MEMORANDUM

To: Interested Parties
From: D.J. Powers
Date: March 31, 2003
Re: **Preemption questions regarding credit scoring**

Question Presented:

Would the Federal Fair Credit Reporting Act (FCRA) pre-empt a state law ban on insurers' use of credit scoring for underwriting or rating?

Short Answer:

No. A state ban on insurers' use of credit scoring would not be preempted by the FCRA for several reasons:

1. Congress clearly stated its intent in § 1681t (a) not to preempt state laws. As the courts have ruled, Congress intended to give states the ability to provide greater protections for consumers than provided under the FCRA.

2. Congress provided that the FCRA would preempt state law only in certain limited circumstances, but did not include state laws regarding underwriting in that list. Thus, congressional intent is clear that states can regulate the use of credit reports in underwriting.

3. There is nothing inconsistent between a state ban on credit scoring and the FCRA. Insurers can easily comply with both laws by not using credit scoring. Since there is no inconsistency, the FCRA does not preempt state law.

Thus, the Texas Legislature is free to pass a complete ban on insurers' use of credit scoring in underwriting or rating in homeowners and auto insurance.

Discussion

I. Preemption law

Federal preemption of state law is not favored and a party asserting preemption "must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the

States." *California v. ARC Am. Corp.,* 490 U.S. 93, 101 (1989). Insurance is an area "traditionally regulated by the states;" indeed, federal law expressly provides that the states shall regulate insurance:

> (a) State regulation
>
> > The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> > No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012 (known as the McCarren-Ferguson Act).

The U.S. Supreme Court has held that McCarren-Ferguson is particularly targeted to the relationship between the insurer and consumers:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they to must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the 'business of insurance.

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 460 (1969).

II. The Fair Credit Reporting Act

The FCRA, contained in Title 15 of U.S.C., Chapter 41 on "Consumer Credit Protection," Subchapter III on "Credit Reporting Agencies," is intended to regulate *consumer reporting agencies*, not insurers:

> It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681 (b).

In addition, the statute expressly reserves for the states the power to regulate matters covered by the FCRA, with limited exceptions:

> 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 laws 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 the inconsistency.

15 U.S.C. § 1681t (a). The exceptions are as follows:

> (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 1681b of this title, relating to the prescreening of consumer reports;
> >
> > (B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, …;
> >
> > (C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;
> >
> > ***(D) section 1681m(d) of this title, 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 1681c of this title, relating to information contained in consumer reports, … ; or
> >
> > (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, … ;
>
> (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, … ; or
>
> (3) with respect to the form and content of any disclosure required to be made under section 1681g(c) of this title.
>
> (c) "Firm offer of credit or insurance" [definition applies to state laws].

15 U.S.C. § 1681t (b, c) (emphasis added).

There are two potential areas where the FCRA may preempt state laws in insurance: "underwriting" and "firm offers."

A. Underwriting

For two independent reasons, the FCRA does not preempt states from regulating underwriting: (1) Congress expressly provided that the statute would not preempt state laws and omitted underwriting from its list of exceptions where states could not regulate, and (2) a ban on the use of credit scoring in underwriting is not "inconsistent" with any provision of the FCRA.

1. Underwriting is not in Congress' list of exceptions

FCRA § 1681t (a) provides Congress' general intent that the FCRA "does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State." Congress then lists the exceptions to that rule in § 1681t (b). *The list of exceptions does not include the area of insurance underwriting*. Thus, Congress' intent is clear that states *can* regulate insurers' use of credit scoring.

Two standard rules of statutory construction provide the obvious conclusion that Congress' decision not to include insurance underwriting in the list of exceptions shows congressional intent that states *can* regulate the use of credit scoring by insurers. First, in a case under the FCRA, the U.S. Supreme Court quoted the standard rule of statutory construction that the inclusion of some items in a list of exceptions excludes all others:

> "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."

TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001). Here, Congress did not include insurance underwriting in its list of exceptions to state authority, so states retain complete authority to regulate insurance underwriting.

Second, the doctrine of *expression unius est exclusion alterius* provides that the mention of some items in a list implies the exclusion of other items not mentioned. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993). Here, Congress looked at all the practices regulated by the FCRA and listed some for exclusion from state regulation. The inclusion of some of those items, but not the practice of insurance underwriting, shows a congressional intent to permit states to regulate that practice.

2. A ban on credit scoring would not be inconsistent with any provision of the FCRA

Section 1681t (a) also provides for preemption of state laws "to the extent that those laws are inconsistent with any provision of [the FCRA], and then only to the extent of the inconsistency." There are two provisions of the FCRA that could conceivably be "inconsistent" with a state ban on credit scoring by insurers: § 1681 (b) (related to persons to whom a credit reporting agency may release information) and § 1681 (f) (related to prohibitions regarding the use of credit reports).

"Inconsistency" under §1681t (a) only applies when compliance with the state law would be a violation of the FCRA. The Federal Trade Commission has held:

> 1. Basic Rule. State law is pre-empted by the FCRA only when compliance with inconsistent State law would result in violation of the FCRA.

16 C.F.R. 600 Appendix A (Sec. 622 (1)). One of the leading cases on FCRA preemption bears this out.

In *Credit Data Of Arizona v. State of Arizona*, 602 F.2d 195 (9th Cir. 1979), the Ninth Circuit held that the FCRA allows the states to go further to protect consumers than the federal statute, and that doing so is not "inconsistent" with the FCRA.

> The philosophy behind both statutes is the protection of the consumer and it is clear that the Federal Act permits Arizona to go further than the Federal Act does to protect consumers so long as the Arizona Act is not inconsistent with the Federal Act.

Id. at 198. The FCRA in that case expressly allowed a credit reporting agency to charge a consumer for a copy of his or her credit report more than thirty days after an adverse action; the state statute prohibited that charge. *Id.* at 197. The court emphasized that the FCRA simply permitted the charge – it provided that the agency *may* impose a charge. *Id.* In other words, the FCRA did not *require* the agency to impose a charge, so the agency could comply with the state law by not imposing the charge, and that action would not be "inconsistent" with the FCRA because it would not violate the FCRA. *Id.* at 198.

The exact same analysis applies to the credit scoring ban. Just as the FCRA provided that the agency *may* impose the charge, the FCRA arguably provides that an insurer *may* use a credit report for underwriting. Just as the FCRA did not *require* the agency to impose the charge, the FCRA does not *require* an insurer to use a credit report. Thus, just as the state law that prohibited the charge in *Credit Data Of Arizona* was not preempted, the ban on credit scoring would not be preempted. An insurer could comply with both laws by not using credit scoring.

The *Credit Data Of Arizona* court went to agree with the District Court's reasoning that the FCRA was not intended to preempt state laws that provide greater consumer protections:

> District Judge Craig said: "It seems to me that the purpose of the (Federal) Act was not primarily for the purpose of giving a mere permissive authority of credit companies to make a reasonable charge, but rather the fundamental purpose was the protection of the consumer. And State law simply gives the consumer a little more protection than the Federal law in this instance. And I don't see any inconsistencies." … We agree with the district court.

Id. at 198. Similarly in this case, a state law banning credit scoring would simply provide more consumer protections, so would not be inconsistent with, or be preempted by, the FCRA.

a. § 1681b (a)

Section 1681b (a) regulates *when a consumer reporting agency may furnish a consumer report*:

> (a) In general.--Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other: …
>
> (3) To a person which it has reason to believe-- …
>
> (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

15 U.S.C. § 1681b (a)(3)(C). A ban on the use of credit scoring in Texas would in no way be inconsistent with this provision or make it impossible for a credit reporting agency to physically comply with both laws. The Texas ban would not apply to the credit reporting agency, which is the only type of entity to which this section applies. Even if this statute applied to an insurer, the insurer could comply with both laws by not requesting the credit report. Thus, § 1681b (a) would not preempt a state ban on credit scoring.

b. § 1681b (f)

Section 1681b (f) is a *prohibition* against users of credit reports:

> (f) Certain use or obtaining of information prohibited.--A person shall not use or obtain a consumer report for any purpose unless--
>
> (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and
>
> (2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

15 U.S.C. § 1681 (f). The statute *prohibits* an insurer from using a credit report unless for an authorized purpose (which includes underwriting), but the statute does *not give permission to use credit reports for that or any purpose*. Thus, there is nothing inconsistent between the

prohibition in § 1681 (f) against some uses of credit reports in insurance and a state prohibition against all uses of credit reports. The congressional intent here is clearly to prohibit other uses of credit reports, not to grant permission to insurers.

Even if this section were permissive, providing that insurers *may* use credit reports, there would still not be any preemption. Just as the FCRA in *Credit Data Of Arizona* did not *require* the agency to impose the charge, this section does not *require* an insurer to use a credit report. An insurer can easily comply with both the state law (by not using credit scoring for underwriting) and federal law (by not using credit scoring for purposes other than underwriting and firm offers). Thus, just as the state law that prohibited the charge in *Credit Data Of Arizona* was not preempted, the ban on credit scoring would not be preempted.

3. Analysis of decisions on the state's ability to regulate insurance underwriting under the FCRA

Several decisions have looked at whether the FCRA would preempt a state ban on the use of credit scoring in insurance.

The Maryland Attorney General ruled that the FCRA does not preempt a complete state ban on credit scoring. Maryland passed a bill that completely bans the use of credit scoring by homeowners insurers, and places restrictions on the use of credit scoring by automobile insurers. In a letter dated May 14, 2002, the Maryland Attorney General, in a detailed analysis of the issue, determined that the FCRA does not preempt state bans against credit scoring in insurance.

In *Wells v. Shelter General Ins. Co.*, 217 F.Supp.2d 744 (S.D. Miss., 2002), the court reached a general holding that the FCRA does not "completely preempt" state law claims regarding insurers' use of credit scoring in underwriting. In that case, the plaintiffs sued in state court, alleging that the insurer's use of credit scoring was an unfair and deceptive trade practice, in violation of state law. The Defendants removed to federal court, alleging federal court jurisdiction under the doctrine that the Plaintiff's state law claims were preempted by federal law. The court denied the Defendants' argument, holding that "the Court finds that the FCRA does not completely preempt Plaintiffs' state law claims so as to make them removable to federal court." *Id.* at 750.

The Fifth Circuit in *Wilting v. Progressive County Mut. Ins. Co.*, 227 F.3d 474 (5th Cir. Tex. 2000) held that a consumer does not have a cause of action *under the FCRA* against an insurer that uses a credit score, but that decision does not address the preemption issue:

> Wilting also contends that Progressive and Farmers ***violated the Act*** when they obtained his credit report. The Act permits a party to obtain a credit report if it will use the information in connection with the "underwriting" of insurance. 15 U.S.C. § 1681b(a)(3)(C). … Wilting argues that neither insurer was engaged in underwriting because he did not ask the insurers to issue a policy. He only requested a quotation. We conclude that the insurers did act as underwriters. In order to "decide whether or not to issue a policy" the insurers had to obtain a credit report to weigh the risks presented by the consumer. They could not decide

> whether to issue a policy without a credit report and an essential part of providing a quotation is deciding whether or not to issue a policy. Therefore, the insurers properly obtained Wilting's credit report as authorized by the Act.

Id. (emphasis added). Although the language of this case is broad, the basic holding is narrow, *the FCRA* does not prohibit an insurer from using a credit report. However, that case does not hold that the FCRA preempts a state from such a prohibition. The court did not address that issue.

B. Firm offers not initiated by the consumer

15 U.S.C. § 1681t (b)(1)(d) preempts the states from regulating "the duties of persons who use a consumer report of a consumer in connection with any … insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance." There are two requirements for this preemption: a transaction not initiated by the consumer and a firm offer. For our purposes, the important requirement is the "not initiated by the consumer" requirement.

A transaction "not initiated by the consumer" means "prescreening" of mass lists of consumers to determine who to target for mass mailings, and does not involve a consumer initiating a request for credit or insurance:

> At the same time, consumer reporting agencies have expanded beyond their original business of maintaining and providing consumer credit reports. As discussed below, they create and sell lists of consumers for general direct marketing solicitations not initiated by the consumer and, through a process known as "prescreening," sell more refined lists of creditworthy borrowers for creditors who use the information to extend offers of credit to such borrowers.

S. Rep. 103-209, at 3 (1993), 1993 WL 516162. As one court explained:

> In essence, [Section 1681b(c)(1)(B)(i)]allows the sale of target marketing lists provided the lists are used for making firm offers of credit or insurance to the consumers on the list. This practice is known as prescreening.

In re Trans Union Corp. Privacy Litigation, 211 F.R.D. 328, 335 (N.D. Ill. 2002). Thus any preemption regarding "firm offers" is limited to mass mailings and does *not* apply to underwriting or rating a consumer who does initiate the transaction by asking for a quote.