers from requiring an employee or applicant to consent to a request for a credit report, without prohibiting an employer from making the request, one that applicants might not feel free to deny.²²

Of course, these prohibitions have exceptions, some of which threaten to swamp the rule. For instance, most of the laws exempt some types of management positions.²³

¹⁸ *Testimony on Oregon’s Job Applicant Fairness Act*, vimeo, <http://www.vimeo.com/24479508> (last visited Apr. 6, 2012).

¹⁹ See, e.g., CAL. CIV. CODE § 1785.20.5(a) (2013); CAL. LAB. CODE § 1024.5(a) (2013); CONN. GEN. STAT. ANN. § 31-51tt(b) (2013); 820 ILL. COMP. STAT. 70/5 (2013); MD. CODE ANN. LAB. & EMP. § 3-711(b) (2013); VT. STAT. ANN. § 495i(a)(2), (3) (2013); WASH. REV. CODE ANN. § 19.182.010(4) (2013); 22 GUAM CIV. CODE ANN. § 5201(h).
²⁰ CAL. LAB. CODE § 1024.5(a); Del. Code Ann. tit. 19, § 711(g)(1); HAW. REV. STAT. § 378-2(a)(8); 820 ILL. COMP. STAT. 70/10(a); ME. REV. STAT. ANN. tit. 26, § 600-A(1); MD. CODE ANN. LAB. & EMP. § 3-711(b), (c) (use for a non-prohibited purpose); OR. REV. STAT. § 659A.320(1) (effective until Jan. 1, 2014); 21 VT. STAT. ANN. tit. 21, § 495i(b); 22 Guam Civ. Code Ann. § 5201(h). Nevada comes close to prohibiting the acquisition of a report, forbidding employers from inquiring concerning a consumer credit report. NEV. REV. STAT. § 613(7)(3).

²¹ OR. REV. STAT. § 659A.320(1) (effective until Jan. 1, 2014); VT. STAT. ANN. § 495i(b) (2) (forbidding employers from “[i]nquir[ing] about an applicant or employee’s credit report or credit history”); WASH. REV. CODE ANN. § 19.182.020(c).

²² CONN. GEN. STAT. ANN. § 31-51tt(b).

²³ CAL. LAB. CODE 1024.5; CONN. GEN. STAT. ANN. § 31-51tt(4)(a) (managerial positions), (c) (fiduciary positions); ME. REV. STAT. ANN. tit. 26, § 600-A(2)(A) (“management of the company’s finances or a customer’s financial assets”); MD. CODE ANN. LAB. & EMP. § 3-711; NEV. REV. STAT. 613. Illinois exempts those positions for which “a satisfactory credit history is an established bona fide occupational requirement,” a feature that requires the presence of at least one of

Other positions commonly exempted include those with financial institutions or that involve monetary transactions,²⁴ those with law enforcement,²⁵ and those with certain other governmental employers.²⁶

seven designated circumstances, one of which is that the position is managerial. 820 ILL. COMP. STAT. 70/10(b)(4); VT. STAT. ANN. tit. 21, § 495i(c)(2)(E) (positions requiring “a financial fiduciary responsibility to the employer or a client of the employer”); *see also* HAW. REV. STAT. § 378-2.7(a)(1) (credit history is related to a bona fide occupational requirement and the employee has received a conditional offer of employment), 378-2.7(a)(3) (the position is managerial or supervisory); 22 Guam Civ. Code Ann. § 5201(h)(2) (“the position is managerial and involves setting the direction or control of the business”).

²⁴ CAL. LAB. CODE § 1024.5(b) (institutions covered by the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809); 1024(5)(A)-(C) (access to bank or credit card information along with an individual’s date of birth and Social Security Number, excluding routine credit card transactions); 1024.5(8) (positions involving regular access to cash totaling \$10,000 or more); CONN. GEN. STAT. ANN. 4-166 (financial institutions); HAW. REV. STAT. § 378-2.7(a)(4); 820 ILL. COMP. STAT. 70/5 (excluding from the definition of “employer”); 820 ILL. COMP. STAT. 70/10(b)(2), (3) (duties of the position include access to cash or assets worth \$2500 or more, or signatory power over assets of \$100 or more); ME. REV. STAT. ANN. tit. 26, § 600-A(2)(B) (“employer is in the financial services industry”); MD. CODE ANN. LAB. & EMP. § 3-711 (involves a fiduciary responsibility, including collecting payments, and for those who are provided an expense account or corporate debit or credit card); NEV. REV. STAT. § 613(7.5)(3)(a); OR. REV. STAT. § 659A.320 (federally insured banks or credit unions); VT. STAT. ANN. tit. 21, § 495i(c)(1)(C); VT. STAT. ANN. tit. 21, § 495i(c)(1)(B), (G) (access to confidential financial information and the employer’s payroll, respectively).

²⁵ CAL. LAB. CODE § 1024.5(3); 820 ILL. COMP. STAT. ANN. 70/5(3) (excluding from the definition of “employer”); NEV. REV. STAT. § 613(7.5)(3)(d); OR. REV. STAT. § 659A.320; VT. STAT. ANN. tit. 21, § 495i (law enforcement, emergency medical personnel, and firefighters); 22 Guam Civ. Code Ann. § 5201(h)(4), (6) (the position involves “access to customers’, employees’, or the employer’s personal or financial information other than information customarily provided in a retail transaction,” or “includes an expense account”).

²⁶ CAL. LAB. CODE § 1024.5 (for positions with the state department of justice); 820 ILL. COMP. STAT. 70/5-70/30 (where a state or local agency requires a credit report as a condition of employment); 70/10(b)(7) (where the employee’s credit history is required by or exempt under federal or state law); WASH. REV. CODE ANN. § 19.182.010. Other typical exemptions include positions for which another law requires the employer to examine an applicant’s credit report, CAL. CIV. CODE § 1785.20.5 and CAL. LAB. CODE § 1024.5; CONN. GEN. STAT. ANN. § 4-166; ME. REV. STAT. ANN. tit. 26, § 600-A(2)(C); OR. REV. STAT. § 659A.320. Illinois identifies such a legal requirement a condition that qualifies for an exception when paired with another listed condition. 820 ILL. COMP. STAT. 70/10(b)(1) (state or federal law requires bonding of the individual in the position), (7) (federal or state law otherwise requires the employee’s credit history). Some states also exempt those positions that

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A few states weaken their general prohibitions by exempting a catch-all category of positions for which an employer may rely on a credit report, rather than limiting exemptions to specific categories. For instance, Oregon and Washington permit an employer to obtain and act upon a credit report when the report's information is "substantially job related."²⁷ Vermont permits employers to use credit reports where "[t]he employer can demonstrate that the information is a valid and reliable predictor of employee performance in the specific position of employment."²⁸ Hawaii also allows some scrutiny, but only after a delay, permitting the employer to examine a credit history that is "directly related to a bona fide occupational qualification," so long as the employer has extended a conditional offer of employment to the target.²⁹ Nevada's general exception is so broad that it nearly eviscerates the general prohibition, allowing employers to review credit reports when such information is "reasonably related to the evaluation of the employee."³⁰

Notwithstanding such weakening exceptions, however, these restrictions indicate a trend of increasing privacy, of recognizing that simply because information is available, it should not necessarily be seen or used. Such laws install boundaries around an individual's financial life, and implicitly acknowledge that employees have a sphere of existence outside that of their employment.

B. Criminal Record Information

In addition to seeking credit history information about employment candidates, many employers want to know their criminal record history. A 2012 survey by the

grant the employee access to confidential customer or trade secret information. CAL. CIV. CODE § 1785.20.5 and CAL. LAB. CODE § 1024.5 (where the employee would have regular access to bank or credit card information, social security numbers, and date of birth, excluding routine credit card transactions, and positions with access to designated confidential or proprietary information); CONN. GEN. STAT. ANN. 4-166 (access to customer information or confidential or proprietary business information); MD. CODE ANN. LAB. & EMP. 3-711 (access to confidential business information); 820 ILL. COMP. STAT. 70/10(b)(5); *see also* 22 Guam Civ. Code Ann. § 5201(h)(3) (the position "meets criteria in specified federal or state administrative rules to establish the circumstances when a credit history is a bona fide occupational requirement").

²⁷ OR. REV. STAT. § 659A.320 (though requiring the employer to disclose its reasons for obtaining the report to the applicant or employee); WASH. REV. CODE ANN. § 19.182.010.

²⁸ VT. STAT. ANN. tit. 21, § 495i.

²⁹ HAW. REV. STAT. § 378-2.7(a)(1).

³⁰ NEV. REV. STAT. § 613(7.5)(3). In addition, Nevada allows employers access to employee's credit information whenever another law authorizes it. *Id.* § 613(7.5)(1).

Society for Human Resource Management reveals that 69% of employers investigate the criminal background of every applicant.³¹ Such public record information has gotten much more widely available; at one time, a comprehensive criminal background check would have required a county-by-county visit to clerk's counters, but now so many records are available online that an individual's record can be checked from one's own desk, or even a smartphone.³²

While it seems intuitively obvious why employers would want to know of any criminal taint on an applicant's past, employee advocates worry that a criminal record – even simply a single record of arrest – can unjustifiably wall off a candidate from consideration for a position that does not necessarily require an unblemished background.³³ For one thing, the sheer numbers indicate that many will suffer the “collateral consequences” of a criminal record: 8.6 percent of American adults have a felony conviction, and approximately 65 million Americans have some kind of criminal record.³⁴ Accordingly, advocacy groups such as the National Employment Law Project have urged states to reform their employment laws to reduce the impact of a criminal background on an applicant's candidacy.³⁵

The federal act governing consumer reports, the FCRA, does not prohibit the publishing of criminal convictions in credit reports at all.³⁶ In contrast, records of arrest, sentencing, and parole should disappear after seven years.³⁷ However, the FCRA lifts the seven year ban for jobs that can reasonably be expected to draw a salary of \$75,000 or more,³⁸ a figure that has not risen since 1996, and likely allows employers to examine credit histories for an ever-growing pool of positions.³⁹

Nonetheless, some state credit reporting statutes restrict agencies from putting

³¹ Society for Hum. Resource Management, *SHRM Survey Findings: Background Checking – the Use of Criminal Background Checks in Hiring Decisions* (Aug. 15, 2012), available at <http://www.slideshare.net/shrm/2012-backgroundcheck-criminalfinal>.

³² Federal Trade Comm'n, *FTC Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act*, <http://www.ftc.gov/opa/2012/02/mobileapps.shtm> (Feb. 7, 2012).

³³ National Employment Law Project, *State Reforms Reducing Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up 1* (Sept. 2012), available at http://nelp.3cdn.net/6ab3d3b51b9490b40c_cnm6b847q.pdf.

³⁴ National Employment Law Project, *State Reforms Reducing Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up 1*, available at http://nelp.3cdn.net/6ab3d3b51b9490b40c_cnm6b847q.pdf.

³⁵ *Id.*

³⁶ 15 U.S.C. § 1681c(a)(5).

³⁷ *Id.*

³⁸ 15 U.S.C. § 1681c(b)(3).

³⁹ Pub. L. No. 104-208 § 2406(a)(2) (amending 15 U.S.C. § 1681c(b)).

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certain criminal record information into consumer reports.⁴⁰ These restrictions vary widely. New York, with one of the more robust provisions, flatly prohibits agencies from reporting criminal arrest information for past charges unless the individual was convicted of the offense.⁴¹ Furthermore, the state prohibits the reporting of criminal convictions more than seven years old unless an exception applies.⁴² Similarly, California prohibits not only the reporting of criminal record information that is more than seven years old, but also the reporting of any pardoned convictions or other arrests, indictments, or similar information where no conviction followed.⁴³

Nonetheless, exclusions of criminal record information are often themselves subject to an exclusion, returning such information to an employee's credit report, similar to the FCRA's salary threshold exception.⁴⁴ For instance, Washington prohibits records of arrest, indictment, or conviction that predate the report by more than seven years.⁴⁵ However, the Washington state statute, and those of New Hampshire, Maryland, and Kansas as well, lift the cloak on the prohibited criminal record information for jobs that could reasonably be expected to draw a salary of \$20,000 or more.⁴⁶ Thus, while the FCRA protects job applicants who expect to earn between \$20,000 and \$75,000 from information about criminal arrests that are more than seven years old, these would permit employers to see that information. Similarly, New York allows the continued reporting of criminal convictions where the user is seeking to employ the individual for an annual salary of \$25,000 or more.⁴⁷ Maine, Colorado, and Texas align themselves with the federal act, permitting criminal record reporting for higher earners, those earning \$75,000 or more.⁴⁸ In contrast, Massachusetts, Montana, and California maintain the exclusion of criminal record information from consumer reports regardless of the expected salary of the particular employment position.⁴⁹

⁴⁰ See *infra* text accompanying notes 41 to 49.

⁴¹ N.Y. GEN. BUS. LAW § 380-j(a)(1). The statute does permit a consumer reporting agency to disclose the detention of the consumer by a retail mercantile establishment so long as he or she has executed an uncoerced admission of wrongdoing, and received a prescribed notice from the establishment. *Id.* at 380-j(b).

⁴² N.Y. GEN. BUS. LAW § 380-j(f)(1)(v).

⁴³ CAL. CIV. CODE § 1785.13(a)(6).

⁴⁴ See *supra* text accompanying notes 38 to 39.

⁴⁵ WASH. REV. CODE ANN. § 19.182.040.

⁴⁶ MD. CODE. COMM. LAW § 14-1203(b)(3); KAN. STAT. ANN. § 50-704(b)(3); N.H. REV. STAT. ANN. § 359-B:5(II)(c); WASH. REV. CODE ANN. 19.182.040(2)

⁴⁷ N.Y. GEN. BUS. LAW § 380-(j)(f)(2)(iii).

⁴⁸ COLO. REV. STAT. ANN. § 12-14.3-105.3(2)(c); ME. REV. STAT. ANN. § 1313-B(2)(C); TEX. BUS. & COMM. CODE § 20.05(b)(3).

⁴⁹ MASS. GEN. LAWS ANN. ch. 93, § 52; MONT. CODE ANN. § 31-3-112; Cal Code § 1785.13.

Some states address this issue by restricting employers, as opposed to restricting the contents of credit reports.⁵⁰

Notwithstanding such weaknesses, though, these state measures evince attempts by states to calibrate the appropriate balance between an individual's past and an employer's legitimate interest in that past, revealing reasonably relevant information while cloaking the rest. Without evidence that stale criminal convictions, or arrests not resulting in convictions, impede one's employment skills, these states should consider raising the salary threshold for their exceptions, or perhaps eliminating the exceptions altogether.

C. Medical Debt Restrictions

While the rising impact of criminal record information on consumer reports likely arises from enhanced conversion of archived paper records to electronic ones, that is, the accessibility to information, the rise in consumer credit records tarnished by medical debt may arise more from the increased financial burden that health care puts on many Americans.⁵¹ Medical debt is a leading cause of bankruptcies in America.⁵² As the costs

⁵⁰ See, e.g., D.C. Code Ann. § 32-1341-1345 (prohibiting employers from inquiring about criminal convictions until after making a conditional offer of employment, but providing exceptions); N.J. Stat. Ann. §§ 34:6B-11-34:6B-19 (prohibiting employers from inquiring about an applicant's criminal record during the initial employment application process, or from providing in an advertisement that the employer will not consider applicants with criminal records, but providing exceptions); 2015 Or. Laws 559 (declaring it to be an unlawful practice for an employer to "exclude an applicant from an initial interview solely because of a past criminal conviction," but providing exceptions); see also Md. Code Ann. Crim. Pro. §§ 10-301-10-306 (instituting a process by which to shield criminal record information, and prohibiting employers and educational institutions from requiring applicants to disclose shielded information, with exceptions).

⁵¹ See, e.g., Adrienne Kroepsch, *Report Finds Medical Debt Increasing*, <http://www.commonwealthfund.org/Newsletters/Washington-Health-Policy-in-Review/2007/Mar/Washington-Health-Policy-Week-in-Review---March-5---2007/Report-Finds-Medical-Debt-Increasing.aspx> (Feb. 27, 2007). Though consumers' share of overall spending has decreased, because the cost of health care has been growing so quickly, overall bills have risen. Sarah Kliff, *Patients Share of Health Spending is Shrinking. Yes, Really*, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/05/out-of-pocket-health-spending-is-shrinking-yes-really/> (Feb. 5, 2013).

⁵² One scholar testified that in 2007 that 69.9% of bankruptcies included medical bills of \$1,000 or more, a 49.6% increase in the comparable percentage in 2001. Written Testimony of Steffie Woolhandler before the House Judiciary Committee, Subcommittee on Administrative and Commercial Law, July 28, 2009.

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of medical care have soared out of all proportion with the rate of inflation, and incomes at most levels have remained still or have even fallen (along with employment rates), Americans increasingly find themselves burdened with medical debt that may appear on, and taint, their credit reports.⁵³ The Consumer Financial Protection Bureau has reported that over half of the collections tradelines on a group of credit reports it studied consisted of medical debt.⁵⁴ Even one single medical bill can keep one from receiving credit at a desirable rate, or perhaps from receiving credit at all.⁵⁵ But no clear link between financial competence and medical debt has appeared; it is not intuitively obvious that it should, as few people voluntarily or frivolously take on expensive medical care. In fact, one study by the Consumer Financial Protection Bureau indicated that consumers with medical debt were better risks than those with other sorts of debts in collection, and that many of them “ordinarily pay their other financial obligations on time.”⁵⁶ Furthermore, errors in such accounts are notorious,⁵⁷ so people may find themselves blacklisted for debts that they have not even truly incurred, or ones for which an insurance company is responsible.⁵⁸

The weak relationship between medical debt and credit worthiness led the credit scoring company Fair Isaac to reduce the impact of some types of medical debt in its trademarked FICO credit scoring algorithm.⁵⁹ Such an adaptation reveals that legislation may not be the only source of relief to consumers struggling to borrow in the

⁵³ See Kathy Kristof, *Getting Sick Can Kill Your Credit Score*, CBS Moneywatch (May 21, 2014), available at <http://www.cbsnews.com/news/getting-sick-can-kill-your-credit-score/>; Kate Santich, *Medical Bills Can Bankrupt Insured*, ORLANDO SENTINEL A1 (July 31, 2011).

⁵⁴ Consumer Fin. Protection Bureau, *Consumer Credit Reports: A Study of Medical and Non-Medical Collections* 15 (2014), available at http://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf.

⁵⁵ See Elisabeth Rosenthal, *When Health Costs Harm Your Credit*, N.Y. TIMES SUNDAY REVIEW, Mar. 8, 2014 at SR4.

⁵⁶ Consumer Fin. Protection Bureau, *supra* note 54, at 7, 38

⁵⁷ Estimates of errors in medical bills range from 30% to 80%. Jessica Silver-Greenberg, *How to Fight a Bogus Bill*, THE WALL STREET JOURNAL (Feb. 18, 2011).

⁵⁸ See Consumer Fin. Protection Bureau, *supra* note 54, at 39-42 (describing the complexity and lack of transparency of medical costs, insurance coverage, and the billing process).

⁵⁹ See, *FICO Score 9 Introduces Refined Analysis of Medical Collections – FICO*, <http://www.fico.com/en/about-us/newsroom/news-releases/fico-score-9-introduces-refined-analysis-medical-collections/> (Aug. 7, 2014) (stating that “[t]his will help ensure that medical collections have a lower impact on the score, commensurate with the credit risk they represent”).

face of existing medical debt.

While no state prohibits outright the inclusion of medical debt in a consumer report or in calculating a credit score, Congress recently considered a bill that would amend the FCRA to remove from consumer reports information about such any medical debt that was eventually paid up or settled, thus clearing the usual seven year stickiness.⁶⁰ States could consider imposing similar restrictions on consumer reporting agencies to prevent consumer's reports from being hurt disproportionately to the consumer's actual willingness to pay his or her debts. A more dramatic, and helpful, provision would be to remove medical debts from consumer reports entirely.

D. Identity Theft Provisions

Identity theft, an Internet-powered phenomenon, has caused intense misery to its hapless victims, who may find themselves shadowed by a pernicious doppelganger whose spendthrift records they cannot purge from their credit histories. The Federal Trade Commission reported that in 2014 identity theft once again topped the list of consumer complaints to the agency, clocking in at 332,646, up from 290,056 in 2013.⁶¹ States have been contending with the rising impact of identity theft on consumers' credit reports. Fundamentally, the relationship between identity theft and a credit report is one of inaccuracy – once a thief obtains goods, credit, or services in the identity theft victim's name and then fails to pay for them, the lender wrongly ascribes the debt to the victim of the theft rather than to the thief. The debt then shows up not on the thief's credit report, but on the victim's.

In an example of one state's attempt to protect the credit reports of identity theft victims, New Mexico enacted a statute that sought to allow identity theft victims to block a thief's debt from the victim's credit report. Under the New Mexican statute, once a consumer reporting agency has received a proper notice from an identity theft victim that identifies information reported to or by the consumer reporting agency on the basis of identity theft, the agency must remove the information from the victim's file.⁶² The agency may restore the information only if the consumer requests it or pursuant to a

⁶⁰ S. 160, The Medical Debt Responsibility Act of 2013 § 3 (113th Cong., 1st Sess. 2013) (proposing an amendment to 15 U.S.C. § 1681c(a), the obsolescence provision described above, that would delete from credit reports “[a]ny information related to a fully paid or settled medical debt that had been characterized as delinquent, charged off, or in collection which, from the date of payment or settlement, antedates the report by more than 45 days”).

⁶¹ Federal Trade Comm'n, Consumer Sentinel Network Data Book for January-December 2014 5, *available at* <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2014/sentinel-cy2014-1.pdf>

⁶² N.M. STAT. ANN. §§ 56-3A-2(D), 56-3A-3.1(A), (D) (West 2014).

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court order after it has adjudicated the alleged debt.⁶³ The provision significantly overlaps with one in the federal FCRA, but the federal statute gives consumer reporting agencies a good deal more leeway to decline to block an identity theft debt.⁶⁴ The FCRA permits an agency to decline, *sua sponte*, to block an item of information if it determines that the agency mistakenly blocked it, if the consumer misrepresented a material fact about the information, or if the consumer obtained goods, services, or money as a result of the blocked transaction.⁶⁵ This right to act unilaterally can eviscerate the protection the provision intended to give to identity theft victims.

Thus, these four areas of consumer report concerns – employer use of consumer reports, criminal record information in consumer reports, medical debt in consumer reports, and effects of identity theft on consumer reports – are fertile for state intervention in order to protect citizens from consequences disproportionate to their failures. However, state legislation must avoid preemption by the federal Fair Credit Reporting Act in order to be effective. The following section discusses general principles of preemption and analyzes some of the Supreme Court’s recent decisions in the area of preemption.

III. THE THREE VARIETIES OF PREEMPTION AND THE SUPREME COURT’S RECENT PREEMPTION DECISIONS

The Supreme Court has taken up the issue of preemption in a fistful of cases over the last several years. These cases will guide the preemptive effect of the federal Fair Credit Reporting Act on state innovations intended to improve the privacy of their citizens’ historical records.

As a basic matter, the Supremacy Clause of the United States Constitution is the mechanism that elevates federal laws over state ones. The second clause of Article VI provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Now, obviously federal and state laws can peacefully co-exist – our system encourages simultaneous federal and state authority.⁶⁶ Nonetheless, under limited circumstances federal law will neutralize an overlapping state law.

Preemption occurs in three basic varieties: field, express, and implied. Of these, express preemption most influences the viability of state credit reporting restrictions.

⁶³ N.M. STAT. ANN. § 56-3A-3.1(E).

⁶⁴ 15 U.S.C. § 1681c-2(c).

⁶⁵ 15 U.S.C. § 1681c-2(c)(1)(A)-(C).

⁶⁶ *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (“[f]ederalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect”).

A. Field Preemption – “so pervasive . . . or so dominant”⁶⁷

Field preemption preempts the most extensively; it clears an entire subject area from state regulation, reserving it for federal dominion.⁶⁸ Field preemption itself has two sorts. The first measures breadth, and allows federal law to override any state law in the same field where the federal law’s framework is “so pervasive” it leaves no room for state regulation.⁶⁹ The second sort measures intensity, and occurs when the federal interest is “so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”⁷⁰

B. Express Preemption – “a fair but narrow reading”⁷¹

While field preemption can exist without any action by Congress, express preemption arises only when Congress plants specific language in a federal act to target state legislation.⁷² Even though the language may be explicit, however, courts must still construe it when evaluating its impact on a specific state provision, raising the question of how they should they should do so: broadly, narrowly, or somewhere in between?

The Supreme Court recently examined express preemption in the 2013 decision of *Dan’s City Used Cars v. Pelkey*,⁷³ an action that pitted a consumer whose car had been towed and sold without his consent against a federal law that the defendant, the towing authority, asserted barred any state claim by the consumer. This decision followed three significant 2008 decisions about express preemption: *Altria Group, Inc. v. Good*,⁷⁴ *Riegel v. Medtronic, Inc.*,⁷⁵ and *Rowe v. New Hampshire Motor Transp. Ass’n*.⁷⁶ Taken

⁶⁷ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁶⁸ *See, e.g. Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 1599 (2015) (describing field preemption as arising when “Congress may have intended ‘to foreclose any state regulation in the *area*,’ irrespective of whether state law is consistent or inconsistent with ‘federal standards,’” and holding that the federal Natural Gas Act did not preempt state antitrust lawsuits) (citations omitted) (emphasis in original).

⁶⁹ *Arizona v. United States*, 132 S. Ct. 2492, 2501.

⁷⁰ *Arizona v. United States*, 132 S. Ct. at 2501; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488 (2008) (holding that the Clean Water Act’s penalties for water pollution did not preempt maritime common law on punitive damages, stating that “we see no clear indication of congressional intent to occupy the entire field of pollution remedies”).

⁷¹ *Altria Group, Inc. v. Good*, 555 U.S. 70, 80 (2008).

⁷² *See Arizona v. United States*, 132 S. Ct. at 2500.

⁷³ 2013 WL 1942398 (May 13, 2013).

⁷⁴ 555 U.S. 70 (2008).

⁷⁵ 552 U.S. 312 (2008).

⁷⁶ 552 U.S. 364 (2008).

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together, the four cases illustrate that so long as the federal provision leaves some space for states to occupy, the Court is willing to allow states to fill that area.

First, an express preemption provision that preempts state laws “with respect to” a designated area that federal law regulates will receive a compact reading.⁷⁷ In *Dan’s Used City*, the unhappy former car owner sued the towing company under a state consumer protection law that prescribed specific procedures for the storage and sale of a towed vehicle, procedures that he alleged the towing company failed to comply with.⁷⁸ The defendant relied on a preemption provision of the Federal Aviation Administration Authorization Act (known by the ungainly acronym “FAAAA”), which appeared to reach broadly into state domains. This provision stated that “a state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to* a price, route, or service of any motor carrier . . . *with respect to the transportation of property*.”⁷⁹

The phrase “related to” “reflects a broad pre-emptive purpose.”⁸⁰ Nonetheless, the Court resolved that even such a broad phrase “does not mean the sky is the limit”; it “does not preempt state laws affecting carrier prices, routes, and services” “in only a ‘tenuous, remote, or peripheral manner.’”⁸¹ The Court cautioned that the “related to” language could not have too broad and literal an effect, else “for all practical purposes preemption would never run its course.”⁸² In this particular provision, the “related to” language was further limited by the phrase “with respect to the transportation of property.”⁸³ In determining the effect of the language, the Court focused on the different time periods involved: the federal Act addressed the period in which a particular vehicle was in transit and stored in assistance to that transport, while the plaintiff’s state law claims addressed a period well after the car had been towed, that is, the period of the sale, not of the movement, of the car. This distinction maintained the vitality of the state statutory scheme related to the sale of towed cars as well as the state common law bailment claims.⁸⁴

To check its analysis, the Court examined the purpose behind Congress’s enactment of the preemption provision, and concluded that the state law claims would not in any

⁷⁷ See *Altria Group, Inc. v. Good*, 555 U.S. 70, 80-81 (2008).

⁷⁸ 133 S. Ct. at 1775; N.H. REV. STAT. ANN. § 262:36-a.

⁷⁹ 49 U.S.C. § 14501(c)(1) (emphasis added).

⁸⁰ *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (citation omitted).

⁸¹ *Id.* (quoting *Rowe v. New Hampshire Transport Ass’n*, 552 U.S. at 371 (2008)).

⁸² *Id.* (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 655, 665-66 (1995)).

⁸³ 49 U.S.C. § 14501(c)(1).

⁸⁴ *Dan’s City Used Cars*, 133 S.Ct. at 1779.

way interfere with that purpose, which was to prevent states from “constrain[ing] participation in interstate commerce.”⁸⁵

The preference for reading broad preemption language narrowly reflected in *Dan’s City* also prevailed in *Altria Group, Inc. v. Good*. The primary express preemption provision in *Altria* provided as follows: “No requirement or prohibition *based on smoking and health* shall be imposed under State law *with respect to* the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”⁸⁶ The state statute in question was Maine’s deceptive practices act statute.⁸⁷ The petitioners, who were cigarette manufacturers, alleged that the Federal Cigarette Labeling and Advertising Act preempted the respondents’ claims under the state statute.⁸⁸ The respondents were smokers who had smoked “light” cigarettes that the petitioners had manufactured.⁸⁹ They had brought a state law deceptive trade practices claim against the manufacturers that alleged that the petitioners had advertised that the “light” cigarettes passed less tar and nicotine to consumers than regular cigarettes; however, the respondents alleged that the manufacturers knew that this was not so.⁹⁰ The manufacturers argued that the Labeling Act’s express preemption provision preempted the state statute, and thus barred the smokers’ claims.⁹¹

Thus, the question was whether the state deceptive practices act, when applied to challenge the advertising of cigarettes as light, constituted a state law “based on smoking and health . . . with respect to the advertising or promotion of any cigarettes . . .” The Court construed the phrase “based on smoking and health” as modifying the state law taken as a whole, as opposed to the particular application of the law.⁹² Thus, the Court stepped back from the context of the immediate application of the state law and looked at the law itself – was it one “based on smoking and health”? The Court reasoned that

⁸⁵ *Id.* at 1780. In that same term, the Supreme Court construed this preempting provision of the FAAAA and concluded that it preempted a local requirement regarding placard and parking. *American Trucking Ass’ns, Inc. v. City of L.A.*, 133 S. Ct. 2096, 2104 (2013). There, however, the issue was not whether the requirement related, as a substantive matter, to “a price, route, or service of any motor carrier . . . with respect to the transportation of property,” 49 U.S.C. § 14501(c)(1), but rather whether the requirement “ha[d] the force and effect of law.” *Id.*, 133 S. Ct. at 2102.

⁸⁶ 15 U.S.C.A. § 1334(b) (West) (emphasis added).

⁸⁷ 555 U.S. at 72; ME. REV. STAT. ANN. tit. 5, § 207 (Supp. 2008)

⁸⁸ 555 U.S. at 72.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 80-88. The manufacturers also argued that the state law was preempted under a theory of implied obstacle preemption. *Id.* at 88-90. This aspect of *Altria* is discussed *infra* in part II.B.

⁹² 555 U.S. at 80.

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the clause should be given “a fair but narrow reading.”⁹³ The state deceptive practices act said nothing about either “smoking” or “health,”⁹⁴ but rather targeted deceptive statements that induced the respondents to buy the petitioners’ cigarettes, imposing a general duty not to deceive, rather than one bound to smoking and health.⁹⁵ Thus, the express preemption provision did not preempt an action under a state’s general deceptive trade practices statute.⁹⁶

However, in two other recent express preemption cases, the Court concluded that the federal statute’s preemption provision did in fact squelch the state law at issue. From these we discern first that a federal law that targets state “requirements” and “prohibitions” extends to state common law torts in addition to state statutes. What’s more, the Court will examine the policies behind the federal law and the overlapping state law, and will be more likely to find preemption when those policies promote different goals. In addition, the Court has indicated that it will honor specific boundaries, even if they cover a broad expanse, and will preempt even generally applicable common laws.⁹⁷

An expansive preemption provision written in concrete terms will be given expansive preemption power. In *Riegel v. Medtronic*, the Court construed the express preemption provision of the federal Medical Device Amendments Act (the “MDA”).⁹⁸ This provision was quite broad, providing that a state shall not have “any requirement . . . which is different from, or in addition to, any requirement applicable” under federal law to the device.⁹⁹ In effect, this provision left room for the states to enact only identical twins of the federal provision.

Riegel’s petitioners, a husband and wife, sued the manufacturer of a catheter under state strict liability, negligence, and similar laws after the device ruptured.¹⁰⁰ First the Court concluded that the FDA’s premarket approval process imposed “requirements” under the MDA, activating the statute’s preemption provision.¹⁰¹ Thus, the next question was whether the state’s common law claim was a “requirement . . . different from, or in addition to” that premarket approval. Common law duties are, the Court concluded,

⁹³ 555 U.S. at 80 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992)).

⁹⁴ *Id.*

⁹⁵ 555 U.S. at 82-83.

⁹⁶ 555 U.S. at 87 (“In sum, we conclude now, as the plurality did in *Cipollone*, that ‘the phrase ‘based on smoking and health’ fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements.’”).

⁹⁷ *Riegel v. Medtronic*, 552 U.S. 312 (2008).

⁹⁸ 552 U.S. 312.

⁹⁹ 21 U.S.C. § 360k(a).

¹⁰⁰ 552 U.S. at 319.

¹⁰¹ 552 U.S. at 322.

“requirements” for purposes of an express preemption provision.¹⁰² The petitioners, unfortunately, had failed to pursue an argument that their state law claims nonetheless survived as requirements that were simply parallel to, as opposed to different from or in addition to the federal law’s, and thus lost their case once the Court concluded that their claims constituted “requirements.”¹⁰³

Even where an express preemption provision is less expansive, preemption becomes more likely when the federal and state laws have fundamentally different purposes and the state law’s purpose coincides with the motivation behind the federal law’s express preemption provision. In *Rowe v. New Hampshire Transport Ass’n*,¹⁰⁴ the Court examined the preemption language of the Federal Aviation Administration Authorization Act of 1994,¹⁰⁵ the same statute that the Court addressed five years later in *Dan’s City Used Cars, Inc. v. Pelkey*.¹⁰⁶ The language of the preemption provision was as follows: “a State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”¹⁰⁷ Maine, hoping to cut back on minors’ use of tobacco, had enacted two provisions that imposed specific requirements for the transport and delivery of tobacco products.¹⁰⁸ The federal statute was designed to expand interstate trucking commerce by deregulating it; in

¹⁰² 552 U.S. at 324. The Court reasoned that “Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments,” 552 U.S. at 324. The Court had previously interpreted a federal preemption provision’s use of “requirements” as including state common law duties. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Lohr v. Medtronic, Inc.*, 518 U.S. 470 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The Court rejected the petitioners’ argument that even if common-law duties were “requirements,” they were not requirements “with respect to devices,” reasoning that the statutory text did not “suggest[] that the pre-empted state requirement must apply *only* to the relevant device” 552 U.S. at 328. *See also* *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106 (2d Cir. 2009) (construing the language of an FCRA preemption provision, 15 U.S.C. § 1681t(b) that referred to a “requirement or prohibition” under state law as encompassing common law claims as well as statutory claims).

¹⁰³ *Id.* at 330.

¹⁰⁴ 552 U.S. 364 (2008).

¹⁰⁵ 49 U.S.C. § 14501(c)(1).

¹⁰⁶ 133 S. Ct. 1769, 1778 (2013); *see supra* text accompanying notes 78 to 85.

¹⁰⁷ 49 U.S.C. § 14501(c)(1).

¹⁰⁸ The first, imposing two requirements, forbade anyone other than a state-licensed tobacco retailer to accept an order for tobacco delivery, and to require a licensed retailer that accepts an order and ships tobacco to use a delivery service that verifies the identity of the recipient. 552 U.S. 368 (citing ME. REV. STAT. ANN. tit. 22, § 1555-C(1), C(3)(C)). The second forbade any person from knowingly transporting a tobacco product to a person unless either the sender or the receiver had a Maine license, and designated circumstances as deeming knowledge. 552 U.S. at 369 (citing ME. REV. STAT. ANN. tit. 22, § 1555-D).

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contrast, the state law was designed to improve public health, two objectives in tension, at least in this instance.

The respondents in *Rowe*, transport associations affected by the state laws, sued to block them, arguing that the federal act's express preemption provision nullified the state laws.¹⁰⁹ In an earlier decision, *Morales v. Trans World Airlines, Inc.*, the Court had interpreted similar preemptive language as applying to state enforcement actions in connection with "rates, routes, or services" even where the state law only indirectly affected those attributes.¹¹⁰ Reasoning from *Morales*, the *Rowe* court concluded that the two Maine laws not only had a direct "connection with" motor carrier services, but that the provisions would have a "significant" and adverse "impact" in respect of the federal Act's ability to achieve its pre-emption-related objectives," dooming the state laws.¹¹¹ The Court also declined to create a "public health objective" exception to the preemption provision, though Maine tried to distinguish its laws from the sort of economic regulation it argued Congress had intended to preempt.¹¹² The federal law in *Rowe* was unusual because it sought to deregulate, rather than regulate; to clear the table of restrictions on trucking whether they be federal or state. Thus, Maine's laws, clearly directed towards imposing extra burdens on the trucking industry, directly undermined Congress's free market intent.

The difference between *Rowe* and *Dan's City*, the subsequent case interpreting this provision and which permitted, rather than preempted, a state law, lies in the strength of the link between the subject of the state law involved and "a price, route, or service of any motor carrier."¹¹³ The *Dan's City* state law related to events subsequent to the transportation of a vehicle, a time period distinctly subsequent to the time period that the federal law was concerned with, the transporting period.¹¹⁴ That link was too weak to bring the state law into the orbit of the preemption provision.¹¹⁵

So, taken collectively, *Dan's City*, *Altria*, *Riegel*, and *Rowe* indicate that a state is more likely to successfully avoid preemption with a general duty, rather than an area-specific law, and that a court will honor broad but specific boundary setting and Congress's motivation for including the preemption provision.

¹⁰⁹ 552 U.S. at 369.

¹¹⁰ 504 U.S. 374 (1992).

¹¹¹ 552 U.S. at 371-72, 373.

¹¹² 552 U.S. at 374.

¹¹³ 49 U.S.C. § 14501(c)(1).

¹¹⁴ 138 S. Ct. at 1779.

¹¹⁵ *Id.*

C. Implied Preemption – “Congress does not cavalierly pre-empt state-law causes of action”¹¹⁶

Even where a federal law does not seek to pervade a field of regulation, and does not contain an express preemption provision, it can still preempt an overlapping state law through implied preemption. While field preemption removes an entire arena from state regulation, implied preemption removes only those state laws that conflict with a specific federal law.¹¹⁷ Such a conflict can arise in two ways. First, implied preemption negates a state law when “compliance with both federal and state regulations is a physical impossibility,” known as implied impossibility preemption.¹¹⁸ Second, a state law must give way to a federal one where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”¹¹⁹ that is, undermining a policy that the federal law promotes, known as implied obstacle preemption.¹²⁰

The Court’s recent implied preemption cases reflect a great deal of deference to state schemes, so long as the area was not one that Congress had pervasively regulated, leading to field preemption. The Court is fond of quoting the purpose presumption: “[i]n preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”¹²¹

This presumption places a thumb on the scale in favor of leaving state laws intact. For instance, in *Wyeth v. Levine*, a 2009 case of implied preemption, the plaintiff

¹¹⁶ *Medtronic, Inc.* 518 U.S. at 485.

¹¹⁷ *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011); *see also* *Wos v. E.M.A. ex rel. Johnson*, 133 S.Ct. 1391, 1398 (2013) (stating that “[w]here state and federal law ‘directly conflict,’ state law must give way”) (citations omitted).

¹¹⁸ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *see also* *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (describing the doctrine).

¹¹⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also* *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (describing the doctrine); *International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987) (stating that “the Court must be guided by the goals and policies of [a federal act],” and conclude that it preempts if a state law claim would “serious[ly] interfere[] with the achievement of the ‘full purposes and objectives of Congress’” or “with the methods by which the federal statute was designed to reach” its goals) (citation omitted).

¹²⁰ Thus, even without the express preemptive language in the federal statute at issue in *Rowe*, Maine’s trucking laws might well have fallen to implied preemption. *See* 552 U.S. at 271-72 (noting the conflict between the state’s objectives and Congressional intent).

¹²¹ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 471, 485 (1996) (internal citation omitted)).

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brought a state failure to warn claim arising from method of administering anti-nausea drug.¹²² The federal Food, Drug, and Cosmetic Act (the “FDCA”) did not contain an express preemption clause relevant to prescription drugs.¹²³ However, the defendant, the drug’s manufacturer, argued that the FDCA preempted the state law claim under two theories: first, that it was impossible to comply with both the state’s warning requirements and the FDCA, and second, that the FDCA created an obstacle such that complying with state law would obstruct the purposes and objectives of the federal drug labeling regulation led the Court to reject both arguments: “[w]e rely on the presumption because respect for the States as ‘independent sovereigns in our federal system’ leads us to assume that ‘Congress does not cavalierly pre-empt state-law causes of action.’”¹²⁴ Below is discussed recent Supreme Court work on both implied impossibility preemption and implied obstacle preemption.

1. Implied Impossibility Preemption

Implied impossibility preemption arises under the fairly narrow circumstances where a regulated entity cannot comply with one sovereign’s law without simultaneously violating the other’s.

Where a regulated entity does not maintain full control over all contingencies needed to comply with the federal law, state law, or both, the implied impossibility preemption doctrine will likely block the state law, even in the absence of an actual conflict. The Supreme Court recently nullified state law claims on the grounds of implied impossibility by construing “impossible” broadly.¹²⁵ In *PLIVA v. Mensing*, two patients were prescribed a generic form of a prescription drug that the defendants manufactured, and then subsequently developed a serious neurological disorder known to be associated with the drug.¹²⁶ They sued under their respective state’s tort laws for damages, claiming that the manufacturers should have warned of the dangers of developing the condition once a patient took the medication for more than twelve weeks.¹²⁷ The preemption issue arose because Congress imposed slightly different federal drug labeling duties on generic drug manufacturers than on brand name drug manufacturers.¹²⁸ Under FDA regulations, a generic drug manufacturer could acquire approval by showing that its warning label was the same as the brand name’s.¹²⁹ Under state law, the manufacturers

¹²² 555 U.S. 555 (2009).

¹²³ 555 U.S. at 567.

¹²⁴ 555 U.S. at 565 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. at 485).

¹²⁵ *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011).

¹²⁶ *Id.* at 2572-73.

¹²⁷ *Id.* at 2573.

¹²⁸ *Id.* at 2574.

¹²⁹ *Id.*

had to “adequately and safely label their products.”¹³⁰

Of course, new information could require a new warning under either the state or the federal law. However, the Court construed the FDA’s regulations as prohibiting a unilateral change; only with the FDA’s cooperation could the manufacturer have updated the label to warn of the dangers associated with the neurological condition the plaintiffs had acquired, learned of only after the FDA approved the original label.¹³¹ In other words, once the contingency between the manufacturer and the label change was not completely within the manufacturer’s sole control, a scenario arose whereby the manufacturer could no longer be absolutely certain of being able to comply with both the federal and the state law. Since the only way they could have guaranteed that their labels would comply with state law would be to have unilaterally changed them, an act that would have violated federal law, the Court reasoned that the doctrine of implied impossibility preemption applied to block the state law claims.

Furthermore, if the ability to comply with the dual systems would require the regulated party to abandon the regulated activity, that party can claim impossibility and thus trigger preemption, annulling the state law.¹³² Subsequent to *PLIVA*, in the 2013 case of *Mutual Pharmaceutical Co. v. Bartlett*, the Supreme Court reviewed the labeling law involved in *PLIVA* and permitted a manufacturer to claim that it could not possibly comply with both a state tort duty to warn of unreasonable dangers of a generic drug while also acceding to a federal law’s requirement that it warn only of those dangers that the brand-name equivalent manufacturer had attached to that product’s label.¹³³ The Court thus vacated a judgment for a woman whose skin had burned off, a side effect of a generic drug that had not explicitly warned of the known risk of the syndrome that befell her.¹³⁴ The Court specifically rejected the First Circuit’s reasoning that the generic drug manufacturer could have complied with both the state and federal drug laws by simply ceasing to sell the generic drug, reasoning that the Court’s past preemption decisions simply did not allow for that sort of leave-the-market solution, noting that it had not used that rationale to escape preemption in *PLIVA*.¹³⁵ As one dissenting opinion noted, the Court’s majority opinion curiously omitted any reference to the purpose presumption.¹³⁶

¹³⁰ *Id.* at 2577. The issue was whether the FDA’s regulations permitted the generic drug manufacturers to update their warning labels in a way that would meet the state law’s requirements of “warning of [known] dangers,” *id.* at 2573 (Minnesota’s law), or of “provid[ing] adequate instructions for safe use of a product,” *id.* (Louisiana’s law).

¹³¹ *Id.* at 2578.

¹³² *See Mutual Pharm. Co., v. Bartlett*, 133 S. Ct. 2466 (2013).

¹³³ *Id.* at 2470-72.

¹³⁴ *Id.* at 2476.

¹³⁵ *Id.* at 2476.

¹³⁶ *Id.* at 2483 and n.1 (Sotomayor, J., dissenting).

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Thus, the Court’s recent impossibility preemption cases indicate that if the ability to comply with both state and federal law hinged on a contingency outside the defendant’s exclusive control, the federal law would preempt the state law. This preemption would occur even if the defendant had partial control over the contingency and even if the contingency were likely to fall in favor of compliance, and the defendant need not seek to resolve the conflict by withdrawing from the market.

2. Implied Obstacle Preemption

Federal law will also trump a state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Preemption under this doctrine, known as implied obstacle preemption, is relatively unusual.

Sometimes a state law will parallel a federal one, but will provide a remedy that the federal law lacks, sprouting the question of whether the federal claim – and its lack of a remedy – should bar the consumer from recovering. The absence of a federal remedy will not necessarily indicate that Congress wanted to leave consumers without any remedy, and may in fact indicate that it expected consumers to pursue remedies under state law. For instance, in concluding that the FDCA did not bar an injured plaintiff’s state failure to warn claim in *Wyeth v. Levine* the Court considered the preference for consumers to have remedies.¹³⁷ It reasoned that Congress’s choice not to provide a federal remedy for consumers harmed by unsafe or ineffective drugs indicated that Congress thought that “widely available state rights of action provided appropriate relief for injured consumers.”¹³⁸ Further, the Court saw great significance in Congress’s choice to enact an express preemption provision for medical devices, but not for prescription drugs.¹³⁹ Thus, the absence of an express preemption provision can indicate that “Congress [did not think] state lawsuits posed an obstacle to its objectives.”¹⁴⁰ The federal agency’s practices also favored preserving state law, given that the FDA “traditionally regarded state law as a complementary form of drug regulation. The FDA has limited resources to monitor the 11,000 drugs on the market.”

As noted above, the petitioners in *Altria*, cigarette manufacturers fighting a state deceptive practices act claim arising from their advertising their cigarettes as “light,” advanced an implied preemption argument in addition to the express preemption one.¹⁴¹ The Court concluded that the state deceptive trade practices statute was not impliedly preempted by virtue of “presenting an obstacle to a longstanding policy” of the FTC, the

¹³⁷ 555 U.S. at 574.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Altria*, 555 U.S. at 87.

federal agency charged with administering the federal Labeling Act.¹⁴² The Court reviewed the agency's guidance and consent orders and concluded that no relevant longstanding policy existed.

In summary, where a state wants to regulate an area that the federal government has penetrated, it should evaluate the potential for preemption by any existing federal provision in the area regulated. If the area is one that the federal government has penetrated pervasively, the state law may fall to field preemption. If a federal law has express preemption language, the state law may nonetheless be able to intercede in the gaps of the preemption provision, especially in areas traditionally within states' purview, given that the preemption provision should receive a narrow construction. Nonetheless, where the purpose behind the preemption provision conflicts with the state's regulation, the preemption provision may well be construed to encompass the state law, nullifying it. Finally, state provisions that clear field and express preemption must still overcome any implied preemption, but in that contest they will benefit from the purpose preemption, which favors preserving the state law.

The next question is what all this preemption doctrine means for state efforts to restrict the information available in consumers' credit reports, specifically information related to adverse credit history when evaluated for employment, criminal background information, medical information, and identity theft debris.

IV. SURMOUNTING THE FAIR CREDIT REPORTING ACT'S BARRIERS

Taken together, the Court's recent preemption decisions generally bode well for preserving state claims. First, field preemption will not preclude states from intervening to protect consumer financial information. Congress has quite clearly not taken over this area, given that the Fair Credit Reporting Act, the premier piece of federal legislation in this area, itself expressly evinces room for state action.¹⁴³ Nonetheless, the FCRA presents express and implied preemption challenges for states.

Below follows a brief description of the FCRA and an extended discussion of its various preemption provisions, along with a summary of the case law construing those provisions. Subsequently is discussed the likelihood that given the Supreme Court's decisions along with the role and provisions of the FCRA, the various types of state reputation-protecting legislation identified above would prevail against a challenge of preemption.

A. The FCRA

The FCRA provides the primary federal control over consumer reports, and it

¹⁴² 555 U.S. at 89-90.

¹⁴³ 15 U.S.C. § 1681t(a); *see infra* text accompanying notes 148 to 150.

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conveys conflicting and complex messages about the role of state law in regulating consumer credit reports. It creates a regulatory scheme for consumer reports, the name it provides to credit reports. It explicitly recognizes state law by providing a general rule that such laws are preserved. Nonetheless, it claims a monopoly over certain fields within the territory of consumer report regulation, identifying specific kinds of state laws that must yield to the federal act, such kinds varying by the degree to which they relate to their corresponding federal provisions. After accounting for those monopolized areas, though, the FCRA still leaves substantial room for states to act, fields in which states can enact legislation to accord more weight to their citizens' privacy.

1. Overall Scheme

The FCRA regulates “consumer reports,” commonly also known as credit reports, although the definition clearly covers reports describing matters other than mere credit. A consumer report “means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, *character, general reputation, personal characteristics, or mode of living*” where that information is “used or expected to be used or collected” for, among other purposes, “the consumer’s eligibility for employment.”¹⁴⁴ A “consumer reporting agency” includes “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties”¹⁴⁵ Thus, this definition covers everything from the standard big three consumer reporting agencies of Trans Union, Experian, and Equifax, to specialty agencies like tenant screening agencies¹⁴⁶ and the medical information data aggregator MIB.¹⁴⁷

Looked at broadly, the FCRA imposes responsibilities not just on consumer reporting agencies, but also on the users who buy consumer reports from agencies and the furnishers who feed information about consumers to the agencies.

2. General Rule of Non-Preemption

¹⁴⁴ 15 U.S.C. § 1681a(d)(1) (emphasis added).

¹⁴⁵ 15 U.S.C. § 1681(f). The definition includes an interstate commerce nexus as well. *Id.*

¹⁴⁶ For example, Tenant Background Search, which advertises that it can help a landlord “[v]erify your applicant's identity and credit, and search for a criminal background before you rent. Tenant Background Search is the leader in providing high quality landlord tenant credit check and landlord tenant background check services.” <https://www.tenantbackgroundsearch.com/tenantScreening.aspx>.

¹⁴⁷ See <http://www.mib.com/index.html> (describing MIB's services).

By its express language, the FCRA provides that the Act does not preempt state law claims:

Except as provided in subsections (b)¹⁴⁸ and (c),¹⁴⁹ this title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency.¹⁵⁰

This explicit acknowledgement of the states' interest eliminates pervasive field preemption.¹⁵¹ Furthermore, that same acknowledgement shows that the federal regulation does not have the dominance that would lead to intensity field preemption.¹⁵² Accordingly, the remainder of this article will focus on express and implied preemption.

This non-preemption language shows that Congress presumed that the federal

¹⁴⁸ Providing exceptions. 15 U.S.C. § 1681t(b). *See infra* text accompanying notes 155 to 165.

¹⁴⁹ Defining the term "firm offer of credit or insurance" for purposes of both federal and state law. 15 U.S.C. § 1681t(b).

¹⁵⁰ 15 U.S.C. § 1681t(a). This general preemption standard indicates that Congress did not intend to comprehensively preempt states from the field of credit reporting regulation. *See Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir. 2004); *Credit Data of Ariz., Inc. v. State of Ariz.*, 602 F.2d 195, 197 (9th Cir. 1979).

¹⁵¹ *See supra* text accompanying note 69; *see also Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir. 2004) (stating that this provision demonstrates that Congress did not intend to preempt the field of claims and upholding against a challenge of preemption a state insurance statute that regulated behavior not covered by the FCRA); *Credit Data of Ariz., Inc. v. State of Ariz.*, 602 F.2d 195, 197 (9th Cir. 1979) (upholding against a challenge of preemption a state statute that required consumer reporting agencies to provide free reports, a provision that predated the FCRA's present free report provisions in 15 U.S.C. § 1681j(a)(1)); *State Dep't of Commerce, Community, & Econ. Dev., Div. of Ins. v. Progressive Cas. Ins. Co.*, 165 P.3d 624, 626-27 (Alaska 2007) (upholding against a challenge of preemption a state law that forbade insurers from failing to renew a personal insurance policy "based in whole or in part on a consumer's credit history or insurance score" without the consumer's consent). *But see Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 901 (10th Cir. 2012) (asserting that "[t]he FCRA leaves no room for overlapping state regulations. Congress set out to create uniform, national standards in the area of credit reporting") (dicta).

¹⁵² *See supra* text accompanying note 70.

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statute could coexist peacefully with a state statute, even one that overlies the same territory, so long as the two are not inconsistent. In this way the FCRA expressly incorporates a version of the implied preemption doctrine to supplement the act’s express preemption provisions, discussed below. A state law is inconsistent with a federal law only if complying with one would put the actor in violation of the other,¹⁵³ or if it would frustrate a particular purpose of the federal act.¹⁵⁴

3. Specific Express Preemption Provisions

The FCRA somewhat undercuts its general rule of non-preemption by listing five sets of FCRA provisions that it protects against any “requirement or prohibition [that] may be imposed under the laws of any State.”¹⁵⁵ Three of these sets target fairly narrow practices of the FCRA:

- The exchange of information among business affiliates;¹⁵⁶
- Designated disclosures required by the FCRA;¹⁵⁷ and
- The frequency with which consumers can obtain free consumer reports.¹⁵⁸

Along with those three narrow sets, however, the remaining two sets cover a broad array of FCRA provisions. The two sets differ in the reach of the area around the identified provisions that remains reserved for the federal monopoly. The first of these sets, which we will call “subject matter preempters,” preempts state requirements or prohibitions

¹⁵³ See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

¹⁵⁴ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Equifax Servs., Inc. v. Cohen*, 420 A.2d 189, 211 (Me. 1980) (testing the state provision against the “full purposes and objectives” of Congress).

¹⁵⁵ 15 U.S.C. § 1681t(b).

¹⁵⁶ 15 U.S.C. § 1681t(b)(2); see also *American Bankers Ass’n v. Gould*, 412 F.3d 1081, 1087 (9th Cir. 2005) (holding that this provision preempted that part of the California Financial Information Privacy Act to the extent that it attempted to regulate the communication of information among affiliates), *appeal after remand* 541 F.3d 1214 (9th Cir. 2008) (narrowing the state statute to sever the preempted portion).

¹⁵⁷ 15 U.S.C. § 1681t(b)(3). The FCRA specifically exempts from this prohibition specified laws of the states of California, *id.* § 1681t(b)(3)(A), and Colorado, *id.* § 1681t(b)(3)(B). In addition, the act limits the effect of this prohibition on state laws regulating insurance activity. *Id.* § 1681t(b)(3)(C).

¹⁵⁸ 15 U.S.C. § 1681t(b)(4). The FCRA specifically exempts from this prohibition specified laws of the states of Colorado, Georgia, Maine Maryland, Massachusetts, New Jersey, and Vermont in effect on December 4, 2003. *Id.* § 1681t(b)(4)(A)-(G).

imposed as to the “subject matter regulated under” eleven specific FCRA provisions.¹⁵⁹

¹⁵⁹ 15 U.S.C. § 1681t(b)(1)(A)-(I). These eleven provisions are as follows:

- (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.

15 U.S.C.A. § 1681t(b)(1). *See* *Banga v. Equifax Info. Servs. LLC*, No. 14-CV-03038-WHO, 2015 WL 3799546, at *8 (N.D. Cal. June 18, 2014) (holding that a state credit reporting act's prescreening provision was preempted by section 1681t(b)(1)(A)); *Bauer v. Target Corp.*, 2012 WL 4054296, 8:12-CV-978-T-AEP, 2012 WL 4054296, at *5 (M.D. Fla. Sept. 14, 2012) (holding that 15 U.S.C. § 1681t(b)(1)(F) preempted a claim under a Florida state debt collection statute's provision that regulated furnishers' disclosure of information about a debt); *Galper v. JPMorgan Chase, N.A.*, No. 13 CIV. 3449, 2014 WL 1089061, at **3-5 (S.D.N.Y. Mar. 17, 2014) (holding that both a conversion claim and a claim brought under a state statute that restricted the transmission of information resulting from identity theft against a bank that had allegedly made false reports to credit reporting agencies was preempted by section 1681t(b)(1)(F)); *Dickman v. Verizon Communications, Inc.*, 876 F. Supp. 2d 166, 175 (E.D.N.Y. 2012) (concluding that claims

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The other group, which we will call “conduct preempters,” has a narrower scope, eliminating only those state requirements or prohibitions that pertain to the “conduct required by” eleven additional FCRA provisions.¹⁶⁰ If we think of the provisions given

for breach of contract and for violation of a state deceptive practices act based on a furnisher’s furnishing of false information to a credit reporting agency was preempted by section 1681t(b)(1)(F)); *Okocha v. HSBC Bank USA, N.A.*, 700 F. Supp. 2d 369, 375 (S.D.N.Y. 2010) (holding that a claim for violation of a state deceptive practices act against an information furnisher for furnishing false information to a credit reporting agency was preempted by section 1681t(b)(1)(F)); *Consumer Data Industry Ass’n v. Swanson*, No. 07-CV-3376 PJS/JG, 2007 WL 2219389, at *4 (D. Minn. July 30, 2007) (holding that a state statute prohibiting “mortgage trigger” lists was preempted by section 1681t(b)(1)(A)); *see also* *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106-07 (2d Cir. 2009) (holding that mortgage lenders’ claims for misappropriation of trade secrets, unfair competition, and unjust enrichment brought against credit reporting agencies for their use of mortgage “trigger leads” were preempted by section 1681t(b)(1)(A)).

¹⁶⁰ 15 U.S.C. § 1681t(b)(5)(A)-(I). This provision states as follows:

(b) General exceptions

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

* * *

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

(A) section 1681c(g) of this title [pertains to truncation of credit card and debit card numbers];

(B) section 1681c-1 of this title [pertains to identity theft prevention, fraud alerts, and active duty alerts];

(C) section 1681c-2 of this title [pertains to the blocking of information resulting from identity theft];

(D) section 1681g(a)(1)(A) of this title [pertains to the truncation of consumers’ social security numbers on their reports at their request];

(E) section 1681j(a) of this title [pertains to charges for reports made to consumers, including the annual free report, and the time for reinvestigations of information on such reports];

(F) subsections (e), (f), and (g) of section 1681m of this title [pertain, respectively, to the requirement that agencies issue “red flag” guidelines and regulations; the prohibition on the sale or transfer of debt caused by identity theft; and communications required of debt collectors concerning identity theft];

(G) section 1681s(f) of this title [pertains to required coordination among consumer reporting agencies with respect to consumer complaint investigations];

(H) section 1681s-2(a)(6) of this title [pertains to the duties of furnishers upon notice of identity theft-related information]; or

preemptive power as poles planted in the ground of potential state regulation, those of the subject matter preempters will cast a state-law-free shadow around them equivalent in scope to the subject matter of that provision. In general the conduct preempters, though, will cast almost no shadow at all, just wide enough to cover nearly identical state provisions, those that require identical conduct.

Finally, the FCRA blocks state law in one other instance – not by preempting it, but by providing qualified immunity from certain state laws to designated actors.¹⁶¹ The immunity is not absolute; a consumer can overcome it by showing that the defendant provided false information with malice or with willful intent to injure the consumer.¹⁶² The provision plays a robust part in the analysis of preemption of the common law claims it identifies, because to give it full effect, its gears must mesh with those of the preemption provisions in order to allow all the provisions to be effective. Canons of construction encourage giving full meaning to every provision in an act, and discourage interpretations that render a provision superfluous.¹⁶³ Accordingly, courts have had to struggle to harmonize the preemption provisions with the qualified immunity provision in order to ensure that they do not obviate the immunity - after all, no one needs to be immunized from a preempted state law.

However, the impact of the qualified immunity provision is relatively irrelevant for the purpose of enacting reputation-protecting state statutes. The question of the pool of laws subject to qualified immunity has import for only those state causes of action that

(I) section 1681w of this title [pertains to the required disposal of records].

¹⁶¹ This provision states as follows:

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, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report² except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C.A. § 1681h(e).

¹⁶² *Id.*

¹⁶³ This is known as the rule against surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (it is a “cardinal rule of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”) (internal citation omitted).

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are “in the nature of defamation, invasion of privacy, or negligence.”¹⁶⁴ So long as a state statute avoids presenting itself as a common law of one of these flavors it will not be subject to qualified immunity. Therefore, no further discussion of the qualified immunity provision of the FCRA is necessary here.

In its preemption provisions, the FCRA focuses on state “requirement[s] or prohibition[s]” that have a particular relationship with a specified FCRA provision.¹⁶⁵ So, the question arises, how would the Supreme Court define the breadth of such a relationship?

4. Significant Areas Clearly Free from FCRA Preemption

The FCRA identifies a slew of express preemption provisions that require close analysis for purposes of the specific types of state statutes of concern here, gone into below, to determine the extent of areas of regulation fenced off from the states.¹⁶⁶ Nonetheless, large patches of the Act’s coverage are left bare for state intervention. The specific rules regarding medical information, for instance.¹⁶⁷ In addition, most of the Act’s requirements for consumer reporting agencies to put accurate information in agency-issued consumer reports are free from preemption provisions. This means that states themselves can tighten the accuracy standards, improving the protection of their consumers’ reputations.¹⁶⁸ Similarly, states may enact procedures to reinvestigate challenged data that would be more stringent than those in the FCRA.¹⁶⁹ The FCRA also left its requirements for obtaining a report for employment purposes free from preemptive effect, leaving that area open to the states.¹⁷⁰

In addition, the FCRA has special requirements for reports that contain detrimental

¹⁶⁴ 15 U.S.C. § 1681h(e).

¹⁶⁵ 15 U.S.C. § 1681t(b)(1)-(5). While the FCRA uses “relating to” in its preemption section, it does so only to describe the content of the specific preempting provisions. It uses “with respect to” to describe the relationship between the state law and the preempting subject matter.

15 U.S.C.A. § 1681t(b)(5).

¹⁶⁶ See *supra* text accompanying notes 155 to 160.

¹⁶⁷ 15 U.S.C. §§ 1681a(i) (defining medical information); 1681b(g) (requiring agencies to code medical information so that the substance of the medical portion is hidden).

¹⁶⁸ 15 U.S.C. § 1681e(b) (requiring that “[w]henver a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates).

¹⁶⁹ 15 U.S.C. § 1681i.

¹⁷⁰ 15 U.S.C. § 1681b; 1681b(b).

public record information, information that would include bankruptcy and criminal record information.¹⁷¹ This provision falls outside of the thicket of FCRA preemption provisions, permitting states to impose additional requirements for public record information.

Finally, the FCRA's remedies provisions are largely unaffected by the FCRA's preemption provisions.¹⁷² States could provide additional protection to consumers by enhancing the remedies available to those injured by the violation of a state provision, for instance, by offering a treble damages provision. Although one district court has concluded that the FCRA's willfulness damages provision did preempt a Colorado statute's treble damages provision,¹⁷³ the court seemed to misunderstand both the FCRA's punitive damages provision and the presumption against preemption.¹⁷⁴

Below, the FCRA's preemption provisions, viewed through the prism of the Supreme Court's recent express and implied preemption decisions, are applied to four areas that are attractive candidates for state regulation: employers' use of credit reports and other kinds of background checks, the inclusion of criminal record information, the inclusion of medical debt information, and identity theft protections.

B. Strategies for States

The FCRA's relationship to state law, along with its express preemption provisions, allow a fair amount of room in which states could operate to protect the reputations of their citizens, so long as states craft those provisions carefully. With respect to the regulation of consumer reports, no one could credibly argue that consumer credit reporting is subject to field preemption.

¹⁷¹ 15 U.S.C. § 1681k.

¹⁷² 15 U.S.C. § 1681n (civil liability for willful non-compliance); 1681o (civil liability for negligent non-compliance). A few FCRA provisions are expressly free from the act's remedies provisions. *See, e.g.*, 15 U.S.C. §§ 1681s-1; 1681g(e)(6).

¹⁷³ *Eller v. Trans Union LLC*, 2012 WL 786283, at **3-4 (D. Colo. Mar. 9, 2012).

¹⁷⁴ *Id.* at *3. In assessing the FCRA's provision for damages for willfulness, the court noted only that the FCRA allows statutory damages, and failed to note that the act also provides for punitive damages. *See* 15 U.S.C. § 1681n(a)(1)(B)(2). Not only did the court fail to note the general rule of nonpresumption in 15 U.S.C. § 1681t(a), it misread the subsequent subsection as providing a list of FCRA provisions that were exempt from preemption, when in fact it provides a list of subsections that are expressly given preemptive effect. 15 U.S.C. § 1681t(b); *see supra* text accompanying notes 155 to 160. Another Colorado district court has permitted claims for punitive damages under both the FCRA and the Colorado consumer reporting act, though without analyzing preemption. *Eller v. Experian Info. Solutions, Inc.*, 2011 WL 3365955, at **18-19 (D. Colo. May 17, 2011), magistrate's report and recommendation adopted 2011 WL 3365513 (Aug. 4, 2011).

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The preemption analysis benefits from the purpose presumption, a precept the Court has often stressed, “that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”¹⁷⁵ The Court has repeatedly emphasized this point.¹⁷⁶ Under the remaining two preemption theories, a state statute that may tread on an area that Congress has toiled in has to clear three analytical hurdles - express preemption, and the two types of implied preemption - implied impossibility preemption, and implied obstacle preemption.¹⁷⁷

Taken together, the FCRA’s express preemption provisions evince that Congress sought near exclusive control over the regulation of furnishers first,¹⁷⁸ followed by a somewhat less vigorous interest in controlling consumer reporting agencies, and even less interest in controlling users of consumer credit reports. This indicates that the kind of state legislation most likely to survive the preemption provision gantlet is legislation targeted at the users of specific information. Further, while some regulation of agencies might be permitted, very little regulation of furnishers will be tolerated. Below, each area of recent concern is evaluated in light of potential express and implied preemption challenges.

1. Employers’ Use of Credit Reports

¹⁷⁵ *Arizona v. United States*, 132 S. Ct. 2492, at 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁷⁶ *See, e.g.* *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013); *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009); historic

Altria Grp., Inc. v. Good, 555 U.S. 70, 77, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996);

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947).

¹⁷⁷ *See supra* text accompanying notes 72 to 142.

¹⁷⁸ A number of decisions have concluded that the preemption provision of 15 U.S.C. § 1681t(b)(1)(F), which preempts an state “requirement or prohibition . . . 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” preempts a state law claim arising from a furnisher’s furnishing of such information. *See, e.g.*, *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106 (2d Cir. 2009); *Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 426-29 (S.D.N.Y. 2010); *see also* *Aleshire v. Harris*, 586 Fed. App’x 668, 671 (7th Cir. Oct. 15, 2013) (concluding that the plaintiff had forfeited her argument, but reasoning that nonetheless the “argument is without merit because state law tort claims are ‘requirement[s]’ for preemption purposes”) (citation omitted).

The FCRA contemplates that employers will use credit reports in selecting and placing employees. It specifically designates employment purposes as permissible.¹⁷⁹ While the act imposes slightly more onerous terms on employers than apply to, for example, run-of-the-mill creditors that use credit reports,¹⁸⁰ by and large it permits employers as much access to an individual's credit history as any other entity that can claim a permissible purpose.

However, the express preemption doctrine would not block a state law that prohibited employers from obtaining reports for employment purposes. None of the FCRA's express preemption provisions covers the Act's permissible purposes provision, the one that permits an employer to acquire a credit report for employment purposes.¹⁸¹ Absolutely nothing in the FCRA itself *requires* an employer to obtain a credit report; accordingly an employer could meet the demands of both the FCRA and a state law prohibiting employers from accessing credit reports simply by abiding by the state law. Thus, implied impossibility preemption would not arise.

As for implied obstacle preemption, the recent Supreme Court decisions indicate a deference to state schemes, so long as the area is not one in which Congress has pervasively regulated.¹⁸² Given *Wyeth v. Levine*'s heavy reliance on the purpose presumption, and the FCRA's own express reservation of power to states, any state law limiting employers (or other users) from acquiring credit reports would very likely clear implied obstacle analysis.

2. Criminal Record Information

However, state statutes that prohibit consumer reporting agencies from including certain types of state record information are more vulnerable to express preemption. The restrictions described above prohibit specific users from asking for, acquiring, or using credit information. An alternate method to regulate the trafficking of personal information is to regulate the content of a consumer report rather than its acquisition. In short, not "user, you cannot buy this," but "agency, you cannot sell this." This may appear to be an unnecessarily fine distinction, but the FCRA's express preemption provisions render that distinction highly meaningful.

The FCRA has a content preemption provision¹⁸³ that prevents states from regulating the subject matter of section 1681c, identified as "relating to information contained in

¹⁷⁹ 15 U.S.C. § 1681b(a)(3)(B).

¹⁸⁰ The employer must notify the consumer that a consumer report may be obtained for employment purposes and the consumer must authorize the employer's procurement of a consumer report. 15 U.S.C. § 1681b(2)(A)(ii).

¹⁸¹ 15 U.S.C. § 1681b.

¹⁸² See *supra* text accompanying notes 117 to 142.

¹⁸³ 15 U.S.C. § 1681t(b)(1)(E).

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consumer reports”¹⁸⁴ Criminal background information is content information, and furthermore it is content information that section 1681c specifically accounts for by designating some criminal record information as obsolete, and thus ineligible for inclusion as a consumer report, after seven years.¹⁸⁵ The question is whether a state law more protective of such information than section 1681c, one that prohibits consumer reporting agencies outright from placing criminal background information in consumer reports, would be seen as relating to the subject matter of this section, in light of the Supreme Court decisions construing the effects of express preemption provisions.

However, while the title of the section identified as preempting is broad – “[r]equirements relating to information contained in consumer reports”¹⁸⁶ – the actual scope of the section is much narrower. It does not purport to regulate content as a whole, but rather focuses on specific items of information that should be excluded because the information is old. This section addresses criminal record information in three ways. First, it provides that consumer reporting agencies may not, in general, report arrest records (or other adverse criminal record information, aside from convictions) that are more than seven years old.¹⁸⁷ Second, agencies may nonetheless report those arrest records where a credit transaction or life insurance underwriting is for \$150,000 or more, or where the report is to be used in connection with the employment of someone who will receive a salary of \$75,000 or more.¹⁸⁸ Finally, agencies may report all criminal convictions in perpetuity.¹⁸⁹ In analyzing the power of the obsolescence provisions to preempt, one court concluded that the FCRA’s obsolescence provision preempted its parallel Colorado provision that prohibited criminal convictions that were more than seven years old, reasoning that the state provision was clearly of the same subject matter – the length of time an agency can report a criminal conviction.¹⁹⁰ This analysis evinces a broad reading of the section, one not necessarily justified by its content, as discussed next.

However, the provision is less about the substantive character of the information and

¹⁸⁴ 15 U.S.C. § 1681c.

¹⁸⁵ 15 U.S.C. § 1681c(a)(2).

¹⁸⁶ 15 U.S.C. § 1681c.

¹⁸⁷ 15 U.S.C. § 1681c(a)(2) (agencies may not report records more than seven years old or after the governing statute of limitations has expired, whichever is longer).

¹⁸⁸ 15 U.S.C. § 1681c(b)(1)-(3).

¹⁸⁹ 15 U.S.C. § 1681c(a)(5) (exempting criminal conviction records from the general rule that agencies may not report any adverse item of information more than seven years old).

¹⁹⁰ *Simon v. Directv, Inc.*, 09CV00852PABKLM, 2010 WL 1452853, at *4 (D. Colo. Mar. 19, 2010) (report and recommendation of magistrate judge), *adopted by* 09CV00852PABKLM, 2010 WL 1452854 (D. Colo. Apr. 12, 2010).

much more about its age. The provision establishes that information is sufficiently “fresh” only for the designated period of time, without governing the content itself. This construction casts the provision as closely resembling the express preemption provision analyzed in *Altria*, where the Supreme Court interpreted the preemption provision “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter”¹⁹¹ as applying only to state laws based on smoking and health. Reading the span of section 1681t(b)(1)(E) as reaching only the subject matter of state laws that address the obsolescence of criminal record information would mean that under the reasoning of *Altria*, a broader statute, like the Maine deceptive practices act involved in that case, would not be construed as addressing the specific material that the preemption provision refers to. The Court construed the state statute in *Altria* as imposing a general duty not to deceive, rather than one that was more narrowly based on “smoking and health.” Here, the FCRA’s content preemption provision could apply only to state laws regulating the time for which an item with specified content could remain on a report, and not the initial eligibility of the information to *ever* be included in a report. Nonetheless, arguably such an analysis would be an inapt adaptation of *Altria*, given that the state statute there was a broadly applicable anti-fraud statute, in contrast to the sort of content-specific state credit report statute that states might consider to limit information placed in credit reports. Proponents of a state ban on criminal record content might have to argue that *Altria* should permit narrow state statutes where the coverage of the express preemption provision was also commensurately narrower.

What’s more, section 1681c relates specifically to what consumer reporting agencies can put into a consumer report; every subsection pertains to what an agency can and cannot do.¹⁹² Nothing in the section pertains to what an *employer* can or cannot do. Hence, one fair alternative to regulating the criminal record content of a consumer report issued for employment purposes would be to tell employers that they may not request a consumer report that includes such criminal record information, or that if an employer receives a report containing such information, the employer may not use it. This approach regulates users, rather than furnishers or agencies, and would create, in essence, an anti-discrimination law. This is the approach taken by some states, including California and Illinois, in recently enacting criminal history cloaking provisions.¹⁹³ In this way the restriction becomes a restriction on users of consumer reports, not creators of consumer reports, and likely should fall outside the preemptive effects of 15 U.S.C. § 1681t(b)(1)(E).

Under this, a constrained reading of the preemption provision that would comport with the general rule that federal courts should so read such provisions, a state would be

¹⁹¹ 15 U.S.C.A. § 1334(b) (West).

¹⁹² 15 U.S.C. § 1681c(a).

¹⁹³ CAL. LAB. CODE § 1024.5(a); 820 ILL. COMP. STAT. 70/10(a); *see supra* text accompanying notes 40 to 49.

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permitted to prohibit criminal records on credit reports, so long as it did not address the length of time that other categories of information could be reported by a consumer reporting agency. In contrast, a state that sought to limit the window of time that a criminal record – whether arrest, conviction, or other – could be reported would likely be construed as intruding on the subject matter of the FCRA’s obsolescence provision and thereby become preempted.

3. Medical debt restrictions

Using similar reasoning, states should be able to pass preemption-proof restrictions on the placement of medical debt information in consumer reports. While states have not yet acted in this area, the 112th Congress considered a bill that would have prohibited consumer reporting agencies from putting medical debt in a credit report could inspire states to do so.

Concerns over the privacy of medical information motivated Congress to add protections to the FCRA when they revised the act in 1996. Congress limited the use of medical information by creditors, insurers, and employers.¹⁹⁴ It defined medical information broadly, encompassing “information or data . . . that relates to (A) the past, present, or future physical, mental, or behavioral health or condition of an individual”¹⁹⁵ The FCRA’s restrictions on the use of such information are more protective in the case of employment use than in the case of an insurance transaction – for an insurance transaction, the consumer need only consent to the furnishing of the medical information.¹⁹⁶ However, for reports issued for employment or credit transaction purposes, the agency may include the consumer’s medical information in the report only if the information is relevant to the transaction and the consumer has given “specific written consent” for the report, consent that must “describe[] in clear and conspicuous language the use for which the information will be furnished.”¹⁹⁷

Two of the FCRA’s express preemption provisions may impact state regulation of medical debt information in consumer reports, one relating to the content of reports and one relating to the regulation of information furnishers. First, as discussed above, the FCRA has an express preemption provision that prevents states from regulating the subject matter of section 1681c, relating to the content of information contained in

¹⁹⁴ 15 U.S.C. § 1681b(g).

¹⁹⁵ 15 U.S.C. § 1681a(i).

¹⁹⁶ 15 U.S.C. § 1681b(g)(1)(A).

¹⁹⁷ 15 U.S.C. § 1681b(g)(1)(B). The act does permit agencies to include medical information that “pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devices [sic]” where the information is coded to avoid identifying the nature of the services, products, or devices. 15 U.S.C. § 1681b(g)(1)(C).

consumer reports.¹⁹⁸ However, in contrast to its treatment of criminal record content information, discussed above, section 1681c says very little about medical information content. The only reference to the medical industry pertains to a report's inclusion of the identifying information of any medical information furnisher; the FCRA requires agencies to withhold such information unless it is coded to avoid disclosing the nature of the provider and what it has provided.¹⁹⁹

Accordingly, under the relatively state-friendly ruling of *Altria*, if the content restriction of section 1681c were read to size itself down to the very specific and limited content restriction contained within section 1681c, then a broader state law banning medical debt would appear to address subject matter that differed from that in section 1681c, allowing a state law ban to survive express preemption under this theory. The main restrictions on the inclusion of medical information in consumer reports are located not in section 1681c, which is the target of an express preemption provision, but in section 1681b(g), which is not.²⁰⁰ Accordingly, states should remain free to decide what medical information content agencies may and may not put in reports, so long as they do not put agencies in the position of being unable to comply with both the state provision and the FCRA (which would lead to obstacle-impossibility preemption)²⁰¹ or act so broadly as to disrupt the purpose of the FCRA (which would lead to obstacle-purpose preemption).²⁰²

¹⁹⁸ 15 U.S.C. 1681t(b)(1)(E). *See supra* text accompanying note 159.

¹⁹⁹ 15 U.S.C. § 1681c(a)(6). Specifically, the name, address, and telephone number of the medical information furnisher. *Id.* This restriction does not apply if the agency is providing the report to an insurance company for something other than property or casualty insurance – meaning the agency can provide non-coded identifying information to an insurance company that wants the report for medical, life, or other sort of insurance. The FCRA references medical information in a number of other ways. First, in general, information that would otherwise be a consumer report is not such if it meets the terms of the Act's affiliate sharing exemption. 15 U.S.C. § 1681a(d)(2)(A). However, that exception does not apply when affiliates share medical information. *Id.* at 1681d(3). In addition, the FCRA imposes somewhat stricter requirements on reports furnished for employment or credit purposes that contain medical information, requiring that the information be relevant to the transaction and that the consumer provide specific consent for the furnishing of the report. *Id.* at 1681c(g)(1), (3). Nonetheless, information about medical debts may be included without those restrictions so long as the information is coded to obscure the specific provider and the nature of the medical services, products, or devices giving rise to the debt. *Id.* at § 1681c(g)(1)(C). So, as long as the agency codes the information, it may place it in the report including the amount of the debt – that amount, of course, being precisely what will harm the consumer's credit rating.

²⁰⁰ Specifically, section 1681b(g)(1).

²⁰¹ *See supra* text accompanying notes 125 to 136.

²⁰² *See supra* text accompanying notes 137 to 142.

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Once such a state law has cleared preemption of the subject matter of the FCRA's content restriction provision, a state law limiting medical debt information in consumer reports would then have to hurdle section 1681t(b)(1)(F), an express preemption provision prohibiting states from regulating the subject matter of the FCRA's main furnisher-responsibilities provision. However, even this more specific subject matter preemption provision in the FCRA should not impede states much. As discussed above, this preemption provision provides merely that states may not regulate the subject matter of, among other provisions, a provision that requires furnishers "whose primary business is providing medical services, products, or devices" to notify the agency of their status as medical information furnishers, a rather small, perfunctory provision.²⁰³ Thus, given a narrow construction, this preempting provision forbids states from regulating the subject matter of notifications by medical information furnishers to consumer reporting agencies. This preempting provision is far narrower than that of the Medical Device Amendment Act in *Riegel*, which preempted any state law beyond one that was an identical twin to the federal law, leading the Court to conclude that it barred state products liability claims.²⁰⁴ Furthermore, California's Supreme Court has rejected giving this preemption provision a broad reading that would extend to bar a claim under a state medical privacy statute.²⁰⁵ Thus, such a state provision should clear express preemption.

As for implied impossibility preemption, nothing would force an agency into having to violate a state law forbidding the inclusion of medical debt in credit reports in order to comply with the FCRA, because nothing in the FCRA *requires* an agency to include medical debt in a consumer report. Accordingly, that doctrine would not nullify a state effort to keep medical debt out of consumers' credit reports.

As for implied obstacle preemption, a medical debt restriction would not be at direct odds with the FCRA's purposes, one of which is, ultimately, to protect consumers.²⁰⁶ Thus a state provision limiting the corrosive effects of involuntary expenditures for medical services would be entirely consistent with that purpose. The FCRA's pro-consumer purpose contrasts distinctly with that of the federal motor carrier services law

²⁰³ 15 U.S.C. § 1681t(b)(1)(F), incorporating 15 U.S.C. § 1681s-2(a)(9).

²⁰⁴ See *supra* text accompanying notes 97 to 103.

²⁰⁵ *Brown v. Mortensen*, 51 Cal. 4th 1052, 1065 (Cal. 2011) (rejecting argument that the FCRA barred a claim under California's Confidentiality of Medical Information Act that arose from a dentist's sharing of the medical records of a client and his sons, concluding that the state act targeted different subject matter from that of section 1681s-2).

²⁰⁶ See 15 U.S.C. § 1681(a)(4) (stating that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy").

construed in *Rowe* and its purpose to have market forces, rather than state legislatures, impose limits. That purpose conflicted with the youth-protecting purpose of the state anti-tobacco law, and thus the state law fell.²⁰⁷ Therefore, a restriction on medical debt would not become null under a theory of implied obstacle preemption.

In short, states likely have a fair amount of room to exclude medical debt from consumer credit reports, and could use that room to help their citizens maintain the confidentiality of their unanticipated or unaffordable medical expenses. Thus, states that were concerned about the effects of medical debt on their citizens' credit reports could prohibit agencies from putting such debts into credit reports.

4. Identity theft provisions

However, states may be a good deal more hampered when it comes to protecting their consumers from the crushing damage that can arise when an identity thief has poisoned a consumer's credit report with the thief's own transactions. As described above, New Mexico took the step of enacting a provision making it reasonably easy for a consumer to block information arising from an identity thief's debts.²⁰⁸ However, when Congress added identity theft-prevention provisions to the FCRA, it also boosted the preemption subsection to specifically address those provisions, staking out some exclusive federal territory. The identity theft related provisions sheltered by an express preemption provision include some duties imposed on furnishers,²⁰⁹ consumer

²⁰⁷ See *supra* text accompanying notes 104 to 112.

²⁰⁸ See *supra* text accompanying notes 62 to 65.

²⁰⁹ The following duties of furnishers relate to identity theft and are subject to a preemption provision:

- Furnishers' duties to "have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency . . . relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information." 15 U.S.C. § 1681s-2(a)(6)(A), subject to 15 U.S.C. § 1681t(b)(1)(F) (subject matter).
- Furnishers' duties to refrain from furnishing information resulting from identity theft, where the consumer has submitted an identity theft report to the furnisher. 15 U.S.C. § 1681s-2(a)(6)(B), subject to 15 U.S.C. § 1681t(b)(1)(F) (subject matter). To trigger the duty, the consumer must have submitted the report "at the address specified by [the furnisher] for receiving such reports." 15 U.S.C. § 1681s-2(a)(B)(6). The furnisher may resume reporting the information if it "subsequently knows or is informed by the consumer that the information is correct." *Id.*

One court has concluded, however, has upheld a state identity theft provision against a preemption challenge that asserted that the provision was within the "subject matter" regulated by section 1681s-2(a)(6), concluding that the state action "concerns the direct relationship between the credit provider and the

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reporting agencies,²¹⁰ the FTC and other federal agencies,²¹¹ businesses that transact

consumer,” rather than one that fell within the “subject matter” of a furnisher’s reporting of credit information to a consumer reporting agency. *Pasternak v. Trans Union*, C07-04980 MJJ, 2008 WL 928840, at *4 (N.D. Cal. Apr. 3, 2008).

²¹⁰ The following duties of consumer reporting agencies are subject to a preemption provision:

- Consumer reporting agencies’ duty to notify one who has requested a consumer report that the address in the request “substantially differs from the addresses in the file of the consumer.” 15 U.S.C. § 1681c(h). In theory the subject matter of this provision is subject to preemption pursuant to 15 U.S.C. § 1681t(b)(1)(E).
- Agencies’ duties to provide fraud alerts, extended fraud alerts, and active duty alerts, and to refer alerts to other nationwide consumer reporting agencies, and for resellers to reconvey alerts, and to provide consumers with information on how to contact the Bureau of Consumer Financial Protection. 15 U.S.C. § 1681c-1.
- Agencies’ duties to block the reporting of identified theft-related information from a consumer’s report, and to notify the information’s furnisher of the block. 15 U.S.C. § 1681c-2. This provision is subject to the conduct-required-by preemption provision of 15 U.S.C. § 1681t(b)(5)(B). This provision allows consumer reporting agencies to rescind or decline the block under the following circumstances:

[T]he consumer reporting agency reasonably determines that –

(A) the information was blocked in error or a block was requested by the consumer in error;

(B) the information was blocked, or a block was requested by the consumer, on the basis of a material misrepresentation of fact by the consumer relevant to the request to block; or

(C) the consumer obtained possession of goods, services, or money as a result of the blocked transaction or transactions.

15 U.S.C. § 1681c-2(c)(1).

- The duty of nationwide consumer reporting agencies to develop procedures to refer identity theft complaints, fraud requests, and information block requests to one another. 15 U.S.C. § 1681s(f). The conduct required by this subsection is subject to preemption pursuant to 15 U.S.C. § 1681t(b)(5)(G).

²¹¹ The following duties of federal agencies are covered by an express preemption provision:

- The Federal Trade Commission’s duty to prepare a summary of rights of identity theft victims, and consumer reporting agency’s duties to provide consumers who complain of being the victim of fraud or identity theft with the summary. 15 U.S.C. § 1681g(d). States may not impose any

with identity thieves,²¹² owners of debts resulting from identity thieves,²¹³ and debt collectors.²¹⁴

The relevant FCRA provisions generally regulate furnishers and agencies.²¹⁵ Furnishers must refrain from furnishing information resulting from identity theft, and have procedures to respond to a notice from a consumer reporting agency notifications that it has blocked such information.²¹⁶ Agencies, in turn, must provide fraud alerts in reports and block identity theft related information, among other duties.²¹⁷

In assessing the relationship between state identity theft provisions and the FCRA, a California district court dismissed a preemption challenge to a state identity theft provision that authorized claims by identity theft victims against those who assert a claim arising from identity theft.²¹⁸ In an opinion that narrowly construed the “subject matter” reach of 15 U.S.C. § 1681s-2, one of the provisions identified in the FCRA’s subject matter preemption provisions.²¹⁹ The court rejected the consumer reporting agency’s arguments that two different provisions of section 1681s-2 that pertained to

requirement or prohibition “with respect to the disclosures required to be made” by this subsection. 15 U.S.C. § 1681t(b)(3).

- The duty of designated federal agencies to draft red flag guidelines and regulations. 15 U.S.C. § 1681m(e). The conduct required by this subsection is subject to preemption pursuant to 15 U.S.C. § 1681t(b)(5)(F).

²¹² The duty of businesses who have transacted with an identity thief to provide to the victim information about the transaction or transactions. 15 U.S.C. § 1681g(e). The subject matter of this subsection is subject to preemption pursuant to 15 U.S.C. § 1681t(b)(1)(G). Furthermore, states may not impose any requirement or prohibition “with respect to the disclosures required to be made” by this subsection. 15 U.S.C. § 1681t(b)(3).

²¹³ The duty of owners of debts resulting from identity theft who have been properly notified to not sell, transfer, or place for debt collection the debt. 15 U.S.C. § 1681m(f). The conduct required by this subsection is subject to preemption pursuant to 15 U.S.C. § 1681t(b)(5)(F).

²¹⁴ The duty of debt collectors who learn that the debts that they are attempting to collect may be fraudulent or the result of identity theft to notify the person on whose behalf the collector is acting about these qualities of the information, and to provide certain information to the consumer upon request. 15 U.S.C. § 1681m(g). The conduct required by this subsection is subject to preemption pursuant to 15 U.S.C. § 1681t(b)(5)(F).

²¹⁵ See *supra* text accompanying notes 209 to 210.

²¹⁶ See *supra* text accompanying note 209.

²¹⁷ See *supra* text accompanying note 210.

²¹⁸ CAL. CIV. CODE § 1798.92.

²¹⁹ 15 U.S.C. § 1681t(b)(1)(F); *Pasternak v. Trans Union*, C07-04980 MJJ, 2008 WL 928840, at *4 (N.D. Cal. Apr. 3, 2008).

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identity theft bore a subject matter that extended to the state provision, nullifying it.²²⁰ The court characterized the plaintiff's action against the defendant, who sought to force the plaintiff to pay the identity thief's debt, as one that "concerns the direct relationship between the credit provider and the consumer," rather than one that fell within the "subject matter" of a furnisher's reporting of credit information to a credit reporting agency.²²¹ Thus, the court examined the specific subsections of the FCRA's furnisher obligations and carefully analyzed their content rather than simply concluding that the preempting provision should be construed as covering any state claim against a furnisher.²²²

In contrast, some courts have construed the subject matter preemption effect of the FCRA's provision regulating furnishers as broadly preempting *any* claim that relates to furnisher behavior, without carefully examining the precise contours of the different responsibilities identified within that section.²²³

²²⁰ *Pasternak*, 2008 WL 928840, at *4. One FCRA provision pertains to the duties of furnishers upon an agency's notice of identity theft and imposing on furnishers a duty to refrain from refurnishing the disputed information, 15 U.S.C. § 1681s-2(a)(6), while the other requires furnishers to take certain actions upon receiving an identity theft complaint from a consumer, 15 U.S.C. § 1681s-2(a)(8).

²²¹ 2008 WL 928840, at *4.

²²² For similar careful, though less detailed analysis, see *Lichtenfels v. Crook*, CV065007438S, 2007 WL 2938716, at *6 (Conn. Super. Sept. 26, 2007) (dismissing state law claims based on allegations of furnisher behavior that fell within section 1681s-2, but retaining the others) and *Deutsche Bank Nat. Trust Co. v. Lichtenfels*, CV044003402S, 2007 WL 2938730, at *1 (Conn. Super. Sept. 26, 2007) (same).

²²³ See, e.g., *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 888 (9th Cir. 2010) (holding that the FCRA preempted a state provision requiring furnishers who receive notice of a dispute to investigate and review relevant information); *Sukiasyan v. OCS Recovery Inc.*, CV 11-9622 GAF CWX, 2013 WL 490683, at *6 (C.D. Cal. Jan. 22, 2013) (holding that a California statutory provision regulating furnishers that provide negative credit information was preempted); *Harrold v. Experian Info. Solutions, Inc.*, C 12-02987 WHA, 2012 WL 4097708, at *3 (N.D. Cal. Sept. 17, 2012) (concluding that claims brought pursuant to Cal. Civ. Code § 1785.25(b), (c), and (f), which impose accuracy requirements on furnishers of information to credit reporting agencies, were preempted by 15 U.S.C. § 1681t(b)(1)(F)); *Oganyan v. Square Two Fin.*, CV 11-10226 RGK VKB, 2012 WL 3656355, at *4 (C.D. Cal. Aug. 24, 2012) (holding that the section 1681t(b)(1)(F) preempted a California statutory provision regulating furnishers that provide negative credit information, and also a provision regarding furnishers' reinvestigations, which the court characterized as "fall[ing] within the general ambit" of section 1681s-2); *Subhani v. JPMorgan Chase Bank, Nat. Ass'n*, C 12-01857 WHA, 2012 WL 1980416, at *6 (N.D. Cal. June 1, 2012) (concluding that claims brought against a furnisher under a state statute that imposed parallel requirements to those of section 1681s-2(a)); *Banga v. Allstate Ins. Co.*, CIVS081518LKKEFBPS, 2010 WL 1267841, at

A different federal court has also indicated that the FCRA's express preemption provisions may bar a New Mexico law that overlaps the FCRA's identity theft debt blocking provision. The FCRA requires consumer reporting agencies to block the reporting of identity theft debts that a consumer has properly identified as arising from a thief's work.²²⁴ The FCRA provision allows an agency to decline to block or rescind the blocking if it "reasonably determines that one of three conditions was met – the information was erroneously blocked, the consumer made a material misrepresentation about the information blocked, or the consumer benefitted from the blocked transaction."²²⁵ New Mexico's overlapping provision appears to have the same general intent as the FCRA's blocking provision – that of protecting consumers from being tarnished by debts that they did not create. However, the New Mexico provision is more protective of identity theft victims, because it does not permit consumer reporting agencies to evade their responsibilities to block identity theft related debt by engaging in their own independent review of the block and thereafter unilaterally rescinding it.²²⁶ Rather, the New Mexico law permits an agency to lift the block only if the consumer requests it or a court orders it.²²⁷

However, the FCRA expressly preempts state laws with respect to the conduct required by the blocking provision.²²⁸ Accordingly, the main industry association for consumer credit reporting, the Consumer Data Industry Association, sought to block enforcement of the New Mexico provision.²²⁹ The district court dismissed the complaint on the grounds that the CDIA could not establish standing and therefore the case was nonjusticiable, but the Tenth Circuit reversed, concluding that the declaratory relief the

*5 (E.D. Cal. Mar. 31, 2010) (holding that the FCRA preempted a claim against a furnisher brought under California's unfair competition law to the extent that it was predicated on violations of section 1681s-2(a) and (b)); *Drew v. Equifax Info. Servs.*, C 07-00726 SI, 2007 WL 2028745, at *5 (N.D. Cal. July 11, 2007) (holding that the FCRA preempted a claim against a furnisher brought under a state statute with similarities to section 1681s-2, though refusing to dismiss a state claim arising from a user's conduct rather than a furnisher's); *see also* *Wang v. Asset Acceptance, LLC*, 681 F. Supp. 2d 1143, 1150 (N.D. Cal. 2010) (construing California's unfair competition law as imposing a "requirement or prohibition" by prohibiting "any unlawful, unfair or fraudulent business act or practice"); *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1143-44 (N.D. Cal. 2005) (concluding that the 1681s-2 preemption provision precluded a claim under California's unfair competition law that sought to impose a remedy for a violation of the FCRA's provisions).

²²⁴ 15 U.S.C. § 1681c-2.

²²⁵ 15 U.S.C. § 1681c-2(c)(1).

²²⁶ N.M. STAT. ANN. § 56-3A-3.1(D), (E).

²²⁷ *Id.* at § 56-3A-3.1(E).

²²⁸ 15 U.S.C. § 1681t(b)(5)(C).

²²⁹ *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902-03 (10th Cir. 2012).

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CDIA sought would sufficiently redress its injury.²³⁰ The court’s discussion of the preemptive effects of the FCRA cause some concern. Rather than addressing the quite narrow preemption provision that would apply, the court stated grandly that “[t]he FCRA leaves no room for overlapping state regulations.” As discussed below, this substantially misstates the text of the FCRA.²³¹

Two points oppose a broad reading of these identity-theft related preemption provisions. First, these specific preemption provisions should be construed in light of the introductory command of the preemption section, that except as provided, the FCRA does not “annul, alter, affect, or exempt any person . . . from complying with the laws of any State . . . for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent [with the Act], *and then only to the extent of the inconsistency.*”²³² This countervailing instruction indicates that preemption should be limited to only such state statutes that overlap nearly edge to edge with one of the identified FCRA provisions.

Furthermore, as discussed above, the Supreme Court has deferred to state legislation that supports the purpose of the corresponding federal law. As an additional argument against express preemption of the New Mexico identity theft provision, both the FCRA provisions and the New Mexican provision have an intent of protecting consumers from debts that they did not create; the difference is in the details, not the aim. Accordingly, the reasoning of *Rowe*, where the pro-commerce aim of the federal statute differed from and conflicted with the anti-tobacco aim of the state statute, can be meaningfully distinguished. Thus, the New Mexico provision that was the subject of the Tenth Circuit’s decision stepped too closely on the provisions of the identity theft blocking provisions, specifically the circumstances under which a consumer reporting agency could decline to block.

Nothing in the FCRA’s blocking provision *requires* a consumer reporting agency to rescind a block based on its own determination that the block was placed in error. Rather, the Act clearly states that an agency “*may* decline to block, or *may* rescind any block” in the identified circumstances.²³³ Therefore, the absence of required conduct leaves nothing for section 1681t(b)(5)(C) to preempt regarding the rescission (as opposed to the placement of) a block. Second, the preemption provisions extend only to the “conduct required by” the identified FCRA provisions, in contrast to the broader “subject matter regulated under” relationship that applies to a clutch of other preempting provisions.²³⁴

²³⁰ *Id.* at 902-03.

²³¹ *See infra* text accompanying notes 232 to 234.

²³² 15 U.S.C. § 1681t(a) (emphasis added).

²³³ 15 U.S.C. § 1681c-2(c)(1).

²³⁴ 15 U.S.C. § 1681t(b)(1), (5).

However, if the New Mexican law is ultimately found to be preempted by the FCRA, New Mexico, along with other states, could perhaps achieve its goal by painting with a broader brush. The underlying problem with identity theft-related debt tainting a consumer's credit report is not the actual source of the debt, but the fact of its inaccuracy. If a consumer reporting agency reported the debt of another person as belonging to the targeted consumer, the effects on the consumer would be just the same even though the mis-reported debt did not arise from identity theft, but merely from the mixing up by the agency of the targeted consumer with the debt's true creator. What's at issue is the accuracy of the information that the agency chooses to assign to any one report. Accordingly, a state could mitigate the effects of identity theft by imposing stricter accuracy requirements on consumer reporting agencies, or by enhancing the penalties for inaccurate reporting, or both. While the FCRA does, in fact, impose certain accuracy requirements on agencies,²³⁵ they impose nothing like strict attention to accuracy. Accordingly, by requiring agencies to meaningfully assess the accuracy of information initially, or to strictly verify it once it's been disputed by a consumer, a state could quite likely drastically reduce the pernicious effects of identity theft without stepping on the toes of the FCRA, which does not explicitly preempt state laws imposing accuracy on agencies, as opposed to furnishers.²³⁶

Another fruitful area for states to thwart identity theft is through mandating that consumer reporting agencies impose security freezes on the files of consumers who request them. These permit a consumer to hide their credit information from new potential creditors²³⁷ while allowing the consumer to be able to explicitly "thaw" the freeze for specific transactions. Several states have enacted such provisions and they can effectively block an identity thief from co-opting a consumer's credit record.²³⁸

²³⁵ 15 U.S.C. §§ 1681e(b), 1681i.

²³⁶ *See* 15 U.S.C. § 1681t(b)(1)(F), preempting states from regulating the subject matter of 15 U.S.C. § 1681s-2, which imposes accuracy requirements on furnishers.

²³⁷ In general, such freezes may not hide reports from existing creditors. *See, e.g.*, 815 ILL. COMP. STAT. 505/2MM(n) (providing that the freeze provisions do not apply to entities that the consumer owes).

²³⁸ *See, e.g.* ALA. CODE §§ 8-35-1-8-35-3; ALASKA STAT. §§ 45.48.100-45.48.290; ARIZ. REV. STAT. ANN. § 44-1698; ARK. CODE ANN. §§ 4-112-101-4-112-114; CAL. CIV. CODE §§ 1785.11.2-1785.11.4, 1785.11.6; COLO. REV. STAT. ANN. § 12-14.3-106.6-12-14.3-106.9; CONN. GEN. STAT. §§ 36a-701-701a; DEL. CODE ANN. tit. 6 §§ 2201-2204; D.C. CODE ANN. §§ 28-3861-28-3864; FLA. STAT. ANN. §§ 501.0050591.0051; GA. CODE ANN. §§ 10-1-913-10-1-915; HAW. REV. STAT. §§ 489P-3-489P-6; IDAHO CODE ANN. §§ 28-52-101-28-52-109; 815 ILL. COMP. STAT. 505/2MM; IND. CODE §§ 24-5-24-1-24-5-24-17; IOWA CODE §§ 714G.1-714G.11; KAN. STAT. ANN. §§ 50-723-724; KY. REV. STAT. ANN. §§ 367.363-367.365; LA. REV. STAT. ANN. §§ 9:3571.1(H)-(Z), 3571.3; ME. REV. STAT. ANN. tit. 10, § 1310; MD. CODE ANN., Com. Law §§ 14-1212.1-14-1212.3; MASS. GEN. LAWS ch. 93, §§

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States seeking to legislate in identity theft area should avoid implied impossibility preemption by ensuring that an agency, user, or furnisher can comply with both the FCRA and the proposed state law. Furthermore, states should proactively anticipate implied obstacle preemption arguments. *Wyeth* indicated a preference for consumer remedies, and some of the FCRA's identity theft provisions deny consumers a private cause of action for the violation of identity theft specific provisions. For instance, the FCRA allows consumers to obtain transaction information from businesses that have been tricked by an identity thief into relying on the victim's identity.²³⁹ However, the act denies consumers a right to sue over a violation of that provision.²⁴⁰ Instead, only the Federal Trade Commission and designated state officials may sue to enforce this provision.²⁴¹ A state law that provided a remedy could complement the FCRA, promoting the Congressional preference for allowing consumers to have remedies that the *Rowe* court noted.²⁴² Now, quite possibly a defendant might argue that Congress's explicit carve-out of this section from the standard FCRA remedies provisions²⁴³ negated such a general preference in this specific context. However, one response might be that while Congress did not intend to provide a federal remedy, and to have such litigation in federal courts, given the anti-preemption language of section 1681t(a), along with the fact that consumer protection is typically the province of state law,²⁴⁴ that Congress preferred that states determine individually whether a remedy was

56, 62A, 63, 64; MICH. COMP. LAWS §§ 445.2531-445.2535; MINN. STAT. § 13C.016-13C.019; MISS. CODE ANN. §§ 75-24-201-75-24-217; MO. REV. STAT. §§ 407.1380-407.1385; MONT. CODE ANN. §§ 30-14-1727-30-14-1736; NEB. REV. STAT. §§ 8-2601-8-2615; NEV. REV. STAT. §§ 598C.300-598C.390; N.H. REV. STAT. ANN. §§ 359-B:22-359-B:29; N.J. STAT. ANN. §§ 56:11-46-56:11-49; N.M. STAT. ANN. §§ 56-3A-2-56-3A-6; N.Y. GEN. BUS. LAW § 380-t; N.C. GEN. STAT. § 75-63; N.D. CENT. CODE §§ 51-33-01-51-33-14; OHIO REV. CODE ANN. § 1349.52; OKLA. STAT. tit. 24, §§ 149-159; OR. REV. STAT. §§ 646A.606-646A.618; 73 PA. STAT. ANN. §§ 2501-2510; R.I. GEN. LAWS §§ 6-48-1-6-48-9; S.C. CODE ANN. §§ 37-20-160-37-20-161, 37-20-200; S.D. CODIFIED LAWS § 54-15-1-54-15-16; TENN. CODE ANN. § 47-18-2108-2109; TEX. BUS. & COM. CODE §§ 20.031-20.039, 20.21-20.31; UTAH CODE ANN. §§ 13-45-202-13-45-205; VT. STAT. ANN. tit. 9, §§ 2480h-2480j; VA. CODE ANN. §§ 59.1-441.1-59.1-444.3; WASH. REV. CODE §§ 19.182.170-19.182.210; W. VA. CODE §§ 46A-6L-101-46A-6L-105; WIS. STAT. §§ 100.54-100.545; WYO. STAT. ANN. § 40-12-501-40-12-509.

²³⁹ 15 U.S.C. § 1681g(e).

²⁴⁰ 15 U.S.C. § 1681g(e)(6).

²⁴¹ 15 U.S.C. §§ 1681g(e)(6), 1681s.

²⁴² 555 U.S. at 574.

²⁴³ 15 U.S.C. §§ 1681n, 1681o.

²⁴⁴ *See, e.g.,* Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) (“[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area”).

appropriate and whether that state wanted its courts to accommodate such claims, filling that gap in the FCRA.

While the FCRA does preempt states from imposing any “requirement or prohibition . . . with respect to any subject matter regulated under . . . section 1681i of this title, relating to the time by which a consumer reporting agency must take any action,”²⁴⁵ that could fairly be read narrowly, pursuant to the principles described above,²⁴⁶ to prevent a state from requiring an agency to complete a reinvestigation of disputed information before the end of the 30 day period that the section designates.²⁴⁷ Even were it construed to read more broadly, to extend to any reinvestigation of accuracy standards, states could still motivate consumer reporting agencies to be more accurate (and thereby withhold identity theft related data) by imposing a stricter initial standard of accuracy, or by enhancing the penalties available for inaccuracy, neither of which is covered by the act’s express preemption provision.

Nor should such provisions, or any of the other kinds of legislative protections described above, become preempted under either an impossibility or obstacle implicit preemption analysis. Pursuant to *PLIVA* and *Mutual Pharmaceutical*, the standard for impossibility preemption would require the regulated party to show that it could not simultaneously comply with the federal and the state standard. But none of the proposed courses of action would impose that kind of conflict.

To succeed in an implied obstacle preemption analysis, a regulated party would have to show that Congress’s purpose sufficiently differed from that of the state that complying with the state law would “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁴⁸ However, keep in mind that the FCRA is, at its heart, a consumer protection statute, not a consumer reporting agency industry protection statute nor a furnisher or user protection statute. Along with the savings clause language,²⁴⁹ that consumer protection is an area traditionally left to the states,²⁵⁰ and the ample room that the FCRA has left for states to regulate, the area differs significantly from that of *Rowe*, where Congress sought to deregulate, rather than regulate, to clear the table of restrictions on trucking whether they be federal or state.

V. CONCLUSION

²⁴⁵ 15 U.S.C. § 1681t(b)(1).

²⁴⁶ See *supra* text accompanying notes 137 to 142.

²⁴⁷ 15 U.S.C. § 1681i(a)(1)(A), (B).

²⁴⁸ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²⁴⁹ 15 U.S.C. § 1681t(a).

²⁵⁰ See, e.g., *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) (“[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area”).

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The Great Recession may have revealed to us the extent of the freight that attaches to our identities, and the effect of that heft on our opportunities to gain or advance in jobs, acquire credit, find a place to live, or insure our belongings. Those revelations have motivated many state legislatures to adjust the balance between the legitimate interests of those who investigate consumers and the privacy interests of consumers.

To be effective, though, state provisions must avoid preemption by the federal Fair Credit Reporting Act. The breadth of those provisions turns not just on their words, but the interpretation of those words given the Supreme Court's preemption jurisprudence. Broad statutory enactments that impose general duties, such as state deceptive practices act laws, may be less likely to fall victim to preemption. Furthermore, states can strengthen the likelihood that their measures will succeed by aligning the statutory purposes of their legislation with that of the federal act – ensuring the accuracy of reports and promoting consumer protection. States will benefit from the Supreme Court's "purpose presumption," which prefers to avoid preempting legislation in those areas of states' "historic police powers,"²⁵¹ one of which is consumer protection.

Given this backdrop, the types of provisions most likely to succeed are those that focus on the users of reports, forbidding them, for instance, from using a credit report for certain circumstances, such as employment.

Limits on the content of consumer reports are more vulnerable to preemption, but should survive so long as the FCRA's content preemption provisions receive a justifiably tight reading. Accordingly, states should be able to restrict consumer reporting agencies from placing specific criminal record information in credit reports. However, state regulation of identity-theft related debt will likely fall to the FCRA's preemption provisions, which give the federal act nearly a monopoly over such information. Nonetheless, states could achieve the objectives sought by most identity-theft credit report provisions by regulating in an area that the FCRA does not protect through its preemption provisions, such as by tightening overall accuracy requirements imposed on consumer reporting agencies.

States should evaluate the legitimate needs of employers, creditors, landlords, and ascertain the level of access to consumers' information that will both fulfill those needs while cloaking those aspects of their citizens' lives that individuals prefer to keep private.

²⁵¹ See *supra* text accompanying notes 121 to 124.