

FCRA Focus* — The CFPB's FCRA Preemption Flip: What It Means for Consumer Reporting*Hosts: Kim Phan and Dave Gettings****Guest: Stefanie Jackman****Date Aired: November 18, 2025****Dave Gettings (00:05):**

Hey everybody. Welcome to another edition of *FCRA Focus*, the podcast that focuses on all things credit reporting. Today I've got my co-host Kim Phan, along with one of our esteemed partners, Stefanie Jackman, to discuss the long saga, I would say, of the CFPB's interpretation of preemption under the FCRA. We're going to start in 2022 where the CFPB voiced one perspective and then May 2025, where the CFPB suggested it was withdrawing that perspective. And now just this past week where the CFPB confirmed it was withdrawing that perspective and then issued some guidance that was directly contrary to 2022. So it's quite the labyrinth that we are going to unpack for everybody today. But the ultimate outcome is one that is generally, I would view as good for defendants who are seeking to argue preemption under the FCRA. Kim and Stefanie, before we start, anything to add to that just remarkable introduction.

Kim Phan (01:17):

It was a remarkable introduction, but I will say one slight clarification, which is clear in the interpretive rule as well, is that while the Fair Credit Reporting Act has the word credit in the title, it is not limited to just credit. So it addresses all types of consumer reports. And while the interpretive rule does focus quite a bit on things like medical debt, it does also address other consumer reporting areas like rental information and arrest records. Criminal background checks

Dave Gettings (01:47):

A good clarification. Stefanie, how about you?

Stefanie Jackman (01:49):

I don't have anything to add. You guys have already covered it. Just happy to be here today and thanks for inviting me to share my thoughts.

Dave Gettings (01:54):

Of course. Nice to see you both. It's actually unique. We've seen each other in person twice, I think in the last month in Texas and Virginia. So nice to have you all on the podcast again. So let's start with a little bit of historical perspective that we will do relatively quickly. So this podcast talks about FCRA preemption, which again focuses on state laws that are, as Kim pointed out, more than just credit and the main preemption, but not the only preemption provision in the

FCRA is 1681t(b)(1), and that's the site to the US code. I have no idea what the site is to 609 or 603 or 604, whatever some of those other FCRA practitioners use. Kim, do you have any idea or do you use the US code too?

Kim Phan (02:40):

I do use the 609 in other sections from the original enactment, but the US code works, too.

Dave Gettings (02:46):

Okay. Do you have any idea what t(b)(1) is in the 6-0-whatever version?

Kim Phan (02:51):

Oh, I'd have to look that up. But either way, they work. I think there are references to the old 609 codes, again are from the original enactment. There's sort of a colloquial usage. The official version for purposes of legislation for purposes of litigation is the US code version.

Dave Gettings (03:08):

Thanks, Kim. So ultimately, 1681t(b)(1) says that no requirement or prohibition may be imposed under the laws of any state with respect to any subject matter regulated under, and then lists certain sections or subsections of the Fair Credit Reporting Act, for example, 1681b or 1681c and some of their subsections. So that's the main preemption provision that the CFBB has focused on in the last few years. So in July of 2022, the Bureau published an interpretive rule analyzing that section and finding that it had a narrow sweep. And the practical result of the bureau finding that it had a narrow sweep was to allow the possibility of significant state regulation of consumer reports and consumer reporting agencies, meaning if the FCRA preemption power is narrow, it leaves room for other state laws to fill the so-called void of the narrow sweep. Flash forward to the new administration in May of 2025.

The Bureau withdrew a substantial portion of its guidance overall, including the 2022 interpretive rule, and now flash forward to October of 2025. The Bureau is now confirming the withdrawal of the 2022 rule and making clear that it views preemption as fairly broad under 1681t(b)(1) as opposed to a narrow sweep. And the Bureau gave a few reasons for this revised interpretation and confirming the withdrawal and the reasons were besides the new administration, the bureau pointed out that the 2022 rule was neither necessary, nor did it reduce compliance burdens. And so with respect to necessity, it said that the 2022 rule was unnecessary for the bureau to opine because the FCRA does not compel or even authorize the bureau to provide its legally binding views on preemption, nor did it find the rule reduced compliance burdens because in the bureau's opinion, now by limiting the preemptive effect of the FCRA, it actually created the possibility of a patchwork quilt of federal and state laws, which would create actually an increased compliance burden on companies. So that's really how we got here. In short, in 2022, the bureau issued a compliance opinion or guidance that said preemption was narrow, and the new administration came in and in May, and then in October changed streams and said, no preemption's actually quite broad, which leads to the possibility of a more consistent federal regulation of credit reporting. And again, as Kim mentioned, which is more than just credit, it's

background checks, it's medical debt, it's all sorts of different things. So Kim, fair summation of how we got here.

Kim Phan (06:37):

Yes, I think that covered the entire interpretive rule. It's an interesting flip flop that we're seeing from the CFPB right now, which is I think not unexpected, right? The CFPB throughout this entire year has spent most of the year trying to unwind things that the prior administration has done. This is entirely consistent with what they have been doing in other areas, not just at the SCRA, but numerous areas of consumer protection for which they have jurisdiction. And this is no different. I think that they have brought a little bit more to the table as far as making these arguments. They cite case law, they cite legislative history, they cite a lot of different justifications for this position, which is not what they've done in other cases. Right? In other circumstances, we'll see that they will just issue a broad pronouncement and call it a day like when they withdrew the interpretive rule, the 2022 one a few months ago, right?

So they withdrew it a few months ago, and now they're issuing a new interpretive rule to clarify that old rule. But when they did the withdrawal of that and many other FCRA guidance at that time, they gave very little justification for those changes. They just said These are all withdrawn. So this is useful clarification on how the CFPB reached its conclusions for that withdrawal and how they are now making new pronouncements about the scope of the CRA's preemption. But I want to turn it over to Stefanie. I'm sure you and your work with your clients, you have some thoughts on the practical implications of what this will mean for the industries?

Stefanie Jackman (08:17):

Yeah, thanks, Kim. I do. When this interpretive rule came out, people were understandably excited and curious, how can I utilize this to help with, in particular the fragmentation we've seen across states in the medical debt space. And I'm not saying that's the only place, and to your point, Kim, in the beginning about the FCRA does a lot more than just regulate the furnishing of information in the credit bureaus. But that's where there's been a lot happening at the state level, at least in my world. And clients wanted to know, what does this mean? Does it mean those state laws are invalidated? How can I utilize this? Is it those types of questions? Because there has been a proliferation of state laws coming out limiting or outright prohibiting the ability of healthcare providers, and depending on the language of the state laws, those that are their agents asset needs, and even those providing financing directly to patients and perhaps not doing so through that.

It's not the healthcare provider that's offering it, it's being directly offered by a third party. These laws are impacting their ability to furnish information on these accounts and really having more uniformity there would be very, very helpful. I'll come back to that in just a second though, because the reality is, while this is helpful, it's certainly preferable to the 2022 interpretive rule that was put out that said, stay laws are not preempted. Here we have the regulator charged with interpreting this law and what it means saying, we do think those state laws are preempted. Of course, as Dave, you pointed out early on, the bureau started by saying, we didn't really think the initial rule in 2022 was even needed. So that's the first question is, is this 2025 interpretive rule, an interpretive rule of the statute, right? Or is it just being offered to undo the prior interpretive rule that the bureau says wasn't needed?

What's needed? If I'm thinking if I'm a regulator, if it wants to try to diminish this, or if I'm a plaintiff's counsel and I'm trying to think about ways that I can say to a court, you shouldn't follow this, I would try to say, this is really just an undoing, and the bureau admits on its own that this isn't even necessary to begin with, disregard it. And the environment for those types of approaches and arguments has never been better and more favorable as a result of Loper Bright where they said, you don't have to defer to federal regulatory interpretations. You can choose to court, but you don't have to. You're not required to. You need to do your own analysis. So here it's all well and good that this is saying we're backtracking on 2022, but if I'm a court, I can easily set both aside.

I don't have to. I could decide I agree with 2025's version. I could also say I disagree and think 2022 was needed and I think it was appropriate, and I think it went about it the right way, and I'm going to defer or I'm going to just do my own thing, right? So the problem here is this isn't binding. It's helpful, it's possibly persuasive, but it isn't binding. So no, these state laws are not immediately dead and gone. That's just not the impact of an interpretive rule. And you think about some of the existing cases that are already out there that have decided these types of issues. For instance, the first circuit's decision in the Frye case upholding a medical debt furnishing related restriction in Maine's economic abuse statute, and it said there isn't preemption. There have been district court opinions that have said that.

Now surely there are things that have gone the other way, but we still have this tension, and I think that's only going to continue to exist until legal challenges are brought to these state laws and result in courts finding them preempted or Congress amending the FCRA. And I don't mean to suggest that this is going to happen, but one solution would be for Congress to amend it and say it preempts everything instead of the partial preemption that it currently has. But in the meantime, I certainly do think this is a helpful piece to bring into our toolbox of options in assessing the risk of credit reporting on these types of accounts in arguing if we're against some of these state laws if challenged. And at the end of the day, I really do think this is an area where uniformity is necessary because right now you have a nationwide product, right?

Any consumer can have a credit report with Experian, Equifax, TransUnion, any of the big three, but what goes into that credit report? What's shown on that credit report, how it's factored into a credit score, at least in medical debt right now, can vary by state. So a credit report in one state means something different than a credit report in another, possibly a credit report for a consumer residing in one state reflects less or more of the outstanding liabilities that consumer has. How does that result in a usable, consistent product that can be used by companies who are providing frequently financing or other uses? As you've pointed out, Kim, there's lots of things. Credit reports can be used for employers use them as part of hiring and background screenings, all sorts of things. And now we have to contend with the fact that in some states they show a completely different snapshot of a consumer than a consumer residing in another state might have with potentially some really large liabilities.

We want to talk about in a lot of what the CFPB was saying over the past few years is these are just small little debts, right? It's your deductible of a hundred bucks or a couple hundred bucks or some copay you had, and these aren't significant. Let's not exactly correct. Some copays, mine included, and deductibles can be quite significant. And on top of that, people can be self payers. There can be debts of tens of thousands of dollars depending on the consumer. So these aren't always just small little nuisance pieces that fell through the cracks. These can be

substantial and they really can, in my personal view, meaningfully impact the credit picture that somebody presents through a credit report in that instance and taking them off, not showing an unresolved liability on which a judgment could be taken or if we start seeing trying to right now, ability to repay seems to be on the downturn, at least its federal level with the CFPB being pulled back.

But some states think about how can we do a real ability to repay analysis when required by state law uniformity in all 50 states as to what information is and is not included in a consumer's credit report to me, seems like a very important piece of the puzzle within the credit reporting world generally, and would really lend itself to more reliable interpretations of credit reports to ensure both equitable treatment of consumers who may reside in different states, but also reliable pictures to creditors and other users of what is and is not in these credit reports.

Kim Phan (15:50):

But this doesn't provide that uniformity, right?

Stefanie Jackman (15:53):

Exactly. It doesn't.

Kim Phan (15:55):

There was a tension in what the CFPB says. They say very clearly in the interpretive rule that they want to defer to the courts to determine whether the CRA's preemptive effect will negate particular state laws, but they make very strong statements. Otherwise, the interpretive rule, for example, they say that the efforts by states to modify what should or should not be included in consumer reports like medical debt, all of those state laws on that subject are preemptive. They give another example where they say that state laws that concern the responsibilities of furnishers are preempted, that they make these very firm statements, but then they say, I...

Dave Gettings (16:42):

Had that one underlined Kim from my use in my next brief, so thank you for pointing it out.

Kim Phan (16:45):

It seems like they make these very firm statements and then they say, well, then the courts will have to decide.

Stefanie Jackman (16:50):

I couldn't agree more. This isn't providing uniformity. Courts don't have to rely on, it's not binding. It doesn't kill any of these state laws that are challenging. We're going to have to continue to challenge these laws unless Congress decides to say, you know what? Uniformity does matter. It's important here, and here's what we're going to do. And that's bad news because what I really want to tell my clients is a completely unencumbered, this is great. Listen,

I'd rather have this than the 2022 statement gives me something to work with. But it's not the final arrow in our quiver on these issues for sure.

Dave Gettings (17:24):

I agree, but we can at least say this from a litigation perspective. I would much rather have this to rely on and having the 2022 rule withdrawn

Stefanie Jackman (17:34):

For sure

Dave Gettings (17:35):

Than nothing. This does from a litigator perspective, give us a lot to talk about because we can explain to the court and say it's persuasive that this is the CFPB's current position.

Stefanie Jackman (17:46):

Couldn't agree more. And I know you'll make those arguments incredibly persuasively, and you'll help us get these laws taken off the books, right, Dave?

Dave Gettings (17:54):

I will do my very best, but I will argue when we get the next S2B case or the next 200th S2B case that according to the CFPB quote, any state law that concerns the responsibilities of furnishers is preemptive.

Kim Phan (18:08):

Do we read anything into the fact that Russell Vaught himself was the signatory on this interpretive rule?

Stefanie Jackman (18:16):

My short answer is I don't. I think that it certainly sets forth his position. It's consistent with his position that the CFPB is being pulled back, and depending on how you read and interpret what he means by shut down, there's total shuttering. There's also shutting down the CFPB as we knew it, but still the CFPB continuing and fulfilling its specific statutory mandates and Dodd-Frank, but not going any further afield. And this is certainly in my mind, consistent with what I think the acting director would say is appropriate. This wasn't something that was needed in 2022 for the reasons he stated. It didn't reduce compliance burdens. It was straying from what Dodd-Frank says the CFPB is to do versus what the CFPB can do if it so chooses. And I, as the acting director, want the CFPB to do what it is required to do at this current time. So I see it as consistent with that.

Dave Gettings (19:17):

I agree. I did think it was somewhat ironic, and you kind of touched on this earlier, Stefanie, that in the first half of the guidance, the CFPB says effectively it was unnecessary for the CFPB to opine in 2022 about what preemption means, and then the next five pages explained what they think preemption means now. So I hope they don't undermine themselves by being internally maybe a little bit conflicting, but I agree with you on what it means that the director was the one who issued this guidance.

Kim Phan (19:47):

Any further thoughts from Dave, Stefanie on this topic?

Stefanie Jackman (19:53):

No, I mean, I echo what Dave said as a litigator, this is definitely helpful. It's put you in the driver's seat when making this argument instead of in a reactive posture. Definitely prefer it to 2022, but as the compliance side of me rears its ugly head, it doesn't give me any more certainty one way or the other for my clients. So that's a charge to the industry to decide where we want to go on these state laws causing us so much challenge.

Dave Gettings (20:22):

Yep.

Kim Phan (20:22):

Well, Stefanie, thank you so much for joining us today and chatting about this important development. And thank you everyone for joining us on this latest edition of the *FCRA Focus* podcast. However, before you go, let me remind you to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And while you're headed, head on over to Troutman.com and add yourself to our Financial Services email list that allow you to get invitations to our webinars, receive our alerts and advisories that we send out from time to time. And while we make lots of free content available to our listeners, if you cannot get enough FCRA, I would encourage you to explore our subscription-based tracker service, which provides information on federal and state regulatory and legislative developments, as well as summaries of FCRA case law on a weekly basis, as well as monthly round table discussions. These tracker services can also cover topics such as debt collection and privacy and data security. Feel free to reach out to either to myself or Stefanie if you'd like more information. On behalf of myself, my co-host, Dave Gettings, and our guest, Stefanie Jackman. Thank you and we look forward to you. Joining us again for our next *FCRA Focus* podcast.

Copyright, Troutman Pepper Locke LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper Locke. If you have any questions, please contact us at troutman.com.

DISCLAIMER: This transcript was generated using artificial intelligence technology and may contain inaccuracies or errors. The transcript is provided "as is," with no warranty as to the accuracy or reliability. Please listen to the podcast for complete and accurate content. You may [contact us](#) to ask questions or to provide feedback if you believe that something is inaccurately transcribed.