STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA NELSKI, a/k/a PATRICIA PELLAND,

Plaintiff-Appellant,

v

AMERITECH, AMERITECH SERVICES, INC., AMERITECH COMMUNICATIONS, INC., AMERITECH CORPORATION, INC., AMERITECH PUBLISHING, INC., and MICHIGAN BELL TELEPHONE COMPANY,

Defendants-Appellees.

UNPUBLISHED
June 29, 2004

No. 244644
Wayne Circuit Court
LC No. 01-121059-NO

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff, a victim of identify theft, sued defendants alleging defamation and violation of the Fair Credit Reporting Act (FCRA), 15 USC 1681 *et seq*. After plaintiff's FCRA claims were removed to federal court and subsequently resolved by that court, the trial court granted defendants summary disposition of plaintiff's state law claim, concluding that defendants were furnishers of information under the FCRA, that the FCRA applied to this case, and that plaintiff's state law claim was preempted by the FCRA. Plaintiff appeals as of right. We affirm in part, reverse in part, and remand.

Plaintiff alleges that she discovered in 1996 that someone had opened a telephone account with defendants in her name, using a fraudulent address. Plaintiff subsequently learned that she had been the victim of credit card fraud pursuant to a scheme whereby the false address and telephone number were apparently used to establish credit. Plaintiff notified defendants of the fraud and alleges that she was advised by defendants in 1996 that the fraudulent account would be cleared up. But she learned in 1999 that defendants were still reporting false financial information on her credit report. She attempted to have the matter corrected, without success. This action followed.

Plaintiff first argues that the trial court erred in relying on collateral estoppel as a basis for concluding that defendants were furnishers of information under the FCRA. The trial court held that the federal court had already ruled that defendants were subject to the FCRA, and, therefore, collateral estoppel barred plaintiff from relitigating this issue. We disagree.

The FCRA "regulates creditors' reports to credit-reporting agencies, and prescribes the actions that must be taken when a customer reports an error in a credit report." *In re Complaint of Pelland Against Ameritech Michigan,* 254 Mich App 675, 684; 658 NW2d 849 (2003). The FCRA imposes duties on consumer-reporting agencies and on those who furnish information to credit-reporting agencies. In this case, plaintiff argues that defendants fall within the latter category.

Collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior matter. *Horn v Dep't of Corrections,* 216 Mich App 58, 62; 548 NW2d 660 (1996). The ultimate issue in the second case must be the same as that in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). The doctrine requires that the same parties must have had a full opportunity to litigate the issue in the prior proceeding, and there must be mutuality of estoppel. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

> To be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel. [*Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994).]

Collateral estoppel will only apply if the basis of the former "judgment can be clearly, definitely, and unequivocally ascertained." *Ditmore v Michalik,* 244 Mich App 569, 578; 625 NW2d 462 (2001).

We find that the trial court did not err in relying upon the earlier decisions issued in the federal court to conclude that plaintiff was barred by collateral estoppel from arguing that defendants were not furnishers of information under the FCRA. The same parties were involved in both proceedings and there is mutuality of estoppel. Additionally, the question whether the FCRA was applicable to plaintiff's claims against defendants was an essential issue in the federal proceedings, and plaintiff had the opportunity to argue this issue before the federal court.

Furthermore, even if collateral estoppel did not apply, we agree that the FCRA applies to defendants in this matter. Plaintiff appears to argue that defendants are not furnishers of information under 15 USC 1681s-2 because it was Risk Management Alternatives, Inc., and Abacus Financial, both collection agencies, that actually supplied the consumer-reporting agencies with information about plaintiff's account. This distinction does not compel a different result in this case.

Plaintiff relies on *Carney v Experian Information Solutions, Inc,* 57 F Supp 2d 496 (WD Tenn, 1999), to argue that Risk Management and Abacus Financial are the furnishers of information in this case. The facts of that case do not support plaintiff's position. In *Carney,* the plaintiff sued both Exxon and its collection company, G. E. Capital, for violating the FCRA after someone falsely obtained an Exxon credit card in the plaintiff's name. *Id.* at 499. The court considered the duties upon furnishers of information under the FCRA and held that both Exxon and its collection agency were furnishers of information under the act:

> Section 1681s-2 of Title 15 of the FCRA is entitled: "Responsibilities of furnishers of information to consumer reporting agencies." That section identifies two duties imposed upon such furnishers of information: the duty to provide accurate information [§ 1681s-2(a)] and the duty to undertake an investigation upon receipt of notice of dispute from a consumer reporting agency [§ 1681s-2(b)]. Although the term "furnisher of information" is not defined within the FCRA, common sense dictates that the term would encompass an entity such as Exxon which transmits information concerning a particular debt owed by a particular consumer to consumer reporting agencies such as Experian, Equifax, MCCA, and Trans Union. Thus, Exxon and G. E. Capital are subject to the requirements enumerated in 15 USC § 1681s-2. [*Id.* at 501-502.]

Therefore, under *Carney*, a business and its collection agency both may qualify as furnishers of information under the FCRA. Plaintiff believed that Risk Management and Abacus Financial were acting as defendants' agents. Pursuant to *Carney,* the FCRA applies to businesses that provide their collection agencies with credit information that is eventually supplied to consumer-reporting agencies. Accordingly, plaintiff has failed to show that defendants were not furnishers of information because they used the services of collection agencies.

Plaintiff also challenges the trial court's ruling that her state law claim for defamation was preempted by 15 USC 1681t(b)(1)(F), a section of the FCRA. This federal provision limits the rights of states to adopt laws that conflict with the FCRA. Section 1681t provides, in relevant part, as follows:

> (a) In general
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> Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter *from complying with the law of any State* with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of this inconsistency.
>
> (b) General exceptions
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> *No requirement or prohibition may be imposed under the laws of any State*--
>
> (1) with respect to any subject matter regulated under --
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> * * *
>
> (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply --

(i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or

(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996). [Emphasis added.]

Section 1681t was added to the FCRA in 1996. *Carlson v Trans Union, LLC,* 259 F Supp 2d 517, 520 (ND Texas, 2003). Before § 1681t was adopted, 15 USC 1681h(e) provided consumers with a limited right to file state claims. That subsection provides as follows:

(e) Limitation of liability

Except as provided in sections 1681n and 1681o of this title, *no consumer may bring any action or proceeding in the nature of defamation*, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report *except as to false information furnished with malice or willful intent to injury such consumer.* [Emphasis added.]

After § 1681t(b)(1)(F) was adopted, it was not clear how that limitation on liability affected § 1681h(e), and whether Congress intended to bar all state law claims implicating the FCRA. Various approaches have been taken by other courts in an attempt to reconcile these provisions. Two of which are summarized in *Stafford v Cross Country Bank,* 262 F Supp 2d 776, 785 (WD Ky, 2003):

The tension between these two provisions therefore results from the fact that § 1681h(e) permits state tort claims, but requires a higher standard of proof for those in the nature of defamation, slander, or invasion of privacy, while § 1681t(b)(1)(F) prohibits all state claims covered by § 1681s-2. These inherent contradictions have caused disagreement about how best to harmonize them. See *Riley [v Gen Motors Acceptance Corp]*, 226 F Supp 2d 1316 [SD Ala, 2002] (noting the complete lack of circuit court authority on how to analyze the preemption provisions and discussing the various approaches to analyzing the two provisions). No circuit court has weighed in on this issue.

Under the more sweeping approach, some courts have held that the newer section, § 1681t(b)(1)(F), completely preempts *all* state causes of action, and thus also eliminates the possibility of *any* supplemental state claims against furnishers of information. See, e.g., *Hasvold [v First USA Bank]*, 194 F Supp 2d [1228,] 1239 [D Wyo, 2002] (dismissing state claims because "federal law under the FCRA preempts plaintiff's claims against the defendant relating to it as a furnisher of information"); *Jaramillo [v Experian Info Solutions, Inc]*, 155 F Supp 2d [356,] 362 [ED Pa 2001] ("The plain language of section 1681t(b)(1)(F) clearly eliminated all state causes of action against furnishers or information, not just

ones that stem from statutes that relate specifically to credit reporting"). The logic in these cases is that because § 1681t(b)(1)(F) preempts "any subject matter regulated under . . . section 1681s-2"—which addresses the responsibilities of furnishers of credit information—Congress intended to preempt all state law claims that bear any connection to furnishers of credit information. See *Jaramillo*, 155 F Supp 2d at 361-62. Adopting this rule means that no state tort claims are ever permissible against any furnisher of credit information.

Other courts hold that this preemption provision has a more limited scope. See, e.g., *Vazquez-Garcia v Trans Union De Puerto Rico*, 222 F Supp 2d 150, 161 (D PR, 2002); *Aklagi [v Nationscredit Financial Services Corp]*, 196 F Supp 2d [1186,] 1194 [D Kan, 2002]. Under this approach 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. That is, these courts interpret § 1681t(b)(1)(F) as preempting only those claims that relate to the actual language of § 1681s-2.

The *Stafford* Court gave several reasons for rejecting the argument that § 1681t(b)(1)(F) preempts all state claims:

For one, to find that § 1681t(b)(1)(F) preempts all state tort claims would extend that section well beyond its express terms. Section 1681t(b)(1)(F) simply states 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 . . . ." Section 1681s-2, in turn, explains the duties of furnishers of information to provide accurate information, 15 USC § 1681s-2(a), and the obligations of furnishers once they are notified of a dispute. 15 USC § 1681s-2(b). The Bank's argument, however, would have the Court also preempt all state law claims—including those *not* regulated by § 1681s-2. The distinction is important because, as this case illustrates, some state tort claims against furnishers of information have nothing to do with the furnisher's correlation to a credit reporting agency.

Several cannons of statutory construction also suggest that Congress in fact intended to preserve § 1681h(e) as it applied to furnishers of credit information. First, where "Congress explicitly enumerates exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." *TRW*, 534 US at 28; 122 S Ct. 447. In this case, in § 1681t(a) Congress provided that states were free to enact laws regulating consumer credit reporting. Congress then enumerated several exceptions to this rule in § 1681t(b)(1), one of which was for instances where the subject matter the state sought to regulate was already regulated by § 1681s-2. Importantly, § 1681s-2 says absolutely nothing about state common law causes of action, such as those sounding in defamation or slander. Instead, it pertains to the process for collecting information and what a furnisher must do once it is notified the information it possesses is disputed. The most natural reading of § 1681t, then, is that Congress implicitly excluded an exception pertaining to all state common law claims against furnishers of information by explicitly only including the subject matter regulated under § 1681s-2. See *Leatherman v Tarrant County Narcotics*

Intelligence and Coordination Unit, 507 US 163, 168; 113 S Ct 1160; 122 L Ed 2d 517 (1993) ("Expressio unius est exclusio alterius.").

Another well-known rule of statutory construction is that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc v Andrews*, 534 US 19, 31; 122 S Ct 441; 151 L Ed 2d 339 (2001); see *United States v Menasche*, 348 US 528, 538-539; 75 S Ct 513; 99 L Ed 615 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute"). When it enacted § 1681t(b)(1)(F), Congress neither made reference to nor expressly repealed § 1681h(e). Moreover, the Court cannot assume in these circumstances that a more recently enacted provision, such as § 1681t(b)(1)(F), amounts to an implied repeal of the former—in this case § 1681h(e). In fact, an "implied repeal will only be found where provisions in two statutes" are in "irreconcilable conflict," or where the latter act covers the whole subject of the earlier one and "is clearly intended as a substitute." *Branch v Smith*, 538 US 254; 123 S Ct 1429, 1441; 155 L Ed 2d 407 (2003). Neither is true here. The Court is able to reconcile the two provisions; the entire subject matter discussed in § 1681t(b)(1)(F) does not cover the whole subject matter provided in § 1681h(e). As such, the Court must assume § 1681h(e) still applies and was not repealed with regard to furnishers of credit information.

Last, as a matter of public policy, the FCRA is most properly read as harmonizing both preemption provisions. To be sure, because § 1681s-2 regulates the behavior of furnishers of credit information, a fair argument can be made, as two other district courts have done, that any tort claims against those furnishers affect the "subject matter" regulated therein. But, for all practical purposes, adopting that approach makes § 1681s-2 limitless; states would lose any and all power to regulate credit card companies. All state law tort claims against companies like the Bank for behavior completely unrelated to either their reporting function, or negligence in supplying information might be eliminated. The FCRA generally and § 1681t(b)(1)(F) specifically were not intended to broadly protect credit card companies. Rather, as its stated findings suggest in § 1681(a), Congress purported to expand consumer protection and not shrink it as such a broad interpretation of § 1681s-2 would do. [*Id*. at 785-787; emphasis in original.]

A third approach also exists which relies on the statutory language itself and the tenets of statutory construction. In *Carlson, supra* at 521, and *Jeffrey v Trans Union, LLC*, 273 F Supp 2d 725, 727 (ED Va, 2003), the courts held that § 1681t(b)(1)(F) only applies to state statutory regulation, while § 1681h(e) applies only to torts, i.e., claims based in state common law. The *Carlson* Court stated:

Section 1681h(e) clearly applies to torts. The section specifically references "any action or proceeding *in the nature of* defamation, invasion or privacy, or negligence." 15 USC 1681h(e). All claims in the (non- exclusive) list are torts. Section 1681t(b)(1)(F) gives every indication of dealing only with state statutory regulation. This is made yet more clear when you consider the two laws that are

> specifically excluded from Section 1681t(b)(1)(F)'s coverage. [*Carlson, supra* at 521; emphasis in original.]

The two laws the *Carlson* Court refers to are statutory laws from Massachusetts and California.[1] 15 USC 1681t(b)(1)(F)(i), (ii).

This Court finds that the approach adopted in *Jeffrey* and *Carlson* to be the most persuasive. The conclusion that § 1681t(b)(1)(F) only applies to state statutory laws is buttressed by the fact that § 1681t(d)(2) provides that subsections (b) does not apply "to any *provision of State law* (including any provision of a State constitution) that-- (A) is *enacted* after January 1, 2004; (B) states explicitly that the provision is intended to supplement this subchapter; and (C) gives greater protection to consumers than is provided under this subchapter." [Emphasis added.] Furthermore, § 1681t(a) explicitly states that "this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter *from complying with the law of any State* . . . ." Based on the clear language of § 1681t(a) and § 1681t(b)(1)(F), this Court holds that § 1681t(b)(1)(F) only preempts causes of actions relating to the subject-matter of § 1681s-2 brought pursuant to state statutory law.[2] Therefore, the trial court erred in dismissing plaintiff's state common-law claim on the basis that it was preempted by § 1681t(b)(1)(F).

However, our analysis has not ended. We must now determine whether plaintiff's common-law claim of defamation is preempted by § 1681h(e), which provides qualified immunity to furnishers of information, such as defendants, "except as to false information furnished with malice or willful intent to injure such consumer." In Count III of her complaint, plaintiff alleges that "Defendants acted in a libelous, slanderous and defamatory manner in terms of reporting and/or publishing false financial records of your Plaintiff." Plaintiff further alleges that she "was declined credit from two separate companies due to negligent reporting/publishing and/or willful and wanton disregard as to reporting/publishing by Defendants of Plaintiff's financial record." Because plaintiff has sufficiently alleged a cause of action for common-law

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[1] "Section 54A(a) of Chapter 93 of the Massachusetts Annotated Laws requires furnishers to follow 'reasonable procedures to ensure that the information reported to a consumer reporting agency is accurate and complete' and forbids furnishers to knowingly provide false information to a consumer reporting agency. Likewise, section 1785.25(a) of the California Civil Code also deals with inaccurate or incomplete information in a credit report and closely follows the requirements of § 1681s-2." *Carlson, supra* at 521.

[2] We find it unnecessary to resolve the dispute regarding whether § 1681t(b)(1)(F) preempts state claims based on a person furnishes inaccurate information to a consumer reporting agency before and/or after the furnisher received notice of, or had reason to know about the dispute (the "temporal approach"). We note, however, that it seems illogical to hold a furnisher of information liable for furnishing inaccurate information before it had knowledge, or a reason to know, that the information was inaccurate. Thus, the common-law/statutory law distinction and the temporal approach could conceivably co-exist.

defamation under § 1681h(e), the trial court erred in dismissing this claim for failure to state a cause of action pursuant to MCR 2.116(C)(8).

Affirmed in part, reversed and remanded. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Michael R. Smolenski

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WHITE, J. (*concurring*).

I agree with the majority's analysis of the "furnisher of information" issue. I concur regarding the preemption issue because I conclude that in amending 15 USC 1681t and enacting 15 USC 1681s-2, Congress did not intend to bar actions theretofore permitted under 15 USC 1681h(e). On this record, it is unclear whether plaintiff can sustain an action under 15 USC 1681(h). The parties should address this issue on remand.

/s/ Helene N. White