***KEEPING UP WITH THE BUREAU* EPISODE 2: FCRA PREEMPTION ISSUES, INFRINGING STATE LAWS, AND THE CFPB'S POSITION**
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HOST: KIM PHAN
GUESTS: ALAN WINGFIELD AND DAVID ANTHONY

Kim Phan (00:05):

Hello, and welcome to a special edition of Troutman Pepper's *Consumer Finance Podcast*. This is episode two in our four-part series on the latest developments within the CFPB, state AG activities, and private consumer finance litigation. I'm your host today, Kim Phan, a partner in the firm's consumer finance practice. And we have a great episode lined up for you today, focused on the CFPB's position on preemption issues, with the FCRA infringing on state laws, and the CFPB's general position with regard to state interactions and enforcement.

But before we jump into that topic at hand, let me remind you, please visit and subscribe to our blog, consumerfinancialserviceslawmonitor.com, where you can find the latest insightful updates about everything that might be interesting in your world of consumer financial services. And please don't forget to check out our other podcasts, *FCRA Focus* and *The Crypto Exchange*. You can find those on troutmanpepper.com and all your regular popular podcast platforms.

Now, joining me on this episode today are two of my fellow colleagues in the consumer finance practice here at the firm and veteran consumer finance attorneys, David Anthony and Alan Wingfield. Gentlemen, welcome to the show.

Very recently, the CFPB issued an interpretive rule at the end of June with regard to a specific and clear statement that states retain broad authority to protect people from harm due to credit reporting issues, and that state laws are not preempted by the FCRA to the extent that they only conflict and not with regard to other types of narrow preemption categories. And that's just the latest of what the CFPB is doing in this area. Alan, let me start with you. Could you give us your take on that and how the CFPB is expanding the role of state AGs in recent years? And how did we get to where we are today?

Alan Wingfield (01:57):

Thank you, Kim. Thank you so much for having me today, talking about one of my favorite topics. I'm going to defer to David to really drill down on the specific Fair Credit Reporting Act statement by the CFPB and take a little more general rule to build up to how we got to that point. One of the benefits of practicing this area for 30 plus years is you get to watch long trends. And the trend line here is leading up to the enactment of Dodd-Frank there was growing criticism, particularly of the federal banking regulators and actions they took to constrain or even preempt state law from acting in broad swaths of consumer financial services industry. Dodd-Frank in part was enacted the reset that, to actually codify and enable states to take actions to enforce not only their laws, but also to take actions to enforce federal laws as well.

In early years of CFPB, I think it was a fairly happy marriage between state and federal regulators. Things changed in the Kraninger era, where the CFPB took a more cold-shouldered approach to the cooperation, coordination, and even to states exercising their authorities under Dodd-Frank. For example, late in the Kraninger era, the CFPB issued a rule basically acquiring states to pre-report their efforts to enforce laws under Dodd-Frank. Of course, as soon as Director Chopra came in, there was a 180-degree spin on that issue and the sort of low-level

hostility of the CFPB to their state brethren converted into an enthusiastic embrace, both with the theory and the practice of state regulators exercising all their authorities. In fact, the CFPB has gone out of its way to open doors to state regulators to exercise authorities in various ways.

This led up, in my view, to the pinnacle of this trend line, was in May of 2022, just earlier this year when the CFPB issued an interpretive rule, which seemed that the main purpose of which was to make absolutely clear that every door is open to state regulators to enforce not only their own laws, but the federal laws as well under Dodd-Frank. And frankly, the CFPB was urging states to pick up the cudgel and go forward. Before I turn it over to David to dig in on the FCRA angle, which is really the great example of what's going on here, and also incredibly important in its own right, my take is that it's part of Chopra's desire to put his fingers heavily on the favor of pro-consumer protection under federal laws he can. He's seeing that states would be a great ally.

So, for example, if Chopra's term comes to an end and a different administration puts in somebody at the CFPB with a different attitude, well, the states will still be free to go forward with the consumer protection as they see fit. Moreover, it allows him to leverage the states to enforce his view of what laws say. We'll talk about that in a second with David on the FCRA as well. And so, he enlists the states as an additional arm of enforcement to propagate and make real the things he wants to see in the law. There's a real fingerprint of a long game here with his very distinct strategy at the CFPB to green light the states. I'm not sure what's brighter than green. Strobe light the states to go forward. And it's very interesting, and something obviously that warrants close attention, and that's what we're going to do here on this podcast.

Kim Phan (05:29):

Thanks, Alan. I think that historical context is really valuable. And your predictions for the future with regard to the current environment are really insightful. Thank you. But as you noted, I'll defer to David now to talk specifically about that recent FCRA interpretive rule. And my understanding is that the FCRA context and background has an interpretation that has been in place for over 50 years now. Is the CFPB essentially upsetting the apple cart here?

David Anthony (05:57):

I think that's in the eye of the beholder. I think that I would perhaps characterize that the CFPB is taking sides. There are a lot of issues that deal with the Fair Credit Reporting Act that have been resolved. There are a number of issues that have a majority of decisions that have interpreted the plain language of the FCRA and have some well-established principles, if you will. That hasn't meant prior to this most recent Chopra regime at the CFPB, that there haven't been issues here or there, particularly since the financial meltdown and particularly in what I will just call the George Floyd era, where there has been greater scrutiny given to virtually every aspect of our political and financial world in everything from defunding the police, to whether criminal records should be on people's employment applications, to whether tenant eviction process in the United States is fair and accurate. And you overlay that with COVID and you overlay that with an aggressive regulator. And so, this is the latest chapter. One would add a couple of anecdotes to Alan's historical context, which I agree with 100%. If you understand that prior to Chopra there were discussions about the role of the CFPB and the powers and the autonomy of the CFPB. And at the same time, it's been clear under this particular administration that the concepts of, hey, we don't like the law and the Fair Credit Reporting Act, so let's go to Congress and let Congress pass statutory changes to reflect changes in the law, or changes in policy. Seems so 1920s. Chopra instead says, let me put nitroglycerin in my rocket ship, and I'm

just going to start doing insane things. And a lot of people out there disagree on the authority, on the process, on the propriety of that.

And my prediction is that a lot of these things are going to be litigated as to whether or not the CFPB indeed has the power and the authority to make some of these statements, particularly when they are changing, in some people's view, the law. And so, this is the latest example. There've been an almost weekly pronouncement by the CFPB on something. We've reported a lot of these something that had come across in the Fair Credit Reporting Act world, whether that be on medical debt, or whether that be on the affirmation that states can also police credit reporting markets in terms of what they're doing.

And so, the latest is this interpretive rule on preemption. If you think about this from an Administrative Procedure Act perspective, there was no notice and comment, there was no opportunity for interested parties to chime in with their comments. There was no announcement by the CFPB, "Hey, we're considering doing this." There was no offer to receive factual evidence supporting conclusions that were decided upon by the Fair Credit Reporting Act. We all just woke up one day and magically a federal agency had issued an interpretive rule without input from anybody else other than who it had wanted to get input for. Firstly, that's offensive. But this seems to be par for the course of how this agency is operating at this time.

Circling and connecting the dots between Alan's comment and your question, Kim, at the end of the day, if we go back to law school, the concept preemption is that one governmental entity either has the authority on that particular topic or has spoken on that topic. And in the federal state system that we have in the United States, typically speaking, if the federal statute speaks to something, then a state statute is preempted. In other words, it can't conflict to that federal statute. As it relates to the Fair Credit Reporting Act, to me, the key question is, does it conflict? And what does that actually mean? In the broadest sense, conflict could say we have a uniform system and we don't need 50 different systems with 50 different states putting up their own prognostications about what they think is or is not important in the credit reporting system.

On the other end, you might have some additional procedural safeguards that supplement but do not contradict federal law. It has not been commonplace to have big preemption arguments over the last five, 10 years. I think 10, 15 years ago, 20 years ago when Al and I had been doing this work for a long time, there were a couple of issues that seemed to be repeating. We're seeing a whole lot more of those and in the post George Floyd world, there has just been a rash of efforts by states to put in their own view of what should and shouldn't be included in credit reports.

Typically speaking, the driver in the credit report from the industry is the inclusion of accurate information. So, what is to me a groundswell issue or an inflection point for the CFPB's interpretive rule here is they are saying that states are authorized in their view to restrict the reporting of accurate information. That presupposes that they are saying that either the federal government or states can make their own determination as to what can and can't be reported in the credit report without changing the Fair Credit Reporting Act. And so, what the interpretative rule from the CFPB does bluntly is to say, hey, don't forget that the Fair Credit Reporting Act has preemption provisions expressly in it. But those are very narrow and targeted. And states have a lot of flexibility to go out and also regularly consume reporting, and particularly for things that affect their citizens.

And so then to be troubling so, the CFPB said, let's just say, for instance, we don't want allow medical debt to be reported, or evictions, or arrest records, or rental arrears, then that's totally fine. That wouldn’t be preempted. Not every court would agree with that. CFPB writes very confidently, but the reality is they are taking a viewpoint on how the preemption law applies in

the Fair Credit Reporting Act. That issue is far from settled across all of the circuits. And different courts have come up with different decisions, taking this very broad approach that the industry would prefer. So, you have one system, not fifty-one systems, versus this extraordinarily narrow view of what preemption would happen to do. So, the interpretive rule is lengthy. In my view, they cherry pick their version of what preemption should be.

And again, I think that it's important to note, again and I'm cynical here, that this is not a legal opinion written by a court trying to get to the truth. This is an agency that is trying to drive its position and to state it's the law. And I think that's a really critical difference here. What does this mean? There's not legal rules in here that say, here are all of the circumstances where the states can and can't do stuff. Rather, it says, hey, states, you have this power. It's very broad. Here are, wink wink, some suggestions of where we think things should be preempted. Don't be stunned if magically there starts to be state laws that appear concerning the affordability of medical debt, eviction arrest records, and that kind of stuff. And also portend that if the CFPB had its way, there would be a state-by-state analog to the Fair Credit Reporting Act. And you can just imagine from a compliance perspective what that would mean.

If you ask me, I think the CFPB is perfectly fine at having an extraordinarily complex system with 50 different states that all have different standards, as well as a federal standard that's all different, because this particular administration doesn't like the credit reporting system. There have been bubbles here and there about nationalizing the credit reporting system. There has been litigation that's been filed against an individual officer of one of the major three CRAs, to which that major CRA has said, this is completely out of bounds. So, you can't help but feel there's a political angle to this. There's an agenda to this. This pronouncement certainly does add some fuel to the credit reporting challenge vehicles that are out there with various states.

A couple of other things that struck me. I think that for those who credit report or those who are in the industry, it doesn't take a rocket scientist, you literally could string together the five or 10 pronouncements that have been made by the CFPB and get a much sharper view of where the industry is going. Obviously, all of this stuff could be undone if there's a change in administration and there is a new president who likely will appoint a new CFPB director. Alan teased this, but I will tell you that we have had conversations, there also could be an argument that Chopra realizes that Congress is never going to do this, and there's going to be a change in power in the midterm elections. So let me as many things that are out there that I say are the law as fast as possible to express our version of this.

I do think there's a lot of truth in that. I don't like that from the standpoint that from a process perspective, this is just awful. From a client compliance perspective, it's just awful because you know that if there's a change in administration, you're going to have a whole ping pong effect that goes back. At the same time, you could only imagine if you're having to fight 50 state preemption arguments as they wind their way through the court while legislatures are simultaneously coming up with new statutes that would tinker with the credit reporting system. From my perspective, at the compliance level, that's a disaster, but you can totally see how this is going to play out in the sense of some states will take this mantle and run with it both from a regulatory perspective and enforcement, as well as from a legislative perspective. And eventually, it wouldn't stun me that the thing is going to filter up through the Supreme Court in three to five years. And then the Supreme Court will clarify the breadth of preemption that goes along here. If the Supreme Court remains as conservative as it is, I'm not sure that they're going to agree with Chairman Chopra's views of this.

But let's just be honest. This is a power struggle by an administrative agency trying to assert aggressively its view of what the law is. From a what does it mean perspective, we've already

talked a little bit about the compliance challenges that are going to be with this. You're going to have increased compliance costs. You're going to have increased litigation costs. But at the same time, you're going to have a non-uniform system. Now, it is important to note that the mere fact that something can't be on the credit report, that doesn't mean that it may or may not be able to be considered by a creditor. For instance, there could be something on a credit application that says, "Have you ever been evicted?" And that may be different from a truthfulness perspective, from a consideration perspective. There's a lot of equivalent Ban the Box type of legislation and statutes that are out there that say what you can and can't consider in those particular contexts. But if you overlay the sort of Ban the Box application process with this, you can just see that it's going to be a mess. So that's a very long-winded answer to your question, but hopefully that gives you my take on the preciseness of the interpretive rule, as well about what the ramifications are going to be for that.

Kim Phan (18:28):

David, you certainly paint a troubling picture of the current state of CFPB activity, and to the extent that there are going to be efforts to reign in the CFPB. And the effectiveness of those efforts, I think remain to be seen. If the states do accept the CFPB's invitation to start regulating consumer reporting, creating and engaging in more enforcement activity more broadly as Alan started us off with, what does that mean from a practical perspective if we have a bunch of mini CFPBs running around amongst the states? Let's start with Alan on this one.

Alan Wingfield (19:04):

Well, we're seeing one of the practical consequences right now. There's a move afoot amongst the cities of America to outright ban use of criminal records in doing tenant screening. So, Seattle, coming in New York, there's probably about five cities so far that are in some point in the process of simply making illegal consumer reporting on this issue. I'll have to say that when this move of actually making illegal reporting of truthful information through the consumer reporting system came up, that based on plain reading of the FCRA, I assumed it was preempted because the FCRA specifically authorizes consumer reporting in the preemption provisions of FCRA, used language that says if the activities governed by certain provisions and the reporting provisions are included in that provision, then you can do it. And it never really occurred to me that the FCRA did anything other than make lawful reporting of truthful information to the consumer reporting system. Yet, there's a move of foot to do exactly that.

And the CFPB's put its finger on the scale here, has taken a position on the preemption issue. And so, they're explicitly green lighting that move. I think the first whipsaw effect is clearly going to be tenant screening. That's the specific move afoot. However, there has been some movement in the states on medical debt as well. So, one could expect the regulation of medical debt at a federal level, the calibrated regulation of reporting a medical debt at the federal level could become outright bans in multiple states on that issue. And basically, legislatures and CFPB are making an implicit policy decision that the benefits of reporting that information are low, and the potential harms are high. And they're making a judgment call about what ought to be included in consumer reports. And so that's the first practical impact is this move afoot to ban criminal records screening, for landlord/tenant in particular, will be validated and gathering steam.

David Anthony (21:06):

It's agenda driven. And the flavor of the week right now is tenant evictions. And there was the moratorium during COVID, those are starting to lift. There are a lot of people who think that's wrong. There are a lot of people who believe they have a right to go evict. You will have not only the CFPB but the states putting their finger on the scales. And it doesn't have an identical relationship here, but it's the same conversation that's happening on the abortion decision by the Supreme Court. In the Dobb's case, a lot of this stuff is reverting back to the states. States have much different interest as to what they're going to do, which in some instances I think they have a right to do other, in others instances I don't think they have a right to do, but you could just imagine the mess that's going to create both politically as well as economically as all this stuff sorts out. Because imagine if the state of California says, we just think that the credit reports are bad, they're not useful. The system's corrupt. And the state of Alabama says, it's totally fine. What's a creditor in California supposed to do? Is it unfair to consider a murder conviction from somebody in whether or not you're going to give them a job? There are politicians that are trying to control that narrative, which is a far different cry from, hey, let's just consider accurate information. There are people who believe that the whole system is wrong. And so, these are just further efforts to really change the system without completely dismantling or changing the law.

Kim Phan (22:36):

Those are all troubling insights. However, we are out of time for today. And that's going to wrap up today's special edition of The Consumer Finance Podcast. Alan, David, thank you so much for taking the time to be here and share your valuable insights. I'd like to remind our audience to check out our blog at consumerfinancialserviceslawmonitor.com. You can subscribe there to sign up for our distribution lists so you can receive our alerts, advisories, webinar invitations and other special content all from your friends at Troutman Pepper. And please don't forget that this is only episode two of our four-part series. In our next episode, our partner, Ethan Ostroff and his guest will examine the constantly evolving requirements for furnishers and the users of consumer reporting data. Thank you all for listening.