

Preemption Not A Silver Bullet To Defeat State Law Claims

In many recent cases—including several chronicled here at FCRA land—courts have dismissed state-law claims when those claims were preempted by FCRA. Yesterday, a court bucked the trend and held that a state-law breach of contract claim was not preempted by FCRA. *Long v. Bank of America, N.A.*, No. 17-CV-2756, 2018 U.S. Dist. LEXIS 190124 (N.D. Ill. Nov. 7, 2018). In doing so, the court emphasized the difference between claims asserting a duty created by state law and claims asserting a duty created by contract.

In this case, the plaintiff, Long, alleged that, during bankruptcy proceedings, she and the bank entered a settlement agreement containing non-disparagement provisions. Under the settlement, Long was required to continue making mortgage payments. Approximately one year after the settlement, the bank began reporting to the credit reporting agencies that, among other things, Long had missed some of her mortgage payments. Long contended that these reports were false and unsuccessfully disputed her credit report. Long then filed suit, asserting that the bank's false and negative credit reports breached its non-disparagement obligations under the prior settlement agreement.

The bank moved to dismiss. It argued (in part) that the breach of contract action, as a state law claim regarding reports made to credit reporting agencies, is preempted by FCRA. The Court, however, looked beyond the fact that the breach of contract claim is styled as a state-law claim. Specifically, the Court looked **at FCRA's preemption provision, which only relates to a "requirement or prohibition . . . imposed under the laws of any state."** 15 U.S.C. § 1681t(b)(1)(F). The Court then ruled that **duties created by contracts—even when a plaintiff seeks to enforce them through a state-law claim—are not "imposed under the laws of any state."** These contract claims are opposed to, for example, claims under state statutes regarding consumer reports and background checks, which likely would involve duties created as a matter of state law. In other words, while a state legislature cannot create duties that go beyond FCRA, a person can voluntarily agree to duties that go beyond FCRA. Therefore, the Court held, FCRA preemption did not apply, and the non-disparagement claims survived the bank's motion to dismiss.