Case No. 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.

Appellants' Reply Brief

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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Argument

I. Respondent's concession that 15 U.S.C. §1681t(b)(1)(E) does not preempt the CMIA, coupled with the disputed issue of fact as to whether respondent acted solely as a "furnisher," compels reversal of the Court of Appeal's decision.

A. There is no record to support respondent's assertion of fact that he acted solely as a "furnisher."

Respondent's Brief is based on a statement of fact which has no basis in the record:

> "It is undisputed that Respondent is . . . merely a "furnisher of information" to credit reporting agencies." Respondent's Brief, p. 12.

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 et. seq., does not define the term, "furnisher." Nowhere in appellants' 4th Amended Complaint is the term, "furnisher," mentioned. What appellants did allege was that "[respondent] disclosed [appellants'] confidential medical information by photographic copying of records, telephone conversations, electronic transmission and otherwise, to third persons, including without limitation national credit reporting agencies, Experian, Equifax and Trans Union, ***said agencies having agreed in writing with respondent to further disclose such information to the public***, including in consumer credit reports, verification files, credit scoring and other written and recorded materials maintained and published by said agencies and distributed worldwide in written reports and materials and electronically by way of the worldwide web internet." (C.T. 623-625, 4th Am. Complaint, ¶70; C.T. 630-632, 4th Am. Complaint, ¶99).

In Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147 (9th Cir. 2009), the Ninth Circuit said, "the CRA [Credit Reporting Agency] is a third party, ***lacking any direct relationship with the consumer***," and that it makes "little sense to impose a more rigorous requirement on the CRAs than

the furnishers." Id. at 1156-1157 (emphasis added).

Respondent's demurrer necessarily admitted that he did in fact ***disclose*** appellants' confidential medical information to third persons, in the several publications, including credit reports, just as appellants' pleading stated.

B. Respondent violated the CMIA if not directly then under contract with an agency.

The credit reporting ***agency*** is just that: an ***agent***. Respondent is liable whether he disclosed confidential medical information ***directly*** or ***indirectly*** through an agent, i.e. website owner, a newspaper, a book publisher, a credit reporting agency or any other agent. In Hudson v. Nixon, (1962) 57 Cal.2d 482 this court said:

> "It is settled that a principal is liable for compensatory damages for the wrong committed by an agent in transacting the principal's business regardless of whether the wrong is authorized or ratified by the principal, and this rule applies even where the wrong is intentional and malicious. (Civ. Code, § 2338; Fields v. Sanders, 29 Cal.2d 834 , 838 et seq. [180 P.2d 684, 172 A.L.R. 525]; Carr v. Wm. C. Cromwell Co., 28 Cal.2d 652 , 654 et seq. [171 P.2d 5].)." Hudson v. Nixon (1962) 57 Cal.2d 482.

Civil Code §56.10(a) provides:

> "(a) No provider of health care, or health care service plan, or contractor shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization, except as provided in subdivision

(b) or (c)."

Civil Code §56.10(c)(3) provides:

> "(3) The information may be disclosed to any person or entity that provides billing, claims management, medical data processing, or other administrative services for providers of health care or health care service plans or for any of the persons or entities specified in paragraph (2). However, ***no information so disclosed shall be further disclosed by the recipient in any way that would be violative of this part.***"

The third persons, credit reporting agencies and others set forth in appellants' 3rd and 4th Causes of Action (C.T. 623-625, 4th Am. Complaint, ¶70; C.T. 630-632, 4th Am. Complaint, ¶99) are not excepted in Civil Code §56.10(b) or §56.10(c). Under Hudson, respondent, the principal, who discloses confidential medical information under a written contract with various publishers and third parties in violation of Civil Code §56.10(a) is liable for "further disclosure" under Civil Code §56.10(c)(3) under the law of agency.

"The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." Michelson v. Hamada (1994) 29 Cal.App.4th 1566, 1576 [36 Cal.Rptr.2d 343].

In Michelson, the Court of Appeal held that the parties' written agreements supported a finding of agency. "The written agreements disclose an agency relationship. . . . It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship. [Citation.] (Malloy v. Fong, supra, 37 Cal.2d at p. 370.) We conclude that under the agreements Michelson

retained the legal right to control the activities of Hamada and the corporation in their role as his agents." Michelson v. Hamada, supra, 29 Cal.App.4th 1566, 1580.

There is no foundation in the record in this case to support respondent's assertion that it is "undisputed" that respondent was a "mere furnisher" of information, as opposed to actually being the person making and controlling the disclosures of appellants' confidential medical information in the alleged publications ***under written contract with credit reporting agencies.*** Respondent's demurrer admits that he disclosed appellants' confidential medical information in several publications under written contract providing for such disclosure. The issue of respondent's liability for such disclosures, those that were made directly by respondent as well as those that respondent made through an agency, is for the trier of fact.

C. Respondent's concession that 15 U.S.C. §1681t(b)(1)(E) does not preempt California's CMIA compels reversal.

Appellants' Brief argued that 15 U.S.C. §1681t(b)(1)(E) does not preempt California's CMIA, since the CMIA was in effect on September 30, 1996 and falls within the purview of the state law savings clause. 15 U.S.C. §1681t(b)(1)(E) provides as follows:

> "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).

Respondent's Brief conceded the above point:

> "[I]f furnishers were allowed to furnish accurate medical information pursuant to Section 1681t(b)(1)(F), credit reporting agencies would still be liable for including the information in the report because ***Section 1681t(b)(1)(E) would not preempt the CMIA.***" (Respondent's Brief (RB) at p. 12).

15 U.S.C. §1681t(b)(1)(E), by its above stated express terms and by respondent's own admission, does not preempt state laws enacted prior to or on September 30, 1996, which includes the CMIA.

Based on respondent's concession that 15 U.S.C. §1681t(b)(1)(E) does not preempt California's CMIA, and based further on the disputed issue of fact as to whether respondent is a "mere furnisher" or, instead, actually disclosed appellants' confidential medical information in the various publications either directly or by way of an agency under contract, the decision of the Court of Appeal must be reversed.

II. 15 U.S.C. §1681t(b)(1)(F) does not premept a general state confidentiality law such as the CMIA.

Respondent takes an extreme position. Although respondent states that the FCRA preempts all state laws "regulating credit information" (R.B. 3), respondent's analysis actually reveals that respondent does not limit his argument to "credit" information. California's CMIA is not a "credit" regulation. The CMIA is a general state law protecting confidential medical information. Respondent actually argues that the FCRA preempts all state laws regulating information in general, not just credit information. Otherwise, California's CMIA would not be preempted under respondent's own express limitation as to "credit" information.

Respondent's argument does not survive scrutiny under the United States Supreme Court ruling in Altria Group, Inc. v. Good, 555 U.S. ____ ,

129 S.Ct. 538 (Dec. 15, 2008).

In Altria, the United State Supreme Court held that federal preemption does not apply to ***general state laws***.

Altria is squarely on all fours with the present case. In Altria, the U.S. Supreme Court addressed the extent of state law preemption based on the same statutory language found in 15 U.S.C. §1681t(b), i.e. "No ***requirement or prohibition*** may be imposed under the laws of any State . . ." (Federal Cigarette Labeling Act, 15 U.S.C. §1334(b), "Labeling Act"). The Supreme Court held that the federal Labeling Act did not preempt the Maine Unfair Trade Practices Act (MUTPA), a general state law prohibiting false advertising. The Labeling Act provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes on the packages of which are labeled in conformity with the provisions of this chapter." The Supreme Court said that since MUTPA "says nothing about either 'smoking' or 'health,' " **it "is a general rule that creates a duty not to deceive."** Altria Group, Inc. v. Good, supra, 555 U.S. ____, 129 S.Ct. 538, 547 (emphasis added). Claims for fraudulent advertising brought under a general law such as MUTPA were, therefore, not preempted. The Supreme Court concluded:

> "[T]he phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." Id. at 549.

Like Maine's MUTPA is a general anti-fraud law, California's CMIA is a general medical confidentiality law. Civil Code §§56.10(c)(3) and 56.13 prohibit ***further disclosure*** of confidential medical information obtained from a health care provider; the CMIA does not regulate credit or credit information accuracy. Accurate credit reporting under 15 U.S.C. §1681s-2, "fairly but narrowly construed does not encompass the more

general duty not to [disclose confidential medical information]." Altria Group, Inc. v. Good, supra, 555 U.S. ____, 129 S.Ct. 538, 547.

In Sanai v. Saltz (2009)170 Cal.App.4th 746, the Court of Appeal said:

> "***[T]he enforcement scheme of Congress under [15 U.S.C.] § 1681s-2(d) . . . concerns only violations of 15 U.S.C. § 1681s-2(a) -- the duty to provide accurate information -- not all possible claims against furnishers of consumer credit information."*** Id. at 777.

By its express terms 15 U.S.C. §1681s-2 regulates requirements and prohibitions for ***accuracy*** in credit reporting. It does not encompass the more general duty to keep medical records confidential. Based on the principles enunciated by the U.S. Supreme Court in Altria, the FCRA does not preempt the CMIA.

III. Since 15 U.S.C. §1681 provides for the protection of "confidentiality," and since Congress made no provision for such protection until May 4, 2005, protection of confidentiality was necessarily left to the states.

15 U.S.C. §1681 expressly states that one of the purposes of the subchapter.(FCRA) is "confidentiality." The purpose of the Fair Credit Reporting Act is:

> ". . . [to meet] 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.

A. No provision in the FCRA with respect to a *furnisher of medical information* existed until May 4, 2005.

No part of 15 U.S.C. §1681s-2 ever mentioned anything with respect to ***a furnisher of medical information*** until an amendment which became effective 15 months after December 4, 2003 (i.e. May 4, 2005). The amendment became 15 U.S.C. §1681s-2(a)(9):

> "***(9) Duty to provide notice of status as medical information furnisher***
>
> A person whose primary business is providing medical services, products, or devices, or the person's agent or assignee, who furnishes information to a consumer reporting agency on a consumer shall be considered a medical information furnisher for purposes of this subchapter, and shall notify the agency of such status." Amendment by section 412(a) of Pub. L. 108-159 [(9) on medical information furnishers effective at end of 15-month period beginning on Dec. 4, 2003, see section 412(g) of Pub. L. 108-159, set out as a note under section 1681b of this title.

Through the present day, the only mention of "medical information" in the FCRA with respect to ***furnishers*** is the ***duty*** to provide the above ***notice*** of such status to credit reporting agencies. 15 U.S.C. §1681c(a) (effective May 4, 2005) restricted the identification of a "medical information furnisher" in a consumer credit report.

In view of the foregoing history, it is impossible that California's CMIA could have been "inconsistent" with the FCRA prior to May 4, 2005, since the FCRA was completely silent with respect to any duty on the part of any person ***furnishing medical information*** prior to said date.

B. The FCRA has never restricted the states from imposing *prohibitions* against *furnishing medical information*.

There has never been any provision in the FCRA restricting any state in any manner whatsoever from imposing any ***prohibition*** on the ***furnishing*** of ***medical information***. Given the mandate in 15 U.S.C. §1681 for the protection of confidentiality, the field was clearly left to the states. "[Respondent] must show in the history . . . an authoritative message of a federal policy against state regulation (Sprietsma v. Mercury Marine , supra, 537 U.S. at p. 67) and "clear evidence of a conflict" between state and federal goals (Geier v. American Honda Motor Co. , supra , 529 U.S. at p. 885)." Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929, 946 [63 Cal.Rptr.3d 50; 162 P.3d 569].

There is no "authoritative message of a federal policy against state regulation" such as California's CMIA. On the contrary, the CMIA is a patient/consumer protection law which carries a strong presumption ***in favor*** of state regulation. In Farm Raised Salmon Cases (2008) 42 Cal.4th 1077 [72 Cal.Rptr.3d 112, 175 P.3d 1170] this court said:

> "The interpretation of the federal law at issue here is further informed by a strong presumption against preemption. [citations] Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

> purpose of Congress. We apply this presumption to the *existence* as well as the scope of preemption. There can be no doubt that the presumption against preemption applies with particular force here . . . [C]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the states' historic police powers and therefore are subject to the presumption against preemption." Farm Raised Salmon Cases, supra, (2008) 42 Cal.4th 1077, 1088.

C. The FCRA's mandate for protection of *confidentiality* and the lack of any provision in the FCRA for such protection necessarily left such protection to the states.

Throughout the history of the FCRA, including all amendments through the present time under FACTA (Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Public Law 108-159, Dec. 4, 2003, amending various provisions in 15 U.S.C. §1681 et seq.), Congress ***left only state law (such as the CMIA) to achieve the policy*** that ***furnishers*** of medical information maintain medical confidentiality.

IV. The FCRA having never implemented the mandate for protection of confidentiality, Congress decided to subordinate the FCRA on the subject of protecting medical confidentiality to HIPPA, which in turn, saved state laws which afford greater confidentiality than HIPPA.

A. Congress subordinated the FCRA to HIPPA.

Prior to May 4, 2005, the only mention at all in the FCRA by Congress with respect to ***anything*** concerning confidentiality of medical information was in 15 U.S.C. §1681b(g): "A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information

about a consumer, unless the consumer consents to the furnishing of the report." Effective May 4, 2005, the section was amended, 15 U.S.C. §1681b(g)(1)(B)(ii), "Protection of Medical Information," in which Congress prohibited medical information from being ***disclosed*** in a consumer credit report "unless the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished." If no such consent is provided, the information is "coded" so as not to identify the provider or the nature of the services. 15 U.S.C. §1681b(g)(1)C).

The caveat to the amendments was that Congress subordinated them to "other provision of Federal law relating to medical confidentiality." 15 U.S.C. §1681b(g)(6) provides:

> "(6) Coordination with other laws: ***No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality."***

15 U.S.C. §1681b(g)(6) became effective on May 4, 2005. At that time, the "Federal law relating to medical confidentiality" consisted of the regulations of the U.S. Department of Health and Human Services ("HHS") under the Health Portability and Accountability Act ("HIPAA") (Public Law 104-191, Aug. 21, 1996).

B. ***HIPPA itself included a nationwide state law savings clause:***

> **"(2) PREEMPTION. - -** ***A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law,*** if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements,

standards, or implementation specifications imposed under the regulation." (P.L. 104-191, §§264(c)(1) and 264(c)(2)).

The above statute, effective in August 1996, clearly reflects Congressional intent that federal law for the protection of confidentiality of medical information sets a minimum standard, and the states have been free to enforce their own laws for greater protection, ***even if contrary to federal law***. The regulations under HIPAA carry the foregoing into effect at 45 C.F.R. §160.203:

> "§ 160.203 General rule and exceptions.
>
> A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, ***except if one or more of the following conditions is met . . .***
>
> (b) The provision of State law relates to the privacy of individually identifiable health information and is ***more stringent*** than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter."

"More stringent" is defined at 45 C.F.R. §160.202:

> "More stringent means, in the context of a comparison of a provision of State law and a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter, a State law that meets one or more of the following criteria:
>
> (1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in

> circumstances under which such use or disclosure otherwise would be permitted under this subchapter, . . .
> (6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information."

California's CMIA provides "greater privacy protection" than the HIPAA regulations. The CMIA does not provide an exception for disclosure to credit reporting agencies as does 45 C.F.R. §164.506(c)(1) (permitting disclosure for "payment" purposes, which, under 45 C.F.R. §164.502, includes disclosure to consumer credit reporting agencies).

California's CMIA was in effect on September 30, 1996. It affords greater protection for medical privacy than the FCRA, since the patient's authorization would be required for disclosures of medical information to credit reporting agencies, even if the information is coded under 15 U.S.C. §1681b(g)(1)C) (effective May 4, 2005 but, under 15 U.S.C. §1681b(g)(6) is subject to HIPPA's above stated state savings regulation, 45 C.F.R. §160.203.

So, under 15 U.S.C. §1681b(g)(6), the FCRA does not supercede HIPPA, and under 45 C.F.R. §160.203 HIPPA does not preempt state law which affords greater privacy protection than HIPAA. Since California's CMIA affords greater privacy protection, it is not preempted by the FCRA.

V. 15 U.S.C. §1681t(b)(1)(F) does not preempt the CMIA in California.

In Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra, 41 Cal.4th 929, 944, this Court said:

> "The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests

Congress with the power to preempt state law. (U.S. Const., art. VI, cl. 2; Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 516; Jevne v. Superior Court (2005) 35 Cal.4th 935 , 949.) fn. 2 There are four species of federal preemption: express, conflict, obstacle, and field." Id.

A. Congress rejected express preemption in 15 U.S.C. §1681t(b)(1)(F).

The presence of a 'non-preemption' provision or 'anti-preemption' provision in a federal law "demonstrates Congress intended to reject express and field preemption of state laws." County of San Diego v. San Diego NORML (2008)165 Cal.App.4th 798, 819 [-- Cal.Rptr.3d –].

15 U.S.C. §1681t does indeed start with such a provision:

"15 U.S.C. §1681t

(a) In general

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, 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.*** (emphasis added).

So, according to the above language in the statute, the express rule is that the FCRA does not preempt state law, excepting only that ***part*** of a state law which is "inconsistent" with the ***subchapter*** itself, 15 U.S.C. §1681 et. seq.

Respondent argued (R.B. 24) that the clause in 15 U.S.C. §1681t(a),

"only to the extent of the inconsistency," does not apply to 15 U.S.C. §1681t(b). Respondent's argument ignores the preceding clause, ***"except to the extent that those laws are inconsistent with any provision of this SUBCHAPTER."*** The clause, "only to the extent of the inconsistency," modifies the preceding clause and, therefore, applies to the entire ***SUBCHAPTER.*** 15 U.S.C. §1681t(b) is obviously part of the subchapter. No court has construed the foregoing clauses in the manner suggested by respondent. Amazingly, respondent actually cites Sanai in support of his foregoing argument. In Sanai, the Court of Appeal reversed the trial court for making the same mistake as respondent herein. The Court of Appeal said:

> "[T]he 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." Sanai v. Saltz, supra, 170 Cal.App.4th 746, 778.

Civil Code §1785.25 is referenced in 15 U.S.C. §1681t(**b**), ***not*** "(**a**)." The Court of Appeal in Sanai was obviously applying the savings

clause to 15 U.S.C. §1681t(**b**). There is no authority or logic to respondent's argument that the non-preemption/anti-preemption clause in 15 U.S.C. §1681t(a) does not apply to the entire ***subchapter***, including 15 U.S.C. §1681t(**b**).

Respondent repeated his above error in support of a further argument that Cisneros v. U.D. Registry, Inc. (1995) 39 Cal.App.4th 548 [46 Cal.Rptr.2d 233], Credit Data of Arizona Inc. v. State of Arizona, 602 F.2nd 195, 198 (9th. Cir. 1979) and Davenport v. Farmers Ins. Group, 378 F.3d 839 (8th Cir. 2004) were superceded by Congress's 1996 amendments to 15 U.S.C. §1681t. In view of the fact that Congress left its reference to the "subchapter" intact, and further in view of the above principles and authorities cited by the Court of Appeal in Sanai, there is no basis to respondent's argument in regard to Cisneros, Credit Data and Davenport.

B. There is no implied (field) preemption in California and Massachusetts.

1. California and Massachusetts were expressly excepted.

In **15 U.S.C. §1681t(b)(1)(F)(i) and 15 U.S.C. §1681t(b)(1)(F)(ii)**, Congress left its express rule against preemption intact with respect to ***California and Massachusetts:***

> "15 U.S.C. §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 -
>
> (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);"***

California Civil Code §1785.25(a) provides:

"1785.25. (a) A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate."

In Gorman v. Wolpoff & Abramson, LLP, supra, 584 F.3d 1147, the Ninth Circuit held that the above California savings clause applies ***broadly***:

"[T]he savings provision, §1681t(b)(1)(F)(ii), provides that FCRA's preemption provisions do not apply "with respect to" California Civil Code section 1785.25(a). Unlike other state laws expressly saved by the exceptions to the express preemption provision, which, for example, state that the FCRA "shall not apply to any State law in effect on September 30, 1996," see §1681t(b)(1)(E) (emphasis added), ***Congress used the broader "with respect to" language to refer to the California statute.*** The most sensible understanding of this difference is that Congress

intended for the exception to apply not only to the specific subsection mentioned in the statute, but also to California laws that operate "with respect to" that subsection, which would include the private enforcement sections. Where Congress saves a particular state law from preemption, it would be incoherent to hold that the state law is otherwise preempted because it was somehow "inconsistent" with an overarching congressional purpose. . . .

"[A]vailable legislative history and administrative interpretation of the FCRA supports our holding concerning the scope of the FCRA preemption provisions. The Senate report concluded that "no State law would be preempted [by the FCRA] unless compliance would involve a violation of Federal law." S.Rep. No. 97-517, at 12 (1969). The Federal Trade Commission, charged with enforcing the FCRA, similarly understands the "basic rule" governing preemption under the FCRA: Section 1681t(a) preempts state law "only when compliance with inconsistent state law would result in a violation of the FCRA." 16 C.F.R. pt. 600 appx. § 622 ¶ 1." Gorman v. Wolpoff & Abramson, LLP, supra, 584 F.3d 1147, 1173 n. 35 (emphasis added).

The Ninth Circuit in Gorman concluded:

"Because the plain language of the preemption provision does not apply to private rights of action, and because the likely purpose of the

express exclusion was precisely to permit private enforcement of these provisions, we hold that the private right of action to enforce Cal. Civ.Code section 1785.25(a) is not preempted by the FCRA." Id. at 1172-1173.

In Viva!, this Court said, "[I]nclusion of savings clause in a statute ***negates field preemption.***" Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra, 41 Cal.4th 929, 944 [63 Cal.Rptr.3d 50; 162 P.3d 569] citing Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005)35 Cal.4th 935, 950 [28 Cal.Rptr.3d 685; 111 P.3d 954] (emphasis added).

2. The California and Massachusetts savings clauses, 15 U.S.C. §1681t(b)(1)(F)(i) and §1681t(b)(1)(F)(ii), necessarily left the field to those states, leaving "conflict" and "obstacle" preemption as the only analytical exceptions.

a. Congress excepted the field of federal regulation of accurate credit reporting in California and Massachusetts.

On September 30, 1996, 15 U.S.C. §1681s-2 read as follows:

> **"(a) Duty of furnishers of information to provide accurate information**
>
> (1) Prohibition
>
> (A) Reporting information with actual knowledge of errors
>
> A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate.
>
> (B) Reporting information after notice and confirmation of errors
>
> A person shall not furnish information relating to a

consumer to any consumer reporting agency if -
(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and
(ii) the information is, in fact, inaccurate.
(C) No address requirement
A person who clearly and conspicuously specifies to the consumer an address for notices referred to in subparagraph (B) shall not be subject to subparagraph (A); however, nothing in subparagraph (B) shall require a person to specify such an address.
(2) Duty to correct and update information
A person who - (A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and (B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.
(3) Duty to provide notice of dispute
If the completeness or accuracy of any information

furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

(4) Duty to provide notice of closed accounts

A person who regularly and in the ordinary course of business furnishes information to a consumer reporting agency regarding a consumer who has a credit account with that person shall notify the agency of the voluntary closure of the account by the consumer, in information regularly furnished for the period in which the account is closed.

(5) A person who furnishes information to a consumer reporting agency regarding a delinquent account being placed for collection, charged to profit or loss, or subjected to any similar action shall, not later than 90 days after furnishing the information, notify the agency of the month and year of the commencement of the delinquency that immediately preceded the action.

(b) Duties of furnishers of information upon notice of dispute

(1) In general After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall -

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

(c) Limitation on liability

Sections 1681n and 1681o of this title do not apply to any failure to comply with subsection (a) of this section, except as provided in section 1681s(c)(1)(B) of this title.

(d) Limitation on enforcement

Subsection (a) of this section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials and the State officials identified in that section." 15 U.S.C. §1681s-2 as it read on September 30, 1996.

Under 15 U.S.C. §1681t(b)(1)(F)(ii), Congress elected that, except with respect to conflicting laws, ***NONE of the above language in §1681s-2 applied with respect to accuracy in credit reporting regulated in California under its Civil Code §1785.25(a):***

- ***None*** of the provisions of 15 U.S.C. §1681s-2(a), "***Duty of furnishers of information to provide accurate information,***"
- ***None*** of the provisions of 15 U.S.C. §1681s-2(b), "***Duties of furnishers of information upon notice of dispute,***"

- ***None*** of the provisions of 15 U.S.C. §1681s-2(c), "***Limitation on liability***,"

- ***None*** of the provisions of 15 U.S.C. §1681s-2(d), ***"Limitation on enforcement"***

b. California regulates accurate credit reporting under Civil Code §1785.25(b) through (g).

With the vacuum left in California on September 30, 1996 by reason of the Congressional California-preemption-exemption under 15 U.S.C. §1681t(b)(1)(F)(ii), California regulated the accuracy and completeness of furnishing information to credit reporting agencies under its Civil Code §§1785.25(b) through (g):

> "1785.25 . . .
>
> (b) A person who (1) in the ordinary course of business regularly and on a routine basis furnishes information to one or more consumer credit reporting agencies about the person's own transactions or experiences with one or more consumers and (2) determines that information on a specific transaction or experience so provided to a consumer credit reporting agency is not complete or accurate, shall promptly notify the consumer credit reporting agency of that determination and provide to the consumer credit reporting agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the consumer credit reporting agency complete and accurate."

The above California state statute closely parallels 15 U.S.C. §1681s-2(a)(2), but not exactly.

California Civil Code §1785.25(c) provides:

> "1785.25 . . .
>
> (c) So long as the completeness or accuracy of any information on a specific transaction or experience furnished by any person to a consumer credit reporting agency is subject to a continuing dispute between the affected consumer and that person, the person may not furnish the information to any consumer credit reporting agency without also including a notice that the information is disputed by the consumer."

The above California state statute closely parallels 15 U.S.C. §1681s-2(a)(3), but not exactly.

California Civil Code §1785.25(d) provides:

> "1785.25 . . .
>
> (d) A person who regularly furnishes information to a consumer credit reporting agency regarding a consumer who has an open-end credit account with that person, and which is closed by the consumer, shall notify the consumer credit reporting agency of the closure of that account by the consumer, in the information regularly furnished for the period in which the account is closed."

The above California state statute is not limited to "open-end" accounts as in the federal statute, 15 U.S.C. §1681s-2(a)(4).

California Civil Code §1785.25(e) provides:

> "1785.25(e) . . .
>
> (e) A person who places a delinquent account for collection (internally or by referral to a third

party), charges the delinquent account to profit or loss, or takes similar action, and subsequently furnishes information to a credit reporting agency regarding that action, shall include within the information furnished the approximate commencement date of the delinquency which gave rise to that action, unless that date was previously reported to the credit reporting agency. Nothing in this provision shall require that a delinquency must be reported to a credit reporting agency."

The above California state statute does not impose a 90 day period for reporting the date of a delinquency as in the federal statute, 15 U.S.C. §1681s-2(a)(5).

California Civil Code §1785.25(f) provides:

"1785.25 . . .

(f) Upon receiving notice of a dispute noticed pursuant to subdivision (a) of Section 1785.16 with regard to the completeness or accuracy of any information provided to a consumer credit reporting agency, the person that provided the information shall (1) complete an investigation with respect to the disputed information and report to the consumer credit reporting agency the results of that investigation before the end of the 30-business-day period beginning on the date the consumer credit reporting agency receives the notice of dispute from the consumer in accordance with subdivision (a) of Section 1785.16 and (2) review relevant information submitted to it."

The above California state statute is similar to 15 U.S.C. §1681s-2(b)(1)(A) through §1681s-2(b)(1)(D).

In Sanai, the Court of Appeal addressed the issue of the import of the specific exception in 15 U.S.C. §1681t(b)(1)(F)(ii) to subdivision "(a)" in California Civil Code §1785.25 and not to subdivision "(g)" of §1785.25 or §1785.31, both of which provide for a private right of action to enforce the mandates for accuracy and completeness found in §1785.25(a). The appellate court in Sanai concluded that the specific reference to subdivision "(a)" did not preempt California from enforcing §1785.25(a) in other statutes. The Court of Appeal said:

> "[B]ecause 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 1172 ["[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]

In Hillsborough County v. Automated Medical Labs., 471 U.S. 707 (1985), the United States Supreme Court held that local regulation of blood plasma centers and donations was not preempted by federal regulation for collection of blood plasma. The high court said that "merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred

from identifying additional needs or imposing further requirements in the field." Id. at

It is a contradiction that Congress would except California and Massachusetts from all of the regulatory provisions found in 15 U.S.C. §1681s-2(a) through (d), i.e. accuracy of information, notices of disputes, limitations on liability and limitations on enforcement, but then preempt California and Massachusetts from regulating the same subjects. Indeed, if Congress had narrowed the California preemption exemption in 15 U.S.C. §1681t(b)(1)(F)(ii) by referencing other specific California statutes relating to Civil Code §1785.25(a), Congress would have tied California's hands to such specific regulatory statutes. Instead, by ***not*** referencing specific California statutes and regulations that define and enforce completeness and accuracy, clearly Congress left the field to California law.

Respondent cited two out-of-state federal district court opinions, one from Wyoming and the other from Pennsylvania, and two federal district court opinions in this state, reciting those courts' views that Congress intended to preempt the field in the FCRA (R.B. 6-7). All of those opinions, however, precede the Ninth Circuit opinion in Gorman to the contrary and are, therefore, superceded. Also, neither of the out-of-state opinions are relevant to California law in view of the saving clause in 15 U.S.C. §1681t(b)(1)(F)(ii).

C. The CMIA does not conflict with the FCRA.

Conflict preemption will be found when "simultaneous compliance with both state and federal directives is impossible." County of San Diego v. San Diego NORML, supra, 165 Cal.App.4th 798:

> "[S]tate law is superseded in cases of an actual conflict with federal law such that compliance with both federal and state regulations is a physical impossibility. [Hillsborough County v. Automated Medical Labs. (1985) 471 U.S. 707,

713] . . . T]he state and federal laws must be such that they cannot be reconciled or consistently stand together." County of San Diego v. San Diego NORML, supra, 165 Cal.App.4th 798, 820.

1. Respondent, as an assignee from a health care provider, cannot claim that compliance with the CMIA was impossible.

Respondent is an ***assignee***; the only basis for his argument that he qualifies as a "furnisher" of information is that he succeeded to the rights, if any, of the health care provider (Reinholds) who assigned appellant's account to respondent. Reinholds' account with appellant carried an important relevant condition: Reinholds never obtained appellant's permission to disclose appellant's confidential medical information to credit reporting agencies. It was not impossible for Reinholds to have done so. All that Reinholds needed to do was to simply ask for such permission, in writing, like virtually every other health care provider on the planet; if appellant refused, then Reinholds could simply have declined to perform dental work. Respondent, as an assignee, stands in the shoes of Reinholds. Professional Collection Consultants v. Hanada (1997) 53 Cal.App.4th 1016 [62 Cal.Rptr.2d 182]. Respondent is bound to follow the CMIA just as Reinholds was. Appellants' confidential medical information, assigned to respondent herein, simply did not permit credit reporting. Some patients grant permission; others don't. Respondent, as a debt collector-assignee, takes his collection accounts as he finds them.

D. The CMIA is not an obstacle to any applicable directive under the FCRA.

"Obstacle preemption will invalidate a state law when under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [Citations.] (Viva!, supra, 41 Cal.4th at p. 936.) Under obstacle preemption, whether a state law presents "a sufficient

obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: [¶] 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished--if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect--the state law must yield to the regulation of Congress within the sphere of its delegated power.' " County of San Diego v. San Diego NORML, supra,165 Cal.App.4th 798 citing Crosby v. National Foreign Trade Council (2000) 530 U.S. 363, 373.

It is hard to imagine how a state law such as the CMIA which is expressly intended for the protection of patient confidentiality would be an "obstacle" to the same express purpose in the FCRA at 15 U.S.C. §1681 to protect "confidentiality." In any event, Respondent's Brief made no argument that the CMIA is an obstacle to the FCRA, i.e. that the purpose of the FCRA cannot be accomplished if the CMIA is enforced in California. Instead, Respondent's Brief argued only in support of field preemption. There was no analysis or discussion in Respondent's Brief about obstacle preemption, and, as a result, the issue should be deemed waived.

Nevertheless, the CMIA does not qualify as an obstacle. Enforcement of the CMIA does not mean that the purpose of the FCRA "cannot otherwise be accomplished," i.e. the FCRA's "operation within its chosen field else must be frustrated and its provisions be refused."

Respondent's assignor, the dentist Reinholds, was required in the CMIA to obtain appellants' written authorization for any disclosure of appellants' confidential medical information not listed in Civil Code §56.10(b) or §56.10(c). It is unclear whether respondent himself was a permitted recipient of appellants' medical information, although he claims that a recipient for debt collection per se includes "billing" under Civil Code

§56.10(c)(3). In deposition testimony, respondent stated that he had not performed billing services for Reinholds. In any event, Civil Code §56.10 (c)(3) and §56.13 both prohibit "further disclosure." Credit reporting agencies are not on the list, and neither respondent's assignor, Reinholds, nor respondent ever obtained written authorization from appellants for disclosure to credit reporting agencies.

The crux of respondent's position is that, ***prior to any court proceeding***, he wants to disclose confidential medical information (name, social security number, address, etc.) to credit reporting agencies in order to identify the alleged debtor (patient) of an alleged medical debt, as well as disclose other more detailed medical information in response to any later dispute by the patient. He feels that, since he is "furnishing" information to credit reporting agencies, federal law, 15 U.S.C. §1681t(b)(1)(F) and 15 U.S.C. §1681s-2, makes him immune from prosecution for violating "any" state law concerning "information" in general, including state medical information confidentiality laws such as California's CMIA. Indeed, respondent claims that he has immunity from state law, even under circumstances such as appellants' 3rd Cause of Action against him for liability for disclosing confidential medical of innocent bystanders, third persons, even minors, about whom he made no allegation of any alleged medical debt and no claim of standing as a debt collector or bona fide furnisher of credit or medical information.

The problem with respondent's argument is that respondent has no natural "right" to be a furnisher in the first instance. There is nothing in the FCRA which defines any class of debt as automatically 'furnishable' regardless of state law. Nothing in the FCRA establishes any right in respondent to receive any class of debt on assignment. Under state law, a debt may be non-assignable altogether (e.g. personal service contracts); a debt may be non-assignable until after being reduced to judgment (e.g. personal injury claims); a debt may be assignable in part, or assignable with

limitations, including obligations under state and federal law.

The CMIA is no obstacle to credit reporting of alleged unpaid medical bills. Under the CMIA, "court" proceedings are excepted. Civ. Code §56.10(b)(1) and §56.10(b)(3). Appellant's alleged unpaid medical debt could be reported to the credit reporting ***after being reduced to judgment.*** If the patient (appellant) prevails in court, the issue of credit reporting is ended because there is nothing to report. If the patient (appellant) does not prevail, then Reinholds or respondent can report the judgment to the credit reporting agencies or record it, in which case it will be obtained by the credit reporting agencies as a public record.

Since neither Reinholds nor respondent obtained a patient authorization from appellant pursuant to California Civil Code §56.10(a) and §56.11, lawful disclosure to credit reporting agencies incurs the added time and expense that the alleged disputed debt first be reduced to judgment. This is no different than any other debt for which an assignment is subject to state law.

Under the foregoing, did the CMIA destroy the purpose and operation of the FCRA? Of course not. Indeed, adjudication of the alleged debt for plaintiff or defendant makes credit reporting more accurate, not less.

VI. Respondent, as an assignee of a health care provider, was a recipient of confidential medical information and was, therefore, prohibited under Civil Code §56.10(c)(3) and §56.13 from making any "further" disclosure to third parties not listed under §56.10(b) or (c).

Civil Code §56.10(c)(3) and §56.13 expressly provide that a "recipient" of confidential medical information is not permitted to make any "further" disclosure. Appellants alleged that respondent, who was a recipient of confidential medical information from a health care provider (a dentist), further disclosed appellants' confidential medical information to third persons, including credit reporting agencies, and to the public generally under written contract with the credit reporting agencies.

Respondent cited Colleen M. V. Fertility & Surgical Associates of Thousand Oaks (2005) 132 Cal.App.4th 1466 in support of an argument that "the CMIA authorizes disclosures in an effort to collect payment." (R.B. 29). Colleen M. stands for no such rule. The appellate court held that disclosure to the patient's ex-boyfriend as a person "responsible" for payment (having permitted his girl friend to use his credit card) was authorized under Civil Code §56.10(c)(2); disclosure to an attorney was authorized under Civil Code §56.10(b)(3). Colleen M concerned specific provisions in the CMIA which are not relevant in this case.

VII. Respondent violated the CMIA by further disclosing appellants' confidential medical information irrespective of the underlying circumstance that appellant disputed an alleged medical debt.

Respondent argues that, since appellant disputed a medical debt, his entire case is based on a claim of inaccurate credit reporting and is therefore preempted by the FCRA.

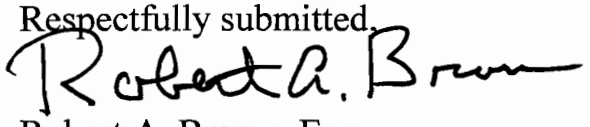
The parties settled appellants' 5th Cause of Action for damages for violations of the Fair Debt Collection Practices Act based on the disputed medical debt. (See Docket in Court of Appeal, Correspondence from the Court of Appeal to the parties' counsel, and the parties' supplemental filing thereto). .

There is no remedy in the CMIA for inaccurate disclosure of credit information. The CMIA is a general state law protecting confidential medical information and does not regulate credit. In appellants' 3rd and 4th Causes of Action, respondent is liable for statutory damages under the CMIA ***not for inaccurate credit reporting*** but, rather, because, as an assignee of an alleged medical debt and thereby a "recipient" of confidential medical information, respondent "further" disclosed appellants' confidential medical information in violation of Civil Code §56.10(c)(3) and §56.13. Respondent's argument ignores the CMIA statutes.

Conclusion

The decision of the Court of Appeal should be reversed.

Respectfully submitted,



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Word Count

I certify that the word count in the above Appellants' Reply Brief is 8312 words, 14 point characters, using Word Perfect X4 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 633 West 5th Street, 28th Fl., Los Angeles, CA 90071.

On August 2, 2010, I deposited in the U.S. Mail in sealed envelope, postage paid, APPELLANTS' REPLY BRIEF addressed as follows:

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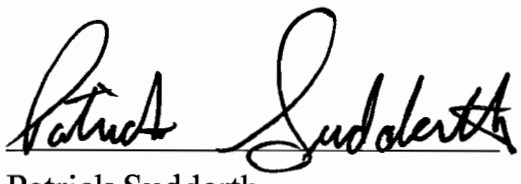
Attention: Hon. Anthony Mohr, Judge

I declare under penalty of perjury under the laws of the state of California that the above is true and correct. Executed August 2, 2010 at Los Angeles, California.



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