termination of an employee. Similar to the analysis for Travelers' policy, because the defamatory statements made by the Waffle House executives also arise out of Waffle House's need to maintain a stable work force, and not in regard to Scribner's employment, Federal's Employment Related Discrimination Exclusion does not bar coverage under the facts. Federal, therefore, owes a duty to indemnify any amounts over the Traveler's policy limits.

The Court reversed the trial court's summary judgment for Travelers and rendered partial summary judgment for Waffle House against Travelers in that Travelers had a duty to indemnify Waffle House for the damages arising out of the defamatory statements and the employment-related practices exclusion did not apply. The Court affirmed the judgment for Federal to the extent that Federal has no duty to indemnify Waffle House for Scribner's mental anguish damages arising from the defamatory statements. Additionally, the Court reversed the trial court's summary judgment for Federal and held Federal had no duty to indemnify Waffle House for Resource's damages for lost profits and rendered partial summary judgment for Waffle House holding Federal owed Waffle House a duty of indemnification for Resource's lost profits but only to the extent Traveler's policy limits are exhausted.

CONSUMER CREDIT

CAR BUYERS WHO INCURRED NO ACTUAL DAMAGES WHEN A DEALER FAILED TO PROVIDE THEM WITH COPIES OF THEIR PURCHASE AGREEMENTS IN A TIMELY MANNER COULD NOT SEEK STATUTORY DAMAGES UNDER THE TRUTH IN LENDING ACT

Baker v. Sunny Chevrolet Inc., 349 F.3d 862 (6th Cir. 2003).

FACTS: Baker signed a retail installment sales contract ("RISC") to purchase a car from the Defendant. Baker asked for a copy of the contract, and Defendant refused. Baker finally received a copy of the contract approximately three weeks later. Baker filed a class action lawsuit for violations of Truth in Lending Act ("TILA"), alleging that Defendant repeatedly failed to give the consumer "a copy of the contract [in connection with the purchase and finance of a motor vehicle] to keep prior to the consummation of the transaction." Baker did not allege any actual damages or claim that any of the disclosures that were made before they signed the RISC were inaccurate. Baker sued only for statutory damages under TILA. The district court denied the motion for class certification and dismissed Baker's complaint in its entirety on the basis that Defendant's refusal to provide the copies of the disclosures could not give rise to TILA statutory damages. Plaintiffs appealed.
HOLDING: Affirmed.
REASONING: The Truth in Lending Act, 15 U.S.C. section 1638(a), requires creditors to make specific disclosures to lenders. Section 1638(b) provides the required form and timing of these disclosures, and section 1640(a) provides consumers with a cause of action for certain violations of the act. For purposes of summary judgment the court assumed a violation of section 1638(b) took place. Under section 1640(a) there are two types of violations. The first is a complete non-disclosure of enumerated items in section 1638(a), which is punishable by statutory damages. The second is when the enumerated items in section 1638(a) are disclosed, but not in the manner required by section 1638(b), which is not subject to the statutory damages.

In the instant case, the lender only violated the section 1638(b) requirement, therefore, damages were not available because the consumer suffered no actual damages for the untimely delivery of the RISC. Furthermore, section 1640(b) provides that violations that are corrected within sixty days by the lender are not subject to statutory damages, assuming certain conditions are met. Defendant provided Baker with the copy of the RISC two weeks after the signing date, which was clearly within sixty days.

FAIR CREDIT REPORTING ACT DOES NOT PREEMPT ALL STATE LAW CLAIMS AGAINST FURNISHERS OF INFORMATION

FOR PURPOSES OF TILA THE TERM "OBLIGOR" INCLUDES PARTIES TREATED BY CREDITOR AS OBLIGOR

Stafford v. Cross Country Bank, 262 F. Supp. 2d 776 (W.D. Ky. 2003).

FACTS: John Stafford filed a complaint against Cross Country Bank ("Bank") in connection with debt accumulated on a Bank credit card that was fraudulently obtained under Stafford's name. Stafford first learned about this credit card in 2000 when he was denied financing because his credit report showed he was delinquent on a Bank credit card. Stafford contacted the Bank to inform them of the fraudulent credit card. At the Bank's request, Stafford provided his current phone number and residence and they updated their records.

Stafford alleged he subsequently received incessant phone calls from the Bank regarding the account. Stafford demanded the account not be turned over to a collection agency. Stafford hired an attorney, who contacted the Bank and requested any information the Bank had that supported Stafford's demand. The Bank sent Stafford a letter saying it planned to report the account to a collection agency and credit bureaus if the amount was not paid within 48 hours. The Bank was on notice as early as August 2000 that the account was not Stafford's but did not change the account's status from "delinquent" to "disputed" until Stafford sued months later. The Bank moved for summary judgment.
HOLDING: Motion sustained in part, denied in part.
REASONING: The Fair Credit Reporting Act has two separate preemption provisions contained in section

1681t(b)(1)(F), which provides furnishers of credit with absolute immunity when fulfilling their obligations under section 1681s-2 and qualified immunity under section 1681h(e) from suits "proceeding in the nature of defamation, invasion of privacy, or negligence…." The court interpreted section 1681t(b)(1)(F) as preempting only those claims that related to the actual language of section 1681s-2. Thus, the only state law claims preempted are those relating to the obligations of furnishers of information once they know, or have reason to know, about possible inaccuracies.

The court found Stafford's harassment claim, and aspects of the invasion of privacy claim fell outside section 1681s-2's reach. As to the defamation and slander claims, the court held that to the extent the Bank furnished inaccurate information after receiving notice of the dispute, the Bank's conduct fell within the scope of sections 1681s-2 and 1681t(b)(1)(F) and completely preempted any state law defamation, slander or invasion of privacy claims. In analyzing section 1681h(e) however, the court found nothing in its plain language that preempted harassment claims. It further found the text of section 1681h(e) only provided qualified immunity from state law claims related to the disclosure of information.

Stafford also filed a claim for violation of the Truth in Lending Act, contending a creditor's demand for payment on an account from someone who is allegedly not the obligor qualifies as a billing error under paragraphs (1) and (2) of the act's section 1666(b). This section requires on receipt of timely notice of a billing error, a card issuer must acknowledge the notice in writing and either correct the cardholder's account or send the cardholder a written explanation of why the charges in question are correct within 90 days. The court held the term obligor included creditor claims as well as obligors in the contractual sense.

BANK FACES TILA SUIT FOR "TEASER RATE"

Roberts v. Fleet Bank, 342 F.3d 260 (3rd Cir. 2003).

FACTS: Fleet Bank sent Denise Roberts a credit card solicitation encouraging her to open an account based on a promise of "7.99% Fixed" APR. The solicitation stated that the interest rate was "NOT an introductory rate" and that "it would not go up in just a few short months." Sometime after Roberts opened her Fleet account, the bank sent her a letter stating that it was increasing the 7.99% fixed APR to 10.5%.

Roberts brought a class action claiming Fleet violated the federal Truth in Lending Act ("TILA") when it failed to clearly and conspicuously disclose that the fixed-rate APR it was offering was limited in duration and subject to its asserted contractual right to change the interest rate at any time.

The District Court granted summary judgment to Fleet, concluding the materials Fleet sent to Roberts allowed it to change the rate.

HOLDING: Reversed and remanded.

REASONING: The Initial Disclosure Statement ("IDS") and the Schumer Box included in Fleet's solicitation materials stated only two conditions under which Fleet could raise Roberts' APR. A reasonable consumer could have read that list as exhaustive and concluded the 7.99% APR could be raised only under those two described circumstances, thereby making the disclosure neither clear nor conspicuous.

While the "clear and conspicuous" standard of the TILA only applies to required disclosures in the IDS and the Schumer Box, Congress amended TILA with the Fair Credit and Charge Card Disclosure Act to grant consumers better access to information and to allow consumers to more easily compare the terms of various credit cards. Congress created the Schumer Box to assist consumers in accessing such information, not to shield credit card companies from liability for information placed outside of the Schumer Box. Although Paragraph 24 of the Cardholder Agreement stated, "we have the right to change any of the terms of this Agreement at any time," Fleet mailed the Cardholder Agreement after acceptance of the invitation. The potential problem was not only that Roberts could have concluded the rate was permanent based on the use of the word "fixed," but Fleet may have misled potential consumers by indicating the rate could only change in the instances specified in the solicitation materials.

A question of fact existed as to whether Fleet made any misleading statements in the mailing and failed to disclose information required under the TILA "clearly and conspicuously" standard.

OVERSTATEMENT OF AMOUNTS DO NOT VIOLATE TILA

Carmichael v. Payment Ctr., Inc., 336 F.3d 636 (7th Cir. 2003).

FACTS: The Payment Center, Incorporated ("PCI") lent $69,000 to Harry and Louise Carmichael, which they secured through a mortgage on their house. The promissory note called for a series of monthly payments followed by a final balloon payment of all remaining principal and interest. PCI provided the Carmichaels a Truth in Lending Act ("TILA") statement, which contained two substantial errors. The statement greatly overstated the finance charge, and resultantly overstated the Carmichaels' total payments. Both amounts due under the loan contract were only a fraction of the numbers listed in the TILA statement.

Despite the mistakes in the TILA statement, the Carmichaels made several monthly payments to PCI. In October 2001, they then made several attempts to rescind the loan. In December 2001, the Carmichaels brought suit against PCI alleging PCI violated TILA, 15 U.S.C. Section 1601, (1) when it failed to disclose the amount of the final payment, (2) when it failed to disclose accurately the annual percentage rate, and (3) when it refused to allow the Carmichaels to rescind the loan during the extended recision period of three years applicable when the creditor makes a material non-disclosure.

On PCI's motion for summary judgment, the district court dismissed all three claims. The Carmichaels appealed the dismissal of the three claims.

HOLDING: Affirmed.

REASONING: The court reasoned the TILA provision requiring a creditor to disclose the "amount" of the loan payments did not necessarily require disclosure of an exact dollar figure. The Carmichaels argued PCI violated TILA by grossly overstating the total of payments, thereby insinuating

the final payment was far larger than actually was required. The court agreed with PCI that TILA immunized creditors from liability where they overstate a disclosure affected by a financial charge.

Specifically, section 1605(f)(1)(B) of TILA provides: "in connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the finance charge *and other disclosures affected by any finance charge*…shall be treated as being accurate….if the amount disclosed as the finance charge…is greater than the amount required to be disclosed…."

The Carmichaels argued that PCI violated TILA by grossly overstating the total of payments, thereby insinuating that the final payment was far larger than actually was required.

The court reasoned the final payment derived from the total-of-payments amount. Pursuant to TILA, since this total-of-payments amount was "affected by [the overstated] finance charge," it must be "treated as being accurate." Thus, the court held TILA protected consumers only when the stated amount was *less* than the amount required to be disclosed.

FCRA CREATES PRIVATE CAUSE OF ACTION FOR INACCURATE CREDIT REPORTING

FCRA DOES NOT PREEMPT STATE LAW DEFAMATION CLAIMS

Carlson v. Trans Union, LLC., 259 F. Supp. 2d 517 (N.D. Tex. 2003).

FACTS: Timothy Carlson ("Carlson") reviewed his consumer credit report and discovered some false trade lines from Verizon Wireless. Carlson alleged he never had an account with Verizon. When he contacted Verizon to have the lines removed, Carlson was informed they had no record of the account or his information. Verizon instructed Carlson to contact Trans Union, LLC to dispute the trades. After contacting Trans Union Carlson received a post-reinvestigation credit report that still contained the false trades.

Trans Union told Verizon about the disputed trade lines, but Verizon stated the trade lines had to remain on Carlson credit report. Although Carlson filed a fraud affidavit with Verizon, he began to receive collection demands from Risk Management Alternatives, Inc. After Verizon uncovered a corporate check from Carlson's former employer that matched the allegedly fraudulent account with Carlson's name, they informed Carlson he was personally liable for these debts. Carlson never signed a personal guarantee for the debts of his former employer. Consequently, Carlson was continuously denied for credit and mortgages because of his inaccurate credit report and despite his continued efforts to have the credit reports corrected. Carlson brought a suit against Verizon for a violation of section 1681-2(b) of the Fair Credit Reporting Act ("FCRA") and state law. Verizon then brought a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6) asserting Carlson claim under FCRA is barred because he lacks a private cause of action against a furnisher of information, and Carlson's state claims are barred by preemption.

HOLDING: Defendant's Motions to Dismiss denied.

REASONING: Although 5th Circuit has expressly declined to reach premption issue, the court in the instant case adopted the conclusion of the 9th Circuit decision that there was a private cause of action under section 1681-2(b). The FCRA provides for private causes of action under sections 1681n and 1681o. Although there is no private right of action under section 1681s-2(a), as indicated in sections 1681s-2(c) and (d), there is no such limitation on section 1681s-2(b). The court, therefore, denied Verizon's Motion to Dismiss on the ground there is no private cause of action under section 1681s-2(b).

On the federal preemption issue, the court decided section 1681t(b)(1)(F) applies only to state statutory regulation. Section 1681t(b)(1)(F) gives every indication of dealing only with state statutory regulation, especially because the provision excluded certain Massachusetts and California laws from its coverage. There was no indication that section 1681t(b)(1)(F) was meant to completely preempt all state law claims, including state common law claims. Section 1681t(b)(1)(F), instead, only applies to state laws with subject matter regulated under section 1681s-2. The court found the plaintiff's defamation claim was not statutory and was significantly different from one under section 1681s-2. While the acts giving rise to the two causes of action were the same, the subject matter of the two claims is significantly different. Therefore, section 1681t(b)(1)(F) does not preclude Plaintiff's state law claim for defamation.

FCRA PROVIDES PRIVATE CAUSE OF ACTION AGAINST FURNISHER OF INFORMATION

Gordon v. Greenpoint Credit, 266 F.Supp.2d 1007 (S.D.Iowa 2003).

FACTS: When Mr. and Mrs. Gordon applied for a loan, their credit report revealed delinquent monthly loan payments to Greenpoint Credit, and the loan was denied. Gordons claimed to have always mailed timely payments to Greenpoint and to have attempted to remedy the erroneous information. Greenpoint offered no assistance or response. Gordons filed suit under the Fair Credit Reporting Act ("FCRA"), alleging defamation and negligence.

In the original complaint, Greenpoint was identified as a "credit reporting institution" under the act. The amended complaint identified Greenpoint, as "furnishers of information to consumer reporting agencies," alleging willful and negligent non-compliance with the FCRA under section 1681s-2(b). The amended complaint stated Greenpoint reported false or inaccurate information regarding the Gordon account to credit reporting agencies and then failed to conduct an investigation once notified of a dispute.

Greenpoint argued section 1681s-2(b) did not provide a private cause of action for consumers against "furnishers of information." Gordons moved for leave to amend.

HOLDING: Motion granted.
REASONING: The Court held consumers could bring a private cause of action against a furnisher of information under FCRA when the furnisher failed to adequately investigate disputed information. The Court reasoned inaccuracies come not only from credit reporting agencies, but also from institutions furnishing information to the reporters. To the individual consumer denied credit due to inaccurate information, the source of the error did not matter. Congress enacted the FCRA to protect rights of individual consumers and the integrity of the banking system as a whole.

The FCRA provides furnishers of information to consumer reporting agencies with two general requirements: a duty to provide accurate information (15 U.S.C. § 1681s-2(a)); and a duty to investigate the accuracy of reported information upon receiving notice of a dispute (§ 1681s-2(b)). The Court noted the original complaint alleged only facts challenging the accuracy of furnished information and, thus, fell under the scope of section 1681s-2(a). Because Congress left enforcement of section 1681s-2(a) solely to Federal and State agencies and officials, Gordons could not have maintained a private cause of action under section 1681s-2(a). Because the FCRA imparted civil liability to any person willfully or negligently failing to comply with any Act requirements, and Congress had not expressly excluded section 1681s-2(b) or furnishers of information from this potential liability, the Court held a consumer can maintain a private cause of action against a furnisher of information for willful or negligent noncompliance under section 1681s-2(b).

CREDIT CARD ISSUERS OWE NO DUTY OF CARE TO PROTECT POTENTIAL VICTIMS OF IDENTITY THEFT

Huggins v. Citibank, N.A., 255 S.C. 329 (2003)

FACTS: Plaintiff Huggins brought action in federal court against Citibank and Premier Bankcard ("Banks"). Huggins claimed the Banks negligently issued credit cards to an unknown imposter, "John Doe." The complaint alleged Doe applied for a credit card, asserting he was Huggins. Doe then used the credit cards, but failed to pay the Banks. Huggins alleged the Banks were negligent by not investing Doe's identity, failing to have policies that verify the identities of credit card applicants, and attempting to collect Doe's debt from Huggins. Huggins also alleged that his credit was damaged.

The Banks filed a motion to dismiss, arguing that the complaint failed to state a claim for granting relief and that the Banks owed no duty to Huggins since he was not their customer. Huggins argued that the Banks have a duty to protect victims of identify theft from imposter fraud. The United States District Court for the District of South Carolina certified the question of whether the state recognizes a cause of action for negligent enablement of imposter fraud.
HOLDING: Certified question answered negatively.
REASONING: In order to establish a claim for negligence, a plaintiff must prove the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001). If a defendant owed no duty of care to plaintiff, the defendant is entitled to judgment as a matter of law in a negligence action. *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32 (2000). Duty arises from the relationship between the alleged tortfeasor and the injured party. *South Carolina Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373 (1986). In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care. *Ravan v. Greenville County*, 315 S.C. 447 (Ct. App. 1993).

Although these acts do not fully relieve credit card fraud victims, they are better prepared to address this concern than a negligence claim.

Citibank had no relationship with the "John Doe" imposter or the plaintiff Huggins, who stood simply in a creditor/debtor relationship with Citibank. *Polzer v. TRW*, Inc., 256 A.D.2d 248 (N.Y.App.Div.1998). Huggins was a non-customer of Citibank and Huggins conceded this. In the absence of a duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest negligence liability. *South Carolina Ports Auth v. Booz-Allen & Hamilton*, 289 S.C. 373. Citibank owed no duty to plaintiff, under common law or statute. State and national legislation provides some relief for victims of credit card fraud. Although these acts do not fully relieve credit card fraud victims, they are better prepared to address this concern than a negligence claim.