S180862

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Robert A. Brown and Susana Brown,
Guardians Ad Litem for KI and KA, minors,
Robert A. Brown, individually,
and all others similarly situated,

Plaintiffs and Appellants,

v.

Stewart Mortensen,

Defendant and Respondent.

Petitioners' Reply to Respondent's Answer

After Appeal in the Court of Appeal, Second Appellate District,
Division One, Case No. B199793, from the Superior Court of California,
County of Los Angeles, The Honorable, Anthony Mohr, Judge Presiding
Los Angeles Superior Court Case No. BC289546

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Petitioners' Reply to Respondent's Answer

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: Petitioners hereby reply to Respondent's Answer to Petitioners' Petition For Review of the decision of the Court of Appeal in the above entitled case filed on January 29, 2010.

Petitioner's Appeal and Respondent's Answer

Petitioners appealed to the Court of Appeal, Second Appellate District, Division One, from an order of dismissal in the Los Angeles Superior Court after the trial court sustained a demurrer to petitioners' 3rd and 4th Causes of Action in a Fourth Amended Complaint. Petitioners alleged that respondent Stewart Mortensen ("Mortensen") violated California's Confidentiality of Medical Information Act, California Civil Code §§56 et. seq. ("CMIA") by disclosing petitioners' confidential medical information to credit reporting agencies without petitioners' consent. Petitioners sought damages and injunctive relief.

In an attempt to skirt the reality of Petitioners' 3rd and 4th Causes of Action, Respondent's Answer characterizes Petitioners' suit, not as a suit for damages against Respondent for violating the CMIA by disclosing Petitioners' confidential medical information, but as one for "reporting alleged inaccurate information to the credit bureaus." (Answer, p.1).

Nothing in the CMIA provides relief for the reporting of inaccurate information to credit bureaus. The CMIA affords relief exclusively for disclosure of confidential medical information. The CMIA defines "medical information" as "medical history, mental or physical condition, or treatment" and includes "identifying information" such as name, address, telephone number and social security number. Civ. Code §56.05(g), formerly Civ. Code §56.05(f).

Civil Code §§56.10(a), 56.11 and 56.13 prohibit health care providers ***and their recipients*** from disclosing confidential medical information without the patient's consent. ***The CMIA does not include an exception for reporting to credit reporting agencies.*** Although a health care provider is authorized under the CMIA to disclose confidential medical information to an "administrator" or to a "billing agent," the CMIA expressly prohibits the administrator or billing agent from making any "further disclosure" of the patient's confidential medical information. Civ. Code §56.10(c)(3).

Petitioners did not sue under the CMIA for damages based on ***inaccurate*** medical information being disclosed, as nothing in the CMIA provides for relief for ***'inaccurate'*** disclosure. Petitioners sued for damages and equitable relief under the CMIA based on Respondent's ***disclosure*** of Petitioners' confidential medical information. Petitioners alleged, in their

3rd Cause of Action, 4th Amended Complaint, that defendant, Mortensen, commencing about June 12, 2001 and continuing through August 2003, disclosed confidential medical information about petitioners' minors, KI and KA, **in "consumer credit reports" *under a written agreement with national credit reporting agencies.*** (C.T. 623-625, 4th Am. Complaint, ¶70). Petitioners alleged, in their 4th Cause of Action, 4th Amended Complaint, that, also during the foregoing dates, Mortensen disclosed confidential medical information about petitioner, R. Brown, **in "consumer credit reports" *under a written agreement with national credit reporting agencies.*** (C.T. 630-632, 4th Am. Complaint, ¶99). Petitioners alleged that such disclosures were never consented and not authorized. Ibid at C.T. 625 (lines 8-9) and 632 (lines 7-9).

Whether or not the ***medical information*** which Respondent disclosed was accurate or inaccurate is not an element of a cause of action under the CMIA. Further, Petitioners' claim that no debt was owed to Petitioners' dentist is likewise not an element of a cause of action under the CMIA. The reporting of the alleged debt itself was the basis of Petitioners' 5th Cause of Action (C.T. 638-639), but that cause of action was settled and dismissed. (C.T. 709-714; the record in the Court Appeal includes correspondence between the Court and all counsel that Petitioners' 5th Cause of Action was

settled, and that the trial court signed an Order dismissing same rather than by minute order.)

The issue on appeal is not whether federal law preempts a suit under state law for damages for inaccurate reporting of credit information and an alleged debt to a credit bureau. The issue is whether federal law preempts any state civil action against ***anyone*** who 'furnishes' any information to a credit bureau, even if state law expressly limits disclosure of such information under a state confidentiality statute such as the CMIA.

Argument

A. California's CMIA is not preempted because it was in effect on September 30, 1996 and, therefore, falls under the exception in 15 U.S.C. §1681t(b)(1)(E).

Petitioners' Petition For Review argued that the decision of the Court of Appeal is patently erroneous because it completely ignored the federal statute which is relevant in this case: 15 U.S.C. §1681t(b)(1)(E).

Respondent's Answer, as well as the Opinion of the Court of Appeal, erred by failing to address the relevance of 15 U.S.C. §1681t(b)(1)(E).

Respondent's Answer and the Opinion of the Court of Appeal admit that "the FCRA provides that it "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, or for the prevention or mitigation of identity theft, 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).)." (Opinion of Court of Appeal, p. 7).

Respondent's Answer and the remainder of the Court of Appeal Opinion rest entirely upon the following erroneous premise:

> "The FCRA continues, however, by listing multiple exceptions to that general rule. Of those exceptions, ***one is relevant here***-namely, 15 U.S.C. § 1681t(b)(1)(F) ("section 1681t(b)(1)(F)")." (Opinion of Court of Appeal, p. 7) (emphasis added).

Neither Respondent's Answer nor the Opinion of the Court of Appeal address 15 U.S.C. §1681t(b)(1)(E), the section which expressly prohibits certain information from being disclosed in consumer credit reports, ***regardless of whether the information is accurate or not:***

> "1681t(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 - * * *

(E) section 1681c of this title, relating to information contained in consumer reports, ***except that this subparagraph shall not apply to any State law in effect on September 30, 1996***;"

(emphasis added).

15 U.S.C. §1681c(a) prohibits disclosure of certain information in a consumer credit report in the first instance, regardless of whether or not the information is accurate. So, 15 U.S.C. §1681t(b)(1)(E), through its reference to 15 U.S.C. §1681c(a), clearly preempts state laws, ***but only those laws enacted after September 30, 1996. The CMIA was enacted in 1981 and remained in effect on September 30, 1996; it is therefore, patently and expressly not preempted under federal law.*** The CMIA statutes, California Civil Code §§56.10(c)(3), 56.11, 56.13, prohibit disclosure of confidential medical information obtained from a health care provider, regardless of whether the disclosure is accurate.

After citing 15 U.S.C. §1681t(b)(1)(E), Petitioners referred to a certain California law, Civil Code §1785.13, which somewhat tracks 15 U.S.C. §1681c and expressly prohibits disclosure of confidential medical

information, regardless of whether or not the information is accurate:

> "1785.13(f) Consumer credit reporting agencies shall not include medical information in their files on consumers or furnish medical information for employment or credit purposes in a consumer credit report without the consent of the consumer."

The above statute is not preempted under federal law precisely because of the express language in 15 U.S.C. §1681t(b)(1)(E) which excepts it from federal preemption, not by reference to it by name but by broad reference to the date of ***any*** state law in effect on September 30, 1996.

California Civil Code §1785.25 and §1785.26, both enacted in 1992 and in effect on September 30, 1996, expressly regulate the "Obligations of **Furnishers** of Credit Information." In referring to 15 U.S.C. §1681t(b)(1)(F) and to Civil Code §1785.25(a), the Court of Appeal in Sanai v. Saltz (2009)170 Cal.App.4th 746 said:

> "Notwithstanding this general language preserving state laws that do not conflict with the FCRA, however, in 1996 Congress amended the FCRA to strictly limit the availability of consumer's state remedies against furnishers of credit information.

> As amended, 15 U.S.C. § 1681t(b) provides, "No requirement or prohibition may be imposed under the laws of any State -- [¶] (1) with respect to any subject matter regulated under -- [¶] . . . [¶] (F) section 623 [15 U.S.C. § 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 September 30, 1996];[fn. 20] [¶] **(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on the date of enactment [September 30, 1996] of the Consumer Credit Reporting Reform Act of 1996) . . . ."** Id. at 773 (emphasis added).

It is noteworthy that the exception stated in 15 U.S.C. §1681t(b)(1)(E) is not limited to Civil Code §1785.25(a), but encompasses ***any*** state law in effect on September 30, 1996.

15 U.S.C. §1681c(a) prohibits disclosure of certain information in a consumer credit report in the first instance, regardless of whether or not the information is accurate. Under 15 U.S.C. §1681t(b)(1)(E), 15 U.S.C. §1681c(a) preempts state laws, but only those laws enacted after September 30, 1996. The CMIA was enacted in 1981 and is, therefore, not preempted. The CMIA statutes, California Civil Code §§56.10(c)(3), 56.11, 56.13, prohibit disclosure of confidential medical information obtained from a health care provider. Relief under the CMIA does not depend upon whether the medical information which is disclosed is accurate. 15 U.S.C. §1681s-2 and 15 U.S.C. §1681t(b)(1)(F) do not apply to a cause of action under California's CMIA. 15 U.S.C. §1681t(b)(1)(E) clearly does apply to a cause of action under the CMIA, but the CMIA is excepted under the above September 30, 1996 express exception.

B. The CMIA affords greater protection than federal law for medical privacy and is, therefore, not preempted under federal law.

It has long been law in California that, since the subject federal statutes are intended to protect the public, the states are not preempted from enacting laws which afford greater protection than the federal law. Cisneros v. U.D. Registry, Inc. (1995) 39 Cal.App.4th 548 [46 Cal.Rptr.2d 233]. In Cisneros, the Court of Appeal said:

"Under the supremacy clause, state law is preempted only if it "is in direct conflict with federal law such that compliance with both is impossible, or the state law is an obstacle to the accomplishment of the full purposes and objectives of Congress ...." (Gomon v. TRW, Inc. (1994) 28 Cal.App.4th 1161 , 1173 [34 Cal.Rptr.2d 256]; accord, Doyle v. Board of Supervisors (1988) 197 Cal.App.3d 1358 , 1363 [243 Cal.Rptr. 572].) The remedies afforded to injured consumers by CCRAA are not inconsistent with, but are in addition to, remedies provided by FCRA. * * *

We find further support for this view in the FTC's official commentary on the FCRA's preemption provision. According to the FTC, "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., pt. 600, appen. § 622, ¶ 1 (1995) italics added). This

> interpretation "is based on an unequivocal statement in the principal report in the FCRA's legislative history by the Senate Committee on Banking and Currency that, under the pre-emption provision, 'no State law would be preempted unless compliance would involve a violation of Federal law.' S. Rep., 91-517, 91st Cong., 1st Sess. 8 (November 5, 1969)." (FTC Commentary, 55 Fed.Reg. 18804, 18808, supra.)." Cisneros v. U.D. Registry, Inc., supra, 39 Cal.App.4th 548, 577-578.

Respondent's Answer failed to address the principles of law enunciated in Cisneros. The Court of Appeal's Opinion in the present case erroneously failed to follow them. To that extent, the Court of Appeal Opinion in the present case is in conflict with Cisneros.

In Sanai, the Court of Appeal, consistent with Cisneros, pointed out that federal preemption exists ***only to the extent of inconsistency with the federal law.*** Since the subject federal statutes are intended for consumer protection, states are free to enact laws which provide ***greater*** protection than the federal law. In reversing the trial court in Sanai, the Court of

Appeal referenced the error in the trial court's ruling that the state damage remedy, which afforded greater protection than the federal law, was preempted by federal law:

> "To be sure, as the trial court observed, 15 U.S.C. § 1681t(a) preempts not only state law "requirements and prohibitions," but also "laws [that] are inconsistent with any provision of this subchapter." (See also Liceaga v. Debt Recovery Solutions, LLC, supra , 169 Cal.App.4th at p. ___ ["Subdivision (a) of section 1681t of the Reform Act unequivocally provides that any state law that is not consistent with the FCRA is preempted. Since the FCRA has certain preconditions to proceeding with an action against a furnisher of credit information, and the California statute does not, a [170 Cal.App.4th 778] clear inconsistency would exist."].) ***But the trial court failed to complete the quotation from 15 U.S.C. § 1681t(a), which continues, "and then only to the extent of the inconsistency."*** This express

statutory command to limit the scope of preemption, combined with the general presumption against preemption repeatedly articulated by the United States Supreme Court, particularly "where federal law is said to bar state action in fields of traditional state regulation" (New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. (1995) 514 U.S. 645, 655 [115 S.Ct. 1671, 131 L.Ed.2d 695]), belies the trial court's conclusion recognizing a private cause of action under section 1785.25 would be inconsistent with the FCRA's purported prohibition of a private right of action. Indeed, in Medtronic, supra , ___ U.S. at p. ___ [128 S.Ct. at p. 1011] the Supreme Court recognized that federal law preempting state statutory or common law requirements different from, or in addition to, the requirements imposed by federal law "does not prevent a State from providing a damages remedy for claims premised on a violation of [federal]

> regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements." Similarly, because ***Congress itself has recognized that the requirements of section 1785.25, subdivision (a), are fully consistent with the obligations imposed by federal law***, nothing in the FCRA prevents California from providing a damages remedy for Mr. Sanai's claims based on a violation of that statute. (See Gorman v. Wolpoff & Abramson LLP, supra, 552 F.3d at p. 1032 ["[E]xempting specific state statutes from preemption is very unusual in federal statutes. To suppose Congress would do so for little or no purpose -- as would be the case if the private cause of action under California law were preempted -- is simply not plausible."].) fn. 22 [170 Cal.App.4th 779]." Sanai v. Saltz, supra, 170 Cal.App.4th 746, 777-778.

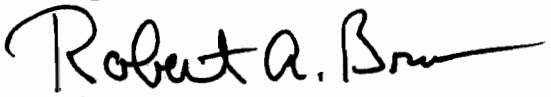
Both Respondent's Answer and the Opinion of the Court of Appeal in the present case are in conflict with the above law as stated in Sanai.

If the published Opinion of the Court of Appeal in this case stands, then anyone who furnishes information to a credit reporting agency may fully disclose in a consumer credit report information about a consumer which is privileged under California's state confidentiality laws, e.g. patient-physician, attorney-client, employer-employee, bank-customer and on and on. ***The decision of the Court of Appeal exposes tens of millions of records of information, which are presently protected and privileged from disclosure under California's confidentiality laws for patients, consumers, clients, borrowers, customers and others, to disclosure in such persons' credit reports. Since nothing in 15 U.S.C. §1681s-2 makes such a sweeping grant of authority of disclosure in the first instance, it is necessary for the Supreme Court to grant review and reverse.***

Conclusion

Petitioners' petition for review should be granted.

Respectfully submitted,



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Word Count

I certify that the word count in the above Petition is 2682 words, 14 point characters, using Word Perfect, v. 12, word count, not including the cover, tables and Proof of Service.

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Proof of Service

I am over the age of 18 years and not a party to this action. My address is 1125 E. Broadway, No. 116, Glendale, CA 91205.

On April 10, 2010, I deposited in the U.S. Mail in sealed envelope, postage paid, PETITIONERS' REPLY TO RESPONDENT'S ANSWER addressed as follows:

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I declare under penalty of perjury under the laws of the state of California that the above is true and correct. Executed March 10, 2010 at Los Angeles, California.

Patrick Sudderth