

Fair Credit Reporting Act

Breaking Down Statutory Text

This chart details which preemption sections of various omnibus and sectoral statutes deal with federal preemption.

Codified Section	Type of Preemption	Are the circuit courts in general agreement on what this means?
15 U.S.C. §1681h(e)	Anti-Preemption Provision	NO. Split over how to reconcile with §1681t
15 U.S.C. §1681h(e)	Express Preemption	NO. Split over how to reconcile with §1681t
15 U.S.C. §1681h(e)	Anti-Preemption Provision	NO. Split over how to reconcile with §1681t
15 U.S.C. §1681t(a)	Anti-Preemption Provision	Not litigated
15 U.S.C. §1681t(a)	Express Preemption	Not litigated
15 U.S.C. §1681t(b)	Anti-Preemption Provision	NO. Split over how to reconcile with §1681h(e). NO. Split over if Congress is preempting private rights of actions
15 U.S.C. §1681t(c)	Express Preemption	Not litigated
15 U.S.C. §1681t(d)	Anti-Preemption Provision	Not litigated

Methodology

The statutory text overwhelmingly contains express preemption and various savings clauses. Express preemption is directly related to statutory text, and it is the only form of preemption with this quality. The remaining types of preemption – field, impossibility, and obstacle – are forms of *implied* preemption. As the name suggests, these preemption categories are implicit in every statute and consequently do not rely on statutory text. (However, sometimes a statute will explicitly address an implied preemption principle, such as 42 U.S.C. § 2000h-4.) Instead, implied preemption principles appear exclusively in case law. Case law that relies on a theory of implied preemption are appropriately notated.

Since courts have not addressed every issue, there may be areas that are marked as “Not litigated.”

Legend:

Express Preemption

Field Preemption

Impossibility Preemption

Obstacle Preemption

Floor Preemption

Anti-Preemption Provision

Compliance Savings Clause

Remedies Savings Clause

Sunset Provision

Ceiling Preemption

Statutory Text

15 U.S.C. §1681h

Conditions and form of disclosure to consumers

(e) Limitation of liability. *Except as provided in sections 616 and 617 [15 USCS §§ 1681n and 1681o], 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 609, 610, or 615 [15 USCS § 1681g, 1681h, or 1681m], 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 injure such consumer.*

15 U.S.C. §1681t Relation to State laws

(a) In general. *Except as provided in subsections (b) and (c), this title [15 USCS §§ 1681 et seq.] does not annul, alter, affect, or exempt any person subject to the provisions of this title [15 USCS §§ 1681 et seq.] from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this title [15 USCS §§ 1681 et seq.], and then only to the extent of the inconsistency.*

(b) General exceptions. *No requirement or prohibition may be imposed under the laws of any State—*

(1) with respect to any subject matter regulated under—

(A) subsection (c) or (e) of section 604 [15 USCS § 1681b], relating to the prescreening of consumer reports;

(B) section 611 [15 USCS § 1681i], relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996];

(C) subsections (a) and (b) of section 615 [15 USCS § 1681m], relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 615(d) [15 USCS § 1681m(d)], relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(E) section 605 [15 USCS § 1681c], relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996];

(F) section 623 [15 USCS § 1681s-2], 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 the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996]); or (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996]);
- (G) section 609(e) [15 USCS § 1681g(e)], relating to information available to victims under section 609(e) [15 USCS § 1681g(e)];
- (H) section 624 [15 USCS § 1681s-3], relating to the exchange and use of information to make a solicitation for marketing purposes;
- (I) section 615(h) [15 USCS § 1681m(h)], relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;
- (J) subsections (i) and (j) of section 605A [15 USCS § 1681c-1] relating to security freezes; or
- (K) subsection (k) of section 605A [15 USCS § 1681c-1], relating to credit monitoring for active duty military consumers, as defined in that subsection;
- (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996]);
- (3) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 609 [15 USCS § 1681g], or subsection (f) of section 609 [15 USCS § 1681g] relating to the disclosure of credit scores for credit granting purposes, except that this paragraph—
- (A) shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);
- (B) shall not apply with respect to sections 5-3-106(2) and 212-14.3-104.3 of the Colorado Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]); and
- (C) shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance;
- (4) with respect to the frequency of any disclosure under section 612(a) [15 USCS § 1681j(a)], except that this paragraph shall not apply—
- (A) with respect to section 12-14.3-105(1)(d) of the Colorado Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]);
- (B) with respect to section 10-1-393(29)(C) of the Georgia Code (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]);

- (C) with respect to section 1316.2 of title 10 of the Maine Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]);
- (D) with respect to sections 14-1209(a)(1) and 14-1209(b)(1)(i) of the Commercial Law Article of the Code of Maryland (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]);
- (E) with respect to section 59(d) and section 59(e) of chapter 93 of the General Laws of Massachusetts (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]);
- (F) with respect to section 56:11-37.10(a)(1) of the New Jersey Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]); or
- (G) with respect to section 2480c(a)(1) of title 9 of the Vermont Statutes Annotated (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003 [enacted Dec. 4, 2003]); or
- (5) with respect to the conduct required by the specific provisions of—
- (A) section 605(g) [15 USCS § 1681c(g)];
- (B) section 605A [15 USCS § 1681c-1];
- (C) section 605B [15 USCS § 1681c-2];
- (D) section 609(a)(1)(A) [15 USCS § 1681g(a)(1)(A)];
- (E) section 612(a) [15 USCS § 1681j(a)];
- (F) subsections (e), (f), and (g) of section 615 [15 USCS § 1681m];
- (G) section 621(f) [15 USCS § 1681s(f)];
- (H) section 623(a)(6) [15 USCS § 1681s-2(a)(6)]; or
- (I) section 628 [15 USCS § 1681w].

(c) Definition of firm offer of credit or insurance. Notwithstanding any definition of the term “firm offer of credit or insurance” (or any equivalent term) under the laws of any State, the definition of that term contained in section 603(l) [15 USCS § 1681a(l)] shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations. Subsections (b) and (c) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996].

Summary

The Circuit Courts of Appeals are split on two issues regarding the statute’s preemptive effect.

First, the courts are asked: How should 15 U.S.C. §1681t(b)(1)(F) and 15 U.S.C. §1681h(e) be reconciled? Both provisions could be used to defeat state-law claims against furnishers of information. Courts have reached five different decisions determining how to read these two sections.

Second, courts are asked to interpret 15 U.S.C. §1681t(b)(1)(F). In this section, Congress explicitly prevents preemption of two state statutes, but does not prevent preemption of the private rights of action for the state statutes. So courts are left to answer: is the private right of action preempted?

This exception applies to two statutes - section 54A(a) of chapter 93 of the Massachusetts Annotated Law and section 1785.25(a) of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996). As such, only two circuits, the First Circuit and the Ninth Circuit, respectively, have had to address this issue. However, the circuits disagree.

Case Law – Question One

Issue: How should 15 U.S.C. §1681t(b)(1)(F) and 15 U.S.C. §1681h(e) be reconciled?

Answer: The two statutes are compatible.

This nuanced approach appears, at first glance, to be Total Preemption. However, the reasoning is different.

“Our point is not that §1681t(b)(1)(F) repeals §1681h(e) by implication. It is that the statutes are compatible: the first-enacted statute preempts some state regulation of reports to credit agencies, and the second-enacted statute preempts more. There is no more conflict between these laws than there would be between a 1970 statute setting a speed limit of 60 for all roads in national parks and a 1996 statute setting a speed limit of 55. It is easy to comply with both: don't drive more than 55 miles per hour.” *Purcell v. Bank of Am.*, 659 F.3d 622, 624-25 (7th Cir. 2011).

This answer has been held by ...

Court of Appeals for the 2nd Circuit

Macpherson v. JPMorgan Chase Bank, N.A., 665 F.3d 45 (2d Cir. 2011) (*per curiam*)

Court of Appeals for the 6th Circuit

Scott v. First Southern Nat'l Bank, 936 F.3d 509 (6th Cir. 2019)

Court of Appeals for the 7th Circuit

Purcell v. Bank of Am., 659 F.3d 622 (7th Cir. 2011)

Answer: 15 U.S.C. §1681t(b)(1)(F) totally preempts, and thereby implicitly repeals, 15 U.S.C. §1681h(e).

This answer has been held by ...

Some courts within the 3rd Circuit District Courts

Jaramillo v. Experian Info. Solutions, Inc., 155 F. Supp. 2d 356 (E.D. Pa. 2001)

Some courts within the 9th Circuit District Courts

Mohammed Subhani v. JPMorgan Chase Bank, 2012 U.S. Dist. LEXIS 76447 (N.D. Cal. 2012)

Desser v. U.S. Bank, N.A., 2014 U.S. Dist. LEXIS 119841 (C.C. Cal. 2014)

Martinez v. Flagstar Bank, FSB, 2016 U.S. Dist. LEXIS 94124 (E.D. Cal. 2016)

Answer: The two can be read together, through the lens of 15 U.S.C. §1681s-2, which addresses a furnisher's responsibilities after receiving notice of the inaccuracy. Section 1681t(b)(1)(F) applies to claims after furnisher of information receives notice of dispute from a CRA. Section §1681h(e) applies to claims before furnisher of information receives notice of a dispute from a CRA.

This answer has been held by ...

Some courts within the 5th Circuit District Courts

Bank One, N.A. v. Colley, 294 F. Supp. 2d 864 (M.D. La. 2003)

Some courts within the 8th Circuit District Courts

Malm v. Household Bank (SB), N.A., 2004 U.S. Dist. LEXIS 12981 (D. Minn. 2004)

Some courts within the 11th Circuit District Courts

Riley v. GMAC, 226 F. Supp. 2d 1316 (S.D. Ala. 2002)

Answer: The two can be read together, as preempting different types of laws. Section 1681t(b)(1)(F) is meant to preempt state statutory causes of action. Section 1681h(e) is meant to preempt state common-law causes of action.

This answer has been held by

Some courts within the 3rd Circuit District Courts

Manno v. Am. Gen. Fin. Co., 439 F. Supp. 2d 418 (E.D. Pa. 2006)

Sites v. Nationstar Mortgage LLC, 646 F. Supp. 2d 699 (M.D. Pa. 2009)

Some courts within the 5th Circuit District Courts

Meisel v. USA Shade and Fabric Structures, Inc., 795 F. Supp. 2d 481 (N.D. Tex. 2011)

Carlson v. Trans Union, LLC, 259 F. Supp. 2d 517, 520-522 (N.D. Tex. 2003)

Some courts within the 10th Circuit District Courts

Greene v. Capital One Bank, 2008 U.S. Dist. LEXIS 33524 (D. Utah 2008)

Some courts within the 11th Circuit District Courts

Baker v. General Electric Capital Corp., 2011 U.S. Dist. LEXIS 48626 (M.D. Ga. 2011)

Answer: The statutes are not in conflict. Instead of a preemptive provision, §1681h(e) is read as a “quid pro quo grant of protection for statutorily required disclosures” that only applies when the cause of action is based on information disclosed pursuant to §1681g, §1681h, or §1681m. When those sections are not at issue, §1681h(e) does not apply, and therefore there was no conflict with §1681t(b)(1)(F).

When determining if §1681h(e) applies to a case at hand, the 4th Circuit used the following inquiry in *Ross v. FDIC*:

- 1) Did the claim fall within the scope of §1681h(e) - that is, is the claim based on §1681g, §1681h, or §1681m, or on information disclosed by a user of a consumer report against whom the user has taken an adverse action?
- 2) Does the "malice or willful intent to injure" exception to the general bar against state law actions apply?

This answer has been held by

Some courts within the 1st Circuit District Courts

Islam v. Option One Mortg. Corp., 432 F. Supp. 2d 181 (D. Mass. 2006)

Leet v. Cellco P'ship, 480 F. Supp. 2d 422 (D. Mass. 2007)

Some courts within the 3rd Circuit District Courts

Cosmas v. Am. Express Centurion Bank, 757 F. Supp. 2d 489 (D.N.J. 2010)

Court of Appeals for the 4th Circuit

Ross v. FDIC, 625 F.3d 808 (4th Cir. 2010)

Some courts within the 11th Circuit District Courts

Schlueter v. Bellsouth Telecommunications, 770 F. Supp. 2d 1204 (N.D. Ala. 2010)

Spencer v. Nat'l City Mortg., 831 F. Supp. 2d 1353 (N.D. Ga. 2011)

Case Law – Question Two

Issue: Does 15 U.S.C. §1681t(b)(1)(F), which explicitly saves State statutes from preemption, preempt, and thereby eliminate, State private rights of action?

Yes - The private right of action is preempted. The claim may not proceed.

Islam v. Option One Mortg. Corp., 432 F. Supp. 2d 181 (D. Mass. 2006)

Facts: Section 1681t(b)(1)(F)(i) creates an exception to explicit preemption for §54A(a) of chapter 93 of Massachusetts Annotated Laws. However, the exception did not apply to §54A(g), which contained the private right of action to enforce §54A(a). Judge Young noted “it would make no sense for Congress to except [§54A(a)] from preemption while at the same time eliminate private rights of action based upon it” (189). While there are no reported cases involving official enforcement of §54A(a), nor an authorization for Massachusetts Attorney General - or another state official - to enforce the section, both parties’ represented at oral

argument that the Attorney General of Massachusetts could enforce §54A(a).
Holding: Relying on this information, Judge Young held that the private right of action, §54A(g), was preempted by the FCRA.

*Note - Judge Young relies on the representation during oral argument that the Massachusetts Attorney General has the power to enforce §54A(a). If this is not true, then it is unclear how the Judge would have ruled.

Leet v. Cellco P'ship, 480 F. Supp. 2d 422 (D. Mass. 2007)

Holding: Using Judge Young's analysis from *Islam*, this court holds that §1681t(b)(1)(F) does not exempt from preemption the provision creating a private cause of action for §54A(a).

No - The private right of action is not preempted. The claim may proceed.

Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147 (9th Cir. 2009)

Holding: The 9th Circuit Court of Appeals held that the private right of action is not preempted. In examining §1681t(b), the court noted that only a "requirement or prohibition" would be preempted. Notably, CCC §1785.25(g) does not impose a requirement or prohibition - it is solely a vehicle for enforcement - so it is not preempted. Thus, CCC §1785.25(a) maintains its enforcement mechanism.

Carvalho v. Equifax Info. Servs., LLC, 615 F.3d 1217 (9th Cir. 2010)

Holding: Reaffirming its holding in *Gorman*, the 9th Circuit again noted that the private right of action to enforce CCC §1785.25(a) is not preempted by §1681t of the FCRA because it is not a "requirement or prohibition" within the meaning of §1681t(b).

Further Readings

Donna L. Wilson et al., *Just the FACT(A)s: The Latest in FCRA Jurisprudence*, 25 J. TAX'N F. INST. 23 (2012)

Elizabeth D. De Armond, *Preventing Preemption: Finding Space for States to Regulate Consumers Credit Reports*, 2016 B.Y.U.L. REV. 365 (2016)

Preemption of State Law by Fair Credit Reporting Act, 8 A.L.R. FED. 2d 233