FRCA Focus: State Laws on Screening and Federal Preemption – Where Are We Now and Where Are We Heading?
Host: Dave Gettings
Guests: Cindy Hanson and Tim St. George
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Announcer:

Welcome to Troutman Pepper's podcast, *FCRA Focus*. This podcast series is designed to educate, inform, and hopefully, entertain you as well on all things related to the Fair Credit Reporting Act. To stay abreast of these issues and to make sure you don't miss an episode, please subscribe via iTunes, Stitcher, Google Play, or wherever you download your podcasts. Now, your host, Dave Gettings.

Dave Gettings:

Hey, everyone. Welcome to another edition of *FCRA Focus*, the podcast that discusses all things credit reporting. Today we're going to be talking about a topic that should be on the front of mind for anyone who litigates state law claims related to credit reporting. The topic of preemption. Preemption has gotten a lot of press recently, with states becoming increasingly active in trying to regulate tenant screening on a state level, and the CFPB chiming in with its perspective on the scope of preemption. Hint, it's not a great scope of preemption for defendants, according to the CFPB.

So luckily, we've got two guests today who are on the forefront of many of these preemption battles. We've got Tim St. George and Cindy Hanson. They're both repeat guests on the podcast who have active practices litigating state and federal credit reporting claims, both individual claims, and class actions. So, they're the perfect guests to give an update on all things preemption.

Dave Gettings:

Tim and Cindy, thanks for joining the show.

Tim St. George:

Thanks for having us.

Cindy Hanson:

Thanks for having me.

Dave Gettings:

Yes, of course. So, given that we don't typically go long in these podcasts, we'll jump right in and talk a little bit about some of the various state and local laws affecting screening, and why

preemption has become so important, especially for tenant screening companies that operate across multiple states or all 50 states.

So first, I thought we'd jump into California and I'll go over to Tim. Tim, can you just explain to the listeners some background about what we're seeing in California in terms of state law? And then we'll pivot eventually to why it makes preemption so important.

Tim St. George:

Sure. Well, thanks, Dave, for having me again. It's a pleasure to be back. Obviously, any screening company that's doing business nationally, is going to have to reckon with California. California is such a big market and my guess is that most screening companies are going to in some way intersect with California. California is also important because it's at the forefront, as it is on a lot of things with consumer protection in the credit reporting and consumer reporting space.

They've specifically have developed two bodies of law that are in addition to the Federal Fair Credit Reporting Act. They've got the California Consumer Credit Reporting Agencies Act, the CCRAA, and then they've got the California Investigative Consumer Reporting Agencies Act, which we often refer to as ICRAA. Now, ICRAA has become a little bit more prominent lately, because there were some California Court of Appeals decisions, and essentially, it put ICRAA on ice for a number of years. There was one decision that found that it was unconstitutionally vague. There was another competing decision that found that it was enforceable. The matter went up to the California Supreme Court. And in 2017, the California Supreme Court said, “No, it's good enough. It's sufficiently definite, so it's enforceable.”

After that, we started seeing a wave of ICRAA litigation, and a lot of my clients started really clamoring for ICRAA compliance. So, ICRAA has become a pretty big deal, and because it imposes a bunch of unique requirements. So, ICRAA, for instance, has a lot of things that are more onerous than the FCRA. They view the FCRA as setting a floor. ICRAA is trying to reach to the ceiling. For instance, they've got prohibitions in ICRAA that prohibit consumer reporting agencies from reporting most forms of public records that are older than seven years, which would include criminal convictions that's a lot different than a federal FCRA.

It's got other key provisions in it, such as a requirement that you re-verify public records within 30 days of reporting them. It's got a bunch of different requirements in terms of various statements and checkboxes and intra-CRA end user certifications that have to be exchanged. Most importantly, ICRAA has got a penalty provision that's a bit eye-popping. It's $10,000 per violation. However, at least that is not applicable in class cases. But that statutory remedy of $10,000 per violation has gotten a lot of attention, and we've seen a lot of mass action-type litigation under ICRAA. So, if you're active in California, you got to pay attention to ICRAA.

Dave Gettings:

So, Tim, the big takeaway from ICRAA, and let me know if I'm wrong, is that there's a lot of requirements that are more stringent than the FCRA, and that you wouldn't necessarily cover if you just got an FCRA compliance program. Is that right?

Tim St. George:

That's exactly right. So, it's not just requirements that are more onerous on existing requirements, for instance, such as the prohibition on reporting criminal convictions beyond seven years, that kind of grafts onto an existing federal FCRA requirement. You've also got stuff that's just totally new. For instance, like all of these checkboxes and certifications and re-verification requirements, none of those things exist at all in the Federal Fair Credit Reporting Act. So, it elevates some preexisting positions under federal law, and then it breaks entirely new ground and other ways as well.

Not to be outdone, various municipalities in California have also taken steps to talk about tenant screening, employment screening, and consumer reporting that occurs within those contexts. So, one example that I like to highlight is Oakland. In 2020, Oakland, California passed the Fair Chance Access to Housing ordinance, which generally prohibits altogether rental housing providers from screening criminal history of applicants. It prohibits advertising as well, any type of advertisement that will potentially ward off an application based on criminal history.

So, it takes a very aggressive blanket ban against criminal history reporting at all, in connection with rental housing applications in the City of Oakland. It also has aggressive penalties up to $1,000 per violation, plus attorney's fees and other penalties. The thing that's perhaps most notable about the Oakland violation is that it kind of has an aiding and abetting provision. It's not just a prohibition purely on housing providers. The penalty provisions in the definitions that are contained within the Act would also seem to sweep in and penalize any entity that facilitates a violation of the law. So, you can easily see tenant screening companies getting swept into this as well, and being subject to the penalty provisions.

That's implicit, but very recently, California also went explicit. As of October 1st of this past year, we have California's employment regulations relating to criminal history and criminal history screening. That's at 2 CCR 11017.1 for anyone who's got a pen.

Dave Gettings:

That's the first citation we've ever had on the *FCRA Focus* podcast. So, thank you, Tim.

Tim St. George:

Yes, we're just trying to be helpful. So in this, the California Civil Rights Council has enacted a bunch of different regulations that regulate every aspect of criminal screening, from advertising to how criminal screening can be conducted, when it can be asked about, how it needs to fit the job application, and the job responsibilities, how it has to be narrowly tailored, how they have to consider evidence of rehabilitation, so on, and so on, and so on.

So, that wasn't that different from a lot of other fair chance ordinances, some of which Cindy will talk about. But the thing that was significant is that the Civil Rights Council amended the definition of employer to also include potentially screening companies. So, employer, the definition has been broadened to include any entity that evaluates the applicant's conviction history on behalf of employer. Employer now means potentially screening company acting on behalf of the employer, and there's been a lot of compliance hand-wringing about how do we comply with this provision that really at its heart, is aimed at regulating users and employers.

FCRA Focus: State Laws on Screening and Federal Preemption – Where Are We Now and Where Are We Heading?

But now which definitionally applies to screening companies that are evaluating applicants on behalf of employers as well.

Because this is so new, we don't have any additional regulatory or judicial guidance on this subject yet. But it's just another way that California is being extremely aggressive in its state laws regulating the consumer reporting process, especially in the employment and tenant screening context.

Dave Gettings:

So, Cindy, let's leave the one state where I shudder every time I see how much they take in taxes, and go to the next state, where I shudder in New York. So, let's talk a little bit about what New York is doing and why it's so concerning and how it plays into preemption issues.

Cindy Hanson:

Thanks, Dave. Glad to be back on the podcast again. New York on the opposite side of the coast, like California is typically at the forefront of adding additional requirements both on screening companies and employers, when it comes to background checks, use of criminal records, or use of any kind of public records in unemployment or a tenant screening context. So, New York City, not to be outdone by its West Coast rival, shall we say, passed the Fair Chance Act, and it makes it illegal for just about any employer in New York City to ask about criminal record, or any sort of criminal history of a job applicant before making a job offer. So, an employer in New York City has to go through its entire process and make the job offer before it is allowed to ask about or inquire about criminal history. For employers, this means in any ads, application, interview questions, all of those would come into context and none of those could have any inquiry into an applicant's criminal record.

It's only after a job offer has been and made that an employer can inquire as to a criminal record. So obviously, this really moves the criminal record process all the way to the end of the process. I mean, from a consumer or from a public advocacy perspective, this was the intention, and the hope of the consumer advocates is that once you have spent so much time investigating an application and going through the interview process, that if a criminal record should appear, you would be less likely to withdraw the offer. That is the public policy behind it. Whether or not that actually plays out, I think is a matter of some question and some issue.

But regardless, if after the employment or the job offer has been made, if the employer then learns about criminal record history, and it wants to revoke the offer, because of that criminal record, there are additional requirements that the employer must go through. So, under the Fair Credit Reporting Act, if you wanted to revoke an offer or not provide an offer because of criminal records, you have to give pre-adverse and post-adverse notice. That's well known probably the most people on this call.

But for New York City, the employer must explain and give the applicant far more information and explanation as to why it is that it is denying or withdrawing the offer in light of the criminal record. So, it must provide a fair chance notice. It must provide a copy of the background check, and it must give the applicant five days to respond. So again, it is building in time for the applicant to go back to the employer, one, obviously to dispute, if there was an issue. But I think what the intent of the statute is, is to give the applicant a chance to explain or provide context

for the criminal record, and to potentially talk the employer out of what appears to be its decision to revoke the offer. It is giving more notice to the applicant and giving a built-in timeframe for the applicant to basically provide its story behind the criminal record.

The other area where New York City has also been active is in tenant screening. And there has been a lot of litigation and a lot of ink spilled over the use of eviction records in tenant screening. A lot of litigation over that, the plaintiffs' bar is continually criticizing the quality or accuracy of those records, and public policy has been really looking into whether or not eviction records should be used in a tenant screening, which seems counterintuitive, but there is a lot of public advocates who are not supportive of eviction records being used in tenant screening.

What New York City did was basically say that a tenant may not be denied an apartment solely because they appear on eviction records. So basically, it leaves a landlord or a housing provider to now have to look at its policies and procedures for how it's going to use eviction records, and eviction records cannot be the sole reason for the denial. So, landlords and housing providers need to consider what other factors would they rely upon, but it cannot be solely eviction records.

Interestingly, that law does not create a private cause of action for the tenant against the landlord. But it does allow the tenant to file a complaint with the New York State Attorney General's Office, which is an AG's office that has been very active. So, I would suspect that if the AG's office receives even a handful of complaints with respect to a landlord, who is allegedly not abiding by this provision, I would expect that landlord to get a knock on its door from the New York AG's office.

Dave Gettings:

Thanks, Cindy. So, those give a pretty good cross-section of some of the different types of state laws that are out there, and that can create varying compliance obligations. We could do multiple podcasts on all the laws, including Washington, Seattle, others around the country. But the main core of this episode is preemption. So, given these divergent state laws, why is preemption so important to our clients and future clients, I will say, and can you give us a little bit of an overview of FCRA preemption generally?

Cindy Hanson:

Sure, I'll start and then I think, Tim, is going to jump in. So, preemption was really one of the hallmarks of the Fair Credit Reporting Act when it was passed. It is to the extent that industry doesn't like the Fair Credit Reporting Act that much. Preemption is an area that the industry does like, because it allows a company to have one set of policies across 50 states. So, if the FCRA requires something, or doesn't require something, the goal of preemption was to make that uniform across the country, and that you would not have a patchwork of 50 state laws and thousands of jurisdictions coming in and requiring certain other procedures or certain other notices, or whatever it may be, that makes life much harder from a screening company's compliance standpoint.

So, the preemption that is most at issue here is what is contained in Section 1681t of the FCRA, which does not have field preemption. There is not complete preemption of the FCRA. But the Section 1681t on many issues does have specific preemption for specific sections of the FCRA,

and what I will say, what I think Tim is going to talk about is the trend in the case law, and definitely the trend in the regulatory guidance is to a far more narrow scope of FCRA preemption.

Twenty-five years ago, if states passed any statute that came anywhere near the FCRA, courts were very willing to find preemption. There really has been a sea change on FCRA preemption, I would say in the last five years, and where you have courts reading it more narrowly, and you have states far more active in trying to find areas where they can legislate where probably once they thought the FCRA did preempt.

Dave Gettings:

Thanks, Cindy. So, maybe for the listeners that haven't dealt much with preemption or haven't dealt in the detail you have. Effectively, the argument about preemption is if the state statute, it falls within the scope of FCRA preemption, then the FCRA prevails, and the state law is trumped effectively. Is that right?

Cindy Hanson:

That's exactly right. That is exactly right. And there, again, was a fair amount of case law and litigation historically, that reached that result. So, I think as a result of that case law, states legislatures were not very active in areas that were typically thought of as being preempted by the FCRA.

Dave Gettings:

Right. So, Tim, let's talk a little bit about where the rubber meets the road. How do some specific instances of FCRA preemption work, and where do they benefit, and where do our clients need to worry about it?

Tim St. George:

Okay, sure. So, the FCRA has got two main preemption provisions. The first is in Section 1681h, and the second is in Section 1681t. Most of the action is in 1681t – so let me just touch on 1681h. So, 1681h is the preemption provision of the FCRA that generally preempts claims for invasion of privacy or defamation, based on the furnishing, or reporting of FCRA governed information. And last, the reporting was willful and really done with intent and malice. That's why generally, when you see FCRA claims asserting inaccurate information being reported, you're not generally going to see an accompanying claim for defamation, or when you see FCRA claims challenging on permissible purpose, you're generally not going to see an accompanying invasion of privacy claim as well.

Now, it's pretty well established that that preemption provision will simply supplant and negate those common law remedies that might otherwise give consumers recourse to seek actual and punitive damages. Again, there is that willfulness exception, but that's very rarely invoked, and even less successful in terms of its application.

So, 1681t is really where it's at from a compliance and litigation perspective. 1681t is extremely long. It's a laundry list of FCRA preemption provisions. Not all FCRA provisions are itemized in

Section 1681t. It is a patchwork, but it's a long patchwork that'll say 1681t generally preempts the subject matter of Section 1681c, for instance, which deals the type of information that can be reported and speaks about dispute-related responsibilities. It speaks about medical debt. It speaks to identity theft. It speaks to a lot of the FCRA's provisions, but not all of them. It's also important to note that 1681t also generally has a fairly significant caveat in terms of timing, largely exempting certain state laws, and also largely exempting laws that were in place before 1996.

So, you can see kind of the legislative sausage-making at work where certain states get preference and there's a grandfather provision. When you're looking at the possibility of preemption of state law causes of action, you need to pay attention not just to where you are in what FCRA provision is impacted, but also, is the law that you're going to claim is preempted - Did that law come into effect before 1996?

There's a lot to think about here and it's quite complicated and it merits really careful compliance review. Let me just give you a couple examples. So, 1681i is generally the FCRA provision that talks about dispute resolution and dispute procedures. And Section 1681t, generally preempts any state law imposing a requirement or prohibition, "with respect to the subject matter under Section 1681, relating to the time by which the FCRA has to take action." And there's various other preemption provisions about notifications, et cetera.

So, you can see in this one specific example, you've got an itemized preemption that applies with respect to certain subject matter, but only then with respect to certain sub-issues like timing and notifications, et cetera. It's using vague and indefinite language, like with respect to or the subject matter. So, you've got things to think about in terms of whether or not your dispute-related processes under 1681i really can just be regulated federally, or whether you need to pay attention to any state law that might apply as well.

Dave Gettings:

So, for example, if a state or a regulator tries to impose a practice where you've got to respond to a dispute within 10 days, that's something that's right in the teeth of a nice preemption argument, right?

Tim St. George:

Exactly. That would be one thing that I would think would fit pretty neatly into Section 1681i preemption, as implemented by 1681t. But say, for instance, a state wants to impose additional notices to the consumer or additional descriptions coming out of the dispute process. Well, that might be a different story. It's not specific. Section 1681t is not specific to those issues, despite using phrases like the subject matter of. So, Dave, your example is squarely preempted, I would contend, whereas other things regarding the dispute process are a little more gray.

Another example that we see a Section 1681c, and this one's actually kind of a big deal. So, Section 1681c is what gives consumer reporting agencies license to report all types of negative information, at least for a seven-year period, or 10 years for bankruptcies, or indefinite reporting allowances for criminal convictions. So, lots of CRAs have built their models, algorithms, filters around the federal allowances.

Then, Section 1681c also is included within Section 1681t. And 1681t does have a preemption provision, again, with respect to the subject matter, regulated under Section 1681c, which is the information contained in Consumer Reports. Now, you would think that that would give you a lot of confidence that you would just abide by Section 1681c, and maybe it should. But again, there's very granular detail embedded with this preemption provision. And Cindy, will talk about some CFPB and state level litigation, largely under Section 1681c and medical debt where the issue of preemption has not been successful. So again, there's a lot to think about.

There are other preemption provisions under Section 1681c-2, which has to do with identity theft, and security freezes. So, you might think, again, I'm very confident that any state-level requirement under Section 1681c-2 is preempted. But you really have to pay attention to the text of the FCRA and state law.

I could go on and on, same thing under Section 1681g, which has to do with file disclosures, summary of consumer rights being exchanged. Some forms that you're probably all familiar with. There's preemption for those forms and their sufficiency. But again, if a state wants to graft on additional requirements, are those really preempted? It really remains to be seen.

The takeaway for me is that if you're going to build a compliance management system around a preemption argument, or you're going to take a stance in litigation, that certain state law claims are preempted. You really need to consult with counsel, and you really need to do a bunch of cross referencing between the state law and question, and the requirements of Section 1681t, where are the state laws coming from, when the state law was enacted. Really consult with your lawyers because these are pretty big deals in terms of your overall exposure.

Dave Gettings:

Yes, Tim, I'll just add one point to that. Not only do you need to do the analysis, but you need to update the analysis, because so much is changing whether it's CFPB interpretations, whether it's court interpretations, or preemption, whether it's states imposing different laws that are trying to get around Federal preemption. It's not just one-and-done. It's something you probably should revisit on a semi-regular course.

Tim St. George:

Agreed.

Dave Gettings:

So, Cindy, building off that amazing segue, I've got all that experience as a podcast host. What are we talking about with respect to the CFPB stance on preemption? Where is the CFPB, and what have they said?

Cindy Hanson:

So, not surprisingly, the CFPB has come out with a position that preemption is very, very limited under the FCRA. In June 2022, they issued an interpretive rule, which I basically view as the CFPB wanted to say something. So, they wrote a letter and they said something. It's not rulemaking it did not go through notice and comment, so it is not formal, in that sense. But it's

the CFPB statement on what they think. And basically, they stated its view that FCRA preemption is “narrow and targeted”. And that state laws that are not inconsistent with the FCRA are generally not preempted.

So, they took a very narrow view. And in particular, they focused on a section that Tim was just talking about, which is Section 1681c of the FCRA, which is generally thought of as the section of the FCRA that relates to what can be in a consumer report. It relates to the content of a consumer report. And here, as Tim said, is where you get the limitation of seven years for adverse information. That's not a criminal conviction, 10 years on bankruptcy, and so forth.

Previously, I think everyone pretty much thought, okay, that section governs content and states cannot touch content or what can and cannot go in a report. The CFPB specifically called out the section and essentially said, if the specific issue is not specifically addressed in 1681c, then the states are free to legislate on anything else. So, the one example that has really come to the forefront here is the issue of medical debt. That has been an issue that the CFPB has been pushing for quite some time, whether medical debt should be reported, and they have numerous arguments for why it should not be reported.

But we began to see the states get into the issue and began to say that medical debt could not be reported on consumer reports, or couldn't be reported unless there was a longer waiting period. But they began to really focus on medical debt. And then, where I would say you begin to see the tide turn with the case law is, for example, Maine passed a statute regarding medical debt, and there was a challenge by industry’s trade organization, the CDIA, to the statute, arguing that was preempted. The CDIA was successful at the district court, but at the appellate court, the First Circuit reversed and remanded it for further discovery and argument on the issue.

But essentially, the First Circuit took much more of a reading in line with the CFPB, that preemption is narrow, and that Section 1681c, since it doesn't speak to medical debt, specifically, preemption may not apply. So, this is what I would say is the trend we are now seeing, in terms of the states with the CFPB’s, I would say, sort of egging them on to pass statutes that limit content of consumer reports in areas that are not specifically mentioned in 1681c. Another area that we have seen is the state of New Jersey has passed the statute, this goes to reinvestigations where the reinvestigation or the consumer report must be provided to requesters in up to 10 different languages. So, we're seeing states push sort of, again, with the CFPB, putting wind in their sails, if you will, on these arguments. But the CFPB is very, very strongly encouraging the states to do this. That is probably a reflection of the fact that there really isn't going to be any appetite on the federal level to amend the FCRA. So, particularly in blue or democratic states, you have legislators who are willing to impose requirements on the consumer reporting agencies that given the makeup of Congress can't happen at the federal level.

Dave Gettings:

So, I'll just wrap up as we get to close. In terms of where we're headed, I know that's a question a lot of our listeners ask. I wish we had a clearer view exactly where it's going, a crystal ball so to speak. But our best guess is we've got a narrowing view of preemption by regulators, and that includes a narrow view of preemption by State AG offices as they try to bring more enforcement actions related to state credit reporting. Maybe we'll get more judicial decisions in

the near term as states pass more laws that are even more restrictive. Maybe we'll get more interpretive rules from the CFPB or other state-level regulators. We will likely get more Amicus support and Amicus briefing in cases that deal with preemption, because it's become an industry-wide concern.

So, the litigation front and the regulatory front is unclear. But we can say that it is a topic that's really on the forefront of a lot of people's minds, especially compliance officers that have to comply across 50 states or across multiple states. With respect to federal law, we had seen in the summer of last year, or excuse me, summer of this year, 2023, when we're recording this, a push for some change in federal legislation, although we haven't seen that go very far yet. So, maybe long story long, we think there's going to be a lot of activity in preemption over the next few years in terms of trying to push and pull and figure out where it ends up. But nobody really knows exactly how it's going to end up. Tim and Cindy, any last-minute thoughts?

Tim St. George:

I think that's right. There's not going to be any federal legislative relief anytime soon. The federal FCRA is not at the top of anyone's legislative priorities. And the legislation that inevitably gets introduced, session after session, is legislation that would expand the FCRA's restrictions, but not in a way that would expand preemption. So, I don't think you're going to get any federal congressional guidance anytime soon, which means that the principal driving factors here are going to be state legislative bodies, federal regulatory agencies, and the judiciary, as all this gets hashed out. So, we're not going to get much more clarity from Congress, and these issues, you're just going to have to work themselves out through regulators, state legislatures, and ultimately the court system. And it means compliance departments have to be constantly vigilant to this year after year after year, in terms of what state legislative activity is happening in the credit reporting space, and how is it going to affect me in my national or regional operations.

Dave Gettings:

Thanks, Tim. Cindy, any last words?

Cindy Hanson:

I would agree with Tim. This is an area to keep your eye on, because it is only going to continue to be an area of grave interest. And if there is not an administration change in a year, the CFPB will just continue to pound its drum on there being a very narrow preemption under the FCRA.

Dave Gettings:

Well, thank you both for your time. I appreciate it. Listeners appreciate it. It's a podcast where Tim said all the action is under 1681t. So, that's truly a credit reporting podcast when you get that line from one of our guests. Thank you for listening. Please do not hesitate to go to our blog, the Troutman Pepper Consumer Financial Services Law Monitor. Listen to all the other Troutman sister podcasts on our website and have a great day. Thank you for listening.