

# FCRA LIMITS CONSUMER RECOURSE Against Furnishers of Information

By Jennifer Mitchell



In *Stafford v. Cross Country Bank*, Kentucky's Western District Court held the Fair Credit Reporting Act ("FCRA") limits private causes of action, but does not preempt all state law claims, against

furnishers of information.<sup>1</sup> In *Stafford*, John and Julie Stafford claimed a third party fraudulently obtained a credit card in John Stafford's name.<sup>2</sup> Subsequently, Stafford filed suit against Cross Country Bank.<sup>3</sup> Stafford alleged the bank violated the Fair Debt Collection Practices Act (FDCPA), federal and state consumer protection statutes, and state common law.<sup>4</sup> Because Stafford did not allege damage to his credit report, the circumstances of this case are unlike most FCRA cases.<sup>5</sup> Cross Country Bank moved for summary judgment, contending the FCRA provides no private right of action for plaintiffs against those who furnish information to consumer reporting agencies and preempts the state law causes of action for defamation, invasion of privacy, slander, and harassment.<sup>6</sup> The district court granted the bank's Motion for Summary Judgment, dismissing Stafford's claims under the FDCPA and his state law claims for defamation and slander.<sup>7</sup> However, the court denied the motion with respect to Stafford's FCRA and Kentucky Consumer Protection Act claims, as well as his state law claims for invasion of privacy and harassment.<sup>8</sup>

## FCRA provides limited private cause of action against furnishers of information

The parties agreed Cross Country Bank constituted a furnisher of credit information, and therefore, its FCRA obligations fell under 15 U.S.C. § 1681s-2.<sup>9</sup> In its analysis, the Court divided Section 1681s-2 into two components.<sup>10</sup> The first component comprised subsections (a), (c), and (d), which sets out the furnisher's duty to provide consumer reporting agencies with accurate information and limits the remedies available for violations of these duties.<sup>11</sup> The limitations specify the FCRA's broad provision creating civil liability for willful and negligent noncompliance are not applicable to violations of Section 1681s-2, and that only government officials can enforce the duties imposed by Section 1681s-2(a).<sup>12</sup> Therefore, Stafford was unable to bring a private cause of action for the Bank's alleged violations of subsection (a).<sup>13</sup>

Fortunately for Stafford, the second component, subsection (b), does not limit the availability of remedies.<sup>14</sup>

Under section 1681s-2(b), the court concluded that if the consumer can prove the credit information furnisher violated the FCRA negligently or willfully, the consumer may bring an action under state common law for defamation, slander or invasion of privacy.<sup>15</sup> However, this provision is not all-inclusive. Subsection (b) relates only to the requirements that a furnisher of information investigate, after receiving notice of a dispute pursuant to section 1681i(a)(2), the accuracy of information provided to a consumer reporting agency. This limitation means a bank has no responsibility to investigate a dispute until the reporting agency, *not* the consumer, notifies it of the dispute.<sup>16</sup>

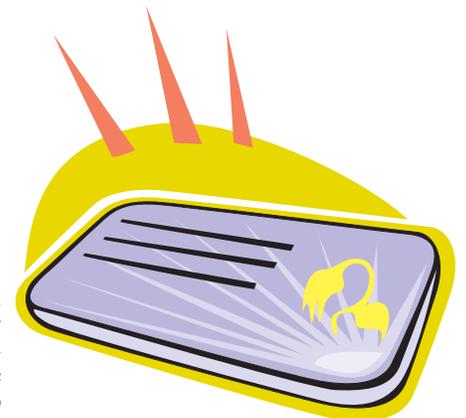
In sum, in order to bring a successful claim against a furnisher of information, the consumer must show negligent or willful violations of the FCRA after notice of a dispute from the consumer reporting agency.

## FCRA does not preempt all state law claims against furnishers of information

The court considered three issues in determining whether Stafford's state law claims were permitted under the FCRA. First, the court recognized the preemptory FCRA sections 1681(b)(1)(F) and 1681h(e) overlapped, and possibly contradicted each other. Second, the court explained two different approaches to analyze and apply the two sections. Lastly, the court stated the provisions only cover some state law claims made by Stafford, and thus analyzed each claim individually.<sup>17</sup>

While section 1681h(e) permits state law tort claims, the section requires a higher standard of proof for claims such as defamation, slander, or invasion of privacy.<sup>18</sup> In its 1996 Amendments, Congress added section 1681t(b)(1)(F), which sweepingly prohibited all state law claims covered by section 1681s-2, but made no mention of section 1681.<sup>19</sup> These inherent contradictions caused courts to utilize different approaches to harmonize the sections.<sup>20</sup>

Using a broad approach to analyze these two sections, some courts have held the new section "completely preempts *all* state causes of action, and thus also eliminates the possibility of *any* supplemental state claims



against furnishers of information.”<sup>21</sup> The rationale behind these decisions is Congressional intent. In other words, section 1681t(b)(1)(F)’s preemption of subject matter under covered in section 1681s-2, illustrates Congress’ intent to preempt all state law claims connected to furnishers of credit information.<sup>22</sup>

Courts using a more narrow approach hold the state law claims are only preempted when they relate to obligations of information furnishers who know, or should have reason to know, of inaccuracies in the information reported.<sup>23</sup> Therefore, this analysis interprets section 1681t(b)(1)(F) to preempt only those claims relating to the actual language of section 1681s-2.<sup>24</sup>

In *Stafford*, the court used the more narrow approach.<sup>25</sup> The court explained that “[s]ection 1681t(b)(1)(F) simply states: in full: that ‘no requirement or prohibition may be imposed under the laws of any state...with respect to *any subject matter* regulated under...section 1681s-2... (emphasis added).”<sup>26</sup> Because section 1681s-2 simply explains the duties of furnishers of information to provide accurate information, along with the furnishers’ obligations after notification of a dispute, not all state law claims necessarily relate to actions or duties covered by this section.<sup>27</sup> Section 1681s-2 merely regulates conduct involved in reporting credit information, so section 1681t(b)(1)(F) preemption only applies to tort claims stemming from the Bank’s functions as a furnisher of credit information. Therefore, Stafford’s harassment claim, and certain aspects of his invasion of privacy claim, was not preempted by the FCRA.<sup>28</sup>

Further, section 1681s-2 “only implicates conduct occurring after the Bank knew it possessed inaccurate information, or consciously avoided such knowledge.”<sup>29</sup> Because the Bank furnished inaccurate information to a consumer reporting agency prior to notification of Stafford’s dispute, that conduct was not regulated by section 1681s-2, and thus not preempted by section 1681t(b)(1)(F).<sup>30</sup>

The preemption analysis of Stafford’s claims regarding the Bank’s actions prior to notification of the dispute must be

further considered under section 1681h(e).<sup>31</sup> Section 1681h(e) of the FCRA provides information furnishers qualified immunity from state law claims of this type by creating a “defense the consumer must overcome to succeed on a state law claim against a party acting in a capacity regulated by the Act.”<sup>32</sup> Under this section’s qualified immunity standard, Stafford was permitted to pursue claims for defamation and slander only if he could prove malice or willful intent to injure by the bank.<sup>33</sup> Unfortunately for Stafford, this higher standard of proof meant that his claims fell back under section 1681s-2, which regulates furnishing of information if done so knowingly. Because the claims were regulated by section 1681s-2, they were preempted by section 1681t(b)(1)(F).<sup>34</sup>

### Current Texas Holding on Private and State Law Claims under FCRA

In *Carlson v. Trans Union L.L.C.*, Texas’ Northern District Court, Dallas Division, held the FCRA did not preempt a state common law claim for defamation.<sup>35</sup> In its decision, the court also stated that sections 1681n and 1681o provide for private causes of action under the FCRA.<sup>36</sup>

The court in *Carlson* considered the interaction of the two preemption sections of the FCRA, and made its decision differently than the court in *Stafford*. The *Carlson* court felt that a simpler approach than the “before or after notice of dispute” analysis, used in *Stafford*, was possible. Looking to the language of the statute, the *Carlson* court felt Congress intended section 1681(e) to apply only to torts, and section 1681t(b)(1)(F) to apply to state statutory regulations.<sup>37</sup>

Currently, only a few courts have decided cases concerning these issues. At this time, the Fifth Circuit has declined to hear cases on this subject.

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### (Endnotes)

<sup>1</sup> *Stafford v. Cross Country Bank*, 262 F.Supp.2d 776 (W.D. Ky. 2003).

<sup>2</sup> *Id.* at 779.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 781.

<sup>7</sup> *Id.* at 794.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 782.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 782-783.

<sup>14</sup> *Id.* at 783.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 783-784.

<sup>17</sup> *Id.* at 784.

<sup>18</sup> *Id.* at 785.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 786.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 787.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 788.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* See *Shaner v. Fleet Bank*, 132 F. Supp. 2d 953, 957 (M.D.Al. 2001).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 788-789.

<sup>35</sup> *Carlson v. Trans Union, L.L.C.*, 259 F. Supp. 2d 517 (N.D. Tex. 2003).

<sup>36</sup> *Id.* at 519.

<sup>37</sup> *Id.* at 521.