No. 06-17226

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. GORMAN,
Plaintiff-Appellant,
v.
WOLPOFF & ABRAMSON, LLP,
Defendant

MBNA AMERICA BANK, N.A.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Hon. James Ware, presiding
NO. CV-04-04507-JW

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, IN SUPPORT OF PLAINTIFF-APPELLANT'S OPPOSITION TO MBNA'S PETITION FOR REHEARING OR REHEARING EN BANC

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DATED: April 23, 2009

Respectfully submitted,

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I. STATEMENT OF INTEREST

Amici curiae National Consumer Law Center and National Association of Consumer Advocates are both nonprofit organizations that work on behalf of consumers. *Amici* have extensive experience on a wide range of consumer protection matters, including Fair Credit Reporting Act issues. *Amici* have an interest in this appeal because they work to protect the rights of consumers, as described in detail in their Motion for Leave to File an Amicus Brief. *Amici* believe that the Panel correctly held that the FCRA does not preempt the California Consumer Credit Reporting Act's enforcement provision and that a furnisher who fails to accurately report that a debt is disputed after reinvestigation violates the privately enforceable provisions of the FCRA. *Amici* believe that this decision benefits consumers.

II. SUMMARY OF ARGUMENT

The Panel correctly held that the FCRA does not preempt the ability of consumers to privately enforce section 1785.25(a) of the California Consumer Credit Reporting Act. Congress specifically and deliberately exempted section 1785.25(a) from the FCRA's general preemption of state law furnisher accuracy requirements. Yet since section 1785.25(a) is nearly identical to the FCRA's own furnisher accuracy requirements, this

exemption would be a nullity if section 1785.25(a) were not privately enforceable, because there would be no difference between the federal and state requirements. Section 1785.25(a) must be privately enforceable because Congress does not enact meaningless legislation.

The Panel also correctly held that a furnisher who fails to accurately report as part of the results of its reinvestigation that a debt is disputed violates section 1681s-2(b) of the FCRA. MBNA's argument rests entirely on the unsupported assumption that requiring a furnisher to accurately report that a consumer continues to raise a *bona fide* dispute is superfluous because the consumer reporting agency (CRA) already knows that information. However, the industry's current credit scoring models will ignore any debt marked as disputed by the furnisher but will not ignore disputes marked by the consumer. The additional information is critical and hardly redundant.

While *amici* oppose rehearing, if rehearing is granted, *amici* urge that the decision be clarified. The Panel's decision could be misinterpreted to establish a rule that a furnisher conducting an investigation of a dispute needs to consider only the information in the "four corners" of the notice sent to it by a CRA. In addition to contradicting other portions of the opinion, such a narrow interpretation would significantly hinder the ability of consumers to dispute errors. The current cooperative practice between

CRAs and most institutional furnishers is to exchange information about a consumer's dispute only by automated means. By agreement with furnishers such as MBNA, the CRAs convert consumers' disputes and supporting documentation into a two or three digit code that they submit to the responsible furnisher instead of forwarding the actual dispute or the critical documentation. Because of the CRAs' systemic refusal to share this essential information with the furnishers, *amici's* published advice to consumers is to send a duplicate copy of the dispute with its enclosures to the furnisher. A "four corners" rule would sanction this system and allow furnishers to willfully turn a blind eye to such information without fear of being held accountable by the consumer. *Amici* urge that the decision be clarified to recognize that while the *nature* of a furnisher's investigation is limited to that identified in the CRA's notice, the furnisher must consider all information reasonably available to it when investigating the dispute.

Similarly, while *amici* oppose rehearing, if a rehearing is granted, *amici* urge that *dicta* regarding a CRA's responsibility in an investigation be clarified. The language that a CRA's reasonable reinvestigation duty consists largely of triggering the investigation by the furnisher conflicts with contrary holdings reached by other Courts of Appeal and by numerous district courts, including at least four within this Circuit. These decisions

have unanimously rejected any mere so-called "parroting" by CRAs and instead have held that a CRA's duties extend beyond simply forwarding a dispute to a furnisher and accepting the results of the furnisher's reinvestigation. In fact, the CRAs' reinvestigation duty was codified over two decades before any furnisher duties were created.

III. ARGUMENT

A. The Panel Correctly Held That the FCRA Does Not Preempt Using the Private Remedies Provisions of the California Consumer Credit Reporting Act to Enforce Section 1785.25(a) of That Act.

MBNA disagrees with the Panel's decision that the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681t, does not preempt the ability of a consumer to bring a private action for violation of section 1785.25(a) of the California Consumer Credit Reporting Agencies Act ("CCRAA") pursuant to sections 1785.25(g) and 1785.31 (the "CCRAA's Remedies Provisions"). *Amici* respectfully submit that the Panel's treatment of the preemption issue was legally correct and a significant decision for protecting the rights of California consumers.

While FCRA section 1681t(b)(1)(F) generally preempts state-law requirements or prohibitions imposed on furnishers of credit information, this section expressly exempts the furnisher's responsibilities under section 1785.25(a) of the CCRAA. Based on this express exemption, the Panel recognized that to interpret the FCRA as preempting the ability of consumers to enforce those responsibilities using CCRAA's Remedies Provisions would essentially gut the savings clause that Congress had carefully crafted. This conclusion is especially true given that section

1785.25(a) imposes nearly the same duties as section 1681s-2(a)(1)(A) of the FCRA.

Section 1785.25(a) of the CCRAA provides:

> 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.

Section 1681s-2(a)(1)(A) of the FCRA provides:

> A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

The language of these two provisions is remarkably similar. Indeed, the Panel concluded that the provisions are "nearly identical." *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1032 (9th Cir. 2009).

Thus, the most significant difference between section 1785.25(a) of the CCRAA and section 1681s-2(a)(1)(A) of the FCRA is that the California version is privately enforceable and the federal version is not. To hold that the CCRAA's Remedies Provisions are preempted would render the savings clause for section 1785.25(a) a nullity. Congress's enactment of a savings clause for section 1785.25(a) cannot have been a meaningless exercise.

MBNA's responds that the savings clause must have been intended to permit only government agencies to enforce the CCRAA. It cites the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.

as the authority for the California Attorney General to enforce the CCRAA against furnishers. Yet using this provision to enforce section 1785.25(a) would be vulnerable to the exact same argument MBNA makes against using sections 1785.25(g) or 1785.31 to enforce section 1785.25(a) – *neither of these subsections is specifically mentioned in the savings clause.* MBNA cannot argue it both ways.

Finally, the Panel's decision that the CCRAA's Remedies Provisions are not preempted furthers the express goal of both the FCRA and CCRAA to protect consumers. *See* § 1785.1(e) of the CCRAA ("The Legislature hereby intends to regulate consumer credit reporting agencies pursuant to this title in a manner which will best protect the interests of the people of the State of California."); 15 U.S.C. § 1681(a)(4)(FCRA enacted to ensure that credit reporting industry members "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.") The CCRAA Remedies Provisions give Californians a valuable tool to challenge errors in their credit reports, especially critical given that these errors are widespread, adversely affecting anywhere from 3% to 25% of consumers' credit reports. *See* National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports*, at pp. 5-6, *available at*

http://www.nclc.org/issues/credit_reporting/content/automated_injustice.pdf (summarizing studies on error rates in credit reports).

The CCRAA Remedies Provisions also give Californians a valuable remedy against systemic furnisher errors and abuses. Unfortunately some of the widespread errors that pervade credit reports stem from furnisher mistakes and abuses. This misconduct includes credit card lenders who wrongfully characterize mere authorized users as jointly liable for an account, debt collectors who "re-age" stale debts in violation of the FCRA's time limits, and furnishers who do not update their reports to CRAs after a bankruptcy discharge. *Id.* at 11-12; *Acosta v. Trans Union*, 243 F.R.D. 377, n. 3 (C.D. Cal. May 31, 2007) (bankruptcy lawyer's survey of approximately 900 clients found that 64% of Trans Union reports and 66% of Equifax reports erroneously list one or more discharged debts as due and owing).

The Panel correctly recognized that proper statutory interpretation and the espoused goals of the FCRA and CCRAA compelled the conclusion that the CCRAA's Private Remedy Provisions are not preempted with respect to enforcing section 1785.25(a). Thus there is no cause for reconsideration of this issue on rehearing or rehearing en banc.

B. The Panel Correctly Held That a Furnisher Who Fails to Accurately Report That a Debt Is Disputed After a Reinvestigation Violates Section 1681s-2(b) of the FCRA.

MBNA urges this Court to grant rehearing of the Panel's decision that a furnisher violates section 1681s-2(b)(1)(D) by failing to report as part of its reinvestigation results that a debt is disputed. MBNA argues that consumers should not be "permitted to sue a furnisher for failing to tell the CRAs that they already know" and assumes that "[s]uch a requirement serves absolutely no purpose…" MBNA Br. at 14-15.

However, requiring a furnisher to accurately report that a consumer continues to raise a *bona fide* dispute does serve a purpose, and a critical one. When a furnisher reports to a CRA that a debt is disputed, that notation of dispute will be reflected in the consumer's credit report; however, the report will not be so notated simply because the consumer has submitted a dispute with the CRA. Therefore, only a furnisher-acknowledged dispute informs other creditors who view the consumer's report of the dispute and thus allows them to take the dispute into consideration when evaluating the consumer for credit granting purpose. In other words, the dispute may prompt the creditor to give less weight or disregard a negatively noted debt.

Most importantly, credit scoring models also take a dispute reported by the furnisher into consideration, and *they ignore any debt that the*

furnisher has marked as disputed. The Fourth Circuit noted this fact in *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 146-47 (4th Cir. 2008), finding that "if BB & T had [reported the debt as disputed], Trans Union would have reported both the debt and the dispute and would not have considered the debt in determining Saunders' total credit score. Thus, BB & T's decision to report the debt but not the dispute resulted in a much lower credit score for Saunders than a report of both the debt and the dispute." *See also* Federal Trade Commission and Federal Reserve Board, *Report to Congress on the Fair Credit Reporting Act Dispute Resolution Process* (Aug. 2006), at 22, n. 139, *available at* www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf (citing email from Fair Isaac stating that its scoring models do take into consideration that an item is subject to a dispute that is being investigated).

Indeed, in *Saunders*, the Fourth Circuit rejected the very argument that MBNA now makes:

> Nor do we find persuasive BB & T's contention that a furnisher's reporting of an ongoing dispute of a debt is superfluous once a consumer has filed a dispute with any CRA. Among other things, when a furnisher reports a dispute, its report confirms that the consumer has actually contacted the furnisher and explained that the consumer believes he does not owe the debt. Moreover, Saunders presented evidence that, in the course of business, CRAs do not consider the furnisher's reporting of a dispute superfluous. For

> instance, when a furnisher responds to a dispute verification form and relates an ongoing dispute, Trans Union records the dispute in the credit report and does not include the derogatory information in assessing the credit score.

Saunders v. Branch Banking & Trust Co., 526 F.3d at 150.

Thus, it is critical that a furnisher accurately report to the CRA that a debt continues to be disputed after a reinvestigation. That information has a significant impact on a consumer's credit score. Requiring the consistent reporting of that information is essential in insuring the accuracy, the uniformity, and thus the efficacy of the industry's extant credit scoring models. The Panel correctly recognized the importance of this furnisher duty. Accordingly, there is no cause for reconsideration of this issue on rehearing or rehearing en banc.

C. If Rehearing Is Granted, the Decision Should Be Clarified to Recognize That While the Nature of The Investigation Is Limited to That Identified in the ACDV, the Furnisher Must Consider All Information Available to It When Investigating the Dispute

While *amici* oppose rehearing as proposed by MBNA, if a rehearing is granted, *amici* urge clarification of what information a furnisher must consider in conducting the investigation. In its decision, the Panel stated that "the reasonableness of the furnisher's investigation is measured by its response to the specific information provided by the CRA in the notice of dispute." *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d. at 1017. In

almost all cases, that notice of dispute is the Automated Consumer Dispute Verification (ACDV) form that is the industry standard.

The Panel's statement could be misinterpreted to establish a rule that a furnisher merely needs to consider and review the “four corners” of an ACDV in conducting an investigation of a dispute. However, later parts of the decision show the Panel’s intent was not to establish such a narrow rule. *Identifying the **nature** of the dispute* is measured by the CRA's description of the dispute in the ACDV, but the investigation itself must consider all information reasonably available to the furnisher, not just the limited information in the ACDV. *Amici* would urge such a clarification.

A rule that a furnisher need only consider the “four corners” of an ACDV in its investigation would formally saddle the FCRA with the wholesale deficiencies of the ACDV system. Engrafting the ACDV process as a formal component of the FCRA dispute process, as *amici* fear that the sentence under scrutiny may be misinterpreted to require, would significantly hinder the ability of consumers to meaningfully dispute errors and would reduce the incentive for furnishers to report accurate and correct information.

Simply put, the ACDV dispute process is broken. *Amicus* NCLC has documented the travesty that the ACDV dispute process has become in a

January 2009 report entitled *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports, available at* http://www.nclc.org/issues/credit_reporting/content/automated_injustice.pdf. In short, the credit reporting and credit industries have cooperatively created and implemented a perfunctory, mechanized process in which the entire "reinvestigation" activity of the CRAs is to take the sometimes detailed disputes written by consumers and convert them into two or three digit codes. The CRAs use the same five codes for over 80% of disputes:

Not his/hers	30.5%
Disputes present/previous Account Status/History	21.2%
Claims Inaccurate Information. Did not provide specific dispute	16.8%
Disputes amounts	8.8%
Claims account closed by consumer	7.0%
Total	84.3%

Automated Injustice at 15.

Furthermore, the CRAs limit the role of their employees and vendors to little more than selecting these two or three digit codes. *Id*. at 17-20. Most importantly, despite the requirement of section 1681i(a)(2) of the FCRA that the CRAs forward "all relevant information" to the furnisher, the CRAs refuse to send furnishers critical documents submitted by consumers, such as canceled checks or payoff statements. *Id*. at 25-28.

Such an automated system has been mutually implemented by CRAs and their customers, including large institutional creditors, such as MBNA and other credit card companies. This system unfortunately permits deliberate ignorance and plausible deniability by furnishers. In order to stand a fighting chance of having their dispute resolved, consumer groups such as *amici* advise consumers to send a copy of their dispute to the furnisher. *See Automated Justice* at 36. This precaution ensures that the furnisher actually receives a copy of critical documentation so it can meaningfully respond to the dispute. For example, a consumer who disputes that a reported outstanding balance is incorrect because the consumer paid off an account may enclose the earlier payoff letter as proof. If the consumer sends a dispute just to the CRA, the CRA will not include the payoff letter to the furnisher, and consequently, the furnisher may verify the debt. This situation is precisely what occurred in *Karmolinski v. Equifax Information Serv.*, 2007 WL 2492383 (D. Or. August 28, 2007). Thus, the advice of consumer groups is to send a duplicate copy of the dispute, with enclosures, to the furnisher.

The Panel citation to *Westra v. Credit Control of Pinellas*, 409 F.3d 825, 827 (7th Cir.2005), illustrates both the problem and the solution. It is precisely because of the facts in the *Westra* case that consumer groups

advise consumers to send a copy of their disputes to the furnishers, so that the furnisher has adequate basis on which to conduct its investigation. In *Westra*, the consumer lodged the dispute with only the CRA so that the furnisher did not have any additional information at its disposal to at least clarify what the Seventh Circuit concluded to be insufficient notice by the CRA.

A rule limiting furnisher investigations themselves to only the information in the "four corners" of the ACDV would absolve the furnisher of any liability for failure to consider or pay attention to this duplicate copy of the consumer's dispute, or any information beyond the ACDV (such as their own internal records or even a court judgment to the contrary, *see e.g*., *Betts v. Equifax Credit Information Services*, 245 F. Supp. 2d 1130 (W.D. Wa. 2003)). Furnishers could willfully turn a blind eye to such evidence without fear of being held accountable by the consumer.[1] Thus, while *amici* oppose MBNA's basis for rehearing, it urges clarification or reconsideration of this separate issue if a rehearing is granted.

[1] A duplicate copy might trigger a furnisher's duty to investigate under 15 U.S.C. § 1681s-2(a)(8). However, that duty is not enforceable by consumers, as the FCRA's private right of action does not apply. 15 U.S.C. § 1681s-2(c).

D. If Rehearing Is Granted, the Decision Should Clarify *Dicta* That Appears to Conflict with Other Court of Appeals' Decisions and District Court Cases regarding a CRA's Responsibility in an FCRA Reinvestigation.

Similarly, while *amici* oppose rehearing as proposed by MBNA, if a rehearing is granted, *amici* urge that the *dicta* be clarified regarding a CRA's responsibility in an investigation. The Panel's decision contains *dicta* that appears to conflict with decisions by other Courts of Appeal and by numerous district courts, including at least four within this Circuit, regarding a critical FCRA issue that was not briefed by either of the parties. Specifically, the Panel observed that "the CRA's 'reasonable reinvestigation' consists largely of triggering the investigation by the furnisher" and "the 'reasonable' qualifier attached to a CRA's duty to reinvestigate limits its obligations on account of its third-party status." *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d. at 1016-17.

This *dicta* contradicts numerous decisions holding that a CRA's duties extend beyond simply forwarding a dispute to a furnisher and accepting the results of the furnisher's reinvestigation. In other words, in a reinvestigation, a CRA may not simply "parrot" the response of a furnisher. *See, inter alia, Cushman v. Trans Union Corp*., 115 F.3d 220, 224, 225 (3d Cir. 1997) (rejecting argument that CRA need only consult furnisher in reinvestigation and "is never required to go beyond the original source in

ascertaining whether the information is accurate"; CRA may not "parrot" furnisher); *Stevenson v. TRW Inc*., 987 F.2d 288, 293 (5th Cir.1993) ("In a reinvestigation of the accuracy of credit reports, a credit bureau must bear some responsibility for evaluating the accuracy of information obtained from subscribers."); *Saenz v. Trans Union, LLC*, 2007 WL 2401745, *7 (D. Or. Aug. 15, 2007) (when CRA is on notice that information is suspect, "it is not reasonable for the [CRA] simply to verify the creditor's position without additional investigation"); *Lambert v. Beneficial Mortgage Corp*., 2007 WL 1309542 (W.D. Wash. May 4, 2007)(CRA cannot simply relay information from furnisher without more); *Cairns v. GMAC Mortgage Corp*., 2007 WL 735564 (D. Ariz. Mar. 5, 2007)(CRA bears responsibility for evaluating accuracy of information; mere parroting does not fulfill reinvestigation obligations, rejecting CRA's argument that it complied with reinvestigation obligations by contacting furnisher, without going beyond the original source of information); *White v. Trans Union*, 462 F. Supp.2d 1079 (C.D. Cal. 2006) (rejecting argument that confirmation of the accuracy of information from its original source is a reasonable inquiry as a matter of law). Additional cases rejecting the assertion that a CRA may merely rely on a furnisher's response to a reinvestigation, but has an independent duty, are cited in the main volume and 2008 supplement of National Consumer

Law Center, *Fair Credit Reporting* (6th ed. 2006), Chapter 4, at notes 580 and 593.

The Panel's remarks relied on the fact that section 1681i(a) requires a CRA to conduct a "reasonable" reinvestigation, while section 1681s-2(b) does not include that word. The Panel apparently believed, without briefing, that the use of the word "reasonable" indicated the CRA's duties were more limited than that of a furnisher. However, the word "reasonable" was added to modify "investigation" by the 2003 amendments to the FCRA, Pub. Law. 108-159, Title III, § 317 (Dec. 4, 2003), and simply codified prior judicial decisions that had already established that a CRA's investigation under the FCRA must be "reasonable." *Cahlin v. Gen. Motors Acceptance Corp*., 936 F.2d 1151, 1160 (11th Cir. 1991) (under § 1681i(a), CRA must "make reasonable efforts to investigate and correct inaccurate or incomplete information"); *Pinner v. Schmidt*, 805 F.2d 1258, 1262 (5th Cir. 1986) (noting that investigation was "unreasonable"). Further, the Panel's discussion of the CRA and furnisher investigation duties, at §1681i(a) and §1681s-2(b) respectively, considered a hierarchal interplay between the two sets of duties that could not have been intended in the statute. The CRA duties were enacted over thirty years ago, while the furnisher duties were only codified in 1996.

Furthermore, confining the CRA's duties in an FCRA reinvestigation to merely forwarding the dispute to the furnisher fails to take into account whether the CRA has reason to doubt the reliability or veracity of the furnisher. For example, the furnisher could be a debt collector who has every incentive to continue to report negative information to pressure the consumer into paying, even if the consumer has already paid or is the wrong consumer. The Panel's *dicta* also overlooks situations in which the CRA itself is responsible for errors, such as "mixed file" cases in which the CRA merges the credit records of two different individuals because of the CRA's overly inclusive matching algorithms. *See Automated Injustice* at 7-9.

The Panel's *dicta* could be applied to significantly alter the legal landscape regarding the long-recognized responsibilities of a CRA in a reinvestigation. Thus, while *amici* oppose rehearing, they urge clarification or reconsideration of this issue if a rehearing is granted.

CONCLUSION

For the foregoing reasons, *amici* urge that the Petition for Rehearing be denied.

Respectfully submitted,

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DATED: April 23, 2009

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief, exclusive of those materials referred to in FRAP 32, contains 3,929 words.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word. The typeface is Times New Roman 14 point.

/s/ Richard J. Rubin
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April 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2009, I electronically filed the foregoing with the Clerk of Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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