Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Case Study: MacPherson V. JPMorgan Chase

Law360, New York (January 10, 2012, 3:44 PM ET) -- The Second Circuit Court of Appeals recently confirmed that the Fair Credit Reporting Act preempts all state laws regarding the furnishing of information to a credit reporting agency. In MacPherson v. JPMorgan Chase Bank NA (2d Cir. 2011), Sean Stewart MacPherson claimed JP Morgan Chase willfully and maliciously provided false information about his finances to Equifax. Based on Chase's information, MacPherson claimed his credit score dropped by 66 points.

MacPherson sued Chase in the Superior Court, Judicial District of Danbury, Conn., for defamation and intentional infliction of emotional distress. He raised no federal or state statutory claims. Chase removed to federal court and moved to dismiss. The district held that plaintiff's tort claims were preempted and dismissed the case.

The Connecticut district court's decision noted the ongoing bewilderment about the 1996 amendments to the Fair Credit Reporting Act. That amendment added a preemption provision, which stated:

> No requirement or prohibition may be imposed under the laws of any State —
>
> (1) with respect to any subject matter regulated under — ...
>
> (F) section 1682s-2 of the title, relating to the responsibilities of persons who furnish information to consumer reporting agencies

15 U.S.C. § 1681t(b)(1)(F).

This provision seems clear enough, but when it is read in concert with this preemption section from the 1970 original legislation it caused confusion:

> "No consumer may bring any action or proceeding in the nature of defamation, evasion of privacy, or negligence with respect to the reporting of information against ... any person who furnishes information to consumer agency, ... except as to false information furnished with malice or willful intent to injure such customer." 15 U.S.C. § 1681h(e).

MacPherson maintained that the 1996 amendments preempted only state statutes and that § 1681h(e) continued to explicitly authorize certain state common-law claims.

On Dec. 23, 2011, the Second Circuit expressly rejected MacPherson's argument that 1681t(b) preempts only state statutes. The court ruled that MacPherson's basic premise is false: "The 1996 provision, § 1681(t)(b)(1)(F), is not in conflict with § 1681h(e), and § 1681h(e) does not insulate state tort actions from preemption." The court concluded that the phase "[n]o requirement or prohibition" in 1681t(b) "sweeps broadly and suggests no distinction between positive enactments and common law."

The court relied on the Seventh Circuit decision in Purcell v. Bank of America, 659 F.3d 622 (7th Cir. 2011) for the proposition that § 1681h(e) preempts some state claims that could arise out of reports to credit agencies and that the new statute simply preempts more of these claims.

In Purcell, the Seventh Circuit found it unnecessary to conclude that the new law repealed the old. The laws are not inconsistent. The court hypothesized that a law setting the speed limit in a national park at 60 miles per hour is not in conflict with a subsequent law saying don't drive over 55 mph. You can comply with both: Don't drive more than 55 mph in national parks. The new law does not repeal the first; it simply lowers the limit. Compliance with both is possible.

Moreover, the Seventh Circuit noted that for more than 70 years courts have held that federal statutes preempt common law to the same extent they preempt state statutory law. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) held that a reference to state "laws" comprises all sources of legal rules, including judicial opinion. Hence "[m] any modern decisions about preemption ... hold that a federal statute preempts state common law to the same extent as it preempts state statutory law."

Purcell and MacPherson should provide some much-needed clarity. After 1996, district courts had to determine how to make sense of these two preemption provisions. Did the amendment repeal the original rule on preemption? If so, why did Congress not expressly say so? Did the new statute apply only to claims made after a furnisher had been alerted to a problem with reporting. Was there significance in Congress' use of the word "laws" instead of "law?"

Nearly 15 years have passed since the FCRA amendment at issue, and only now are litigants getting some clarity about the provision.

District courts have adopted three analytical approaches to reconciling these two provisions.

The first approach — "total preemption" — holds that § 1681(t) preempts all state law claims, whether based on a statute or common law. The courts adopting this analysis have reasoned that "it is clear from the face of section 1681(t)(b)(1)(F) that Congress wanted to eliminate all state causes of action 'related to the responsibilities of persons who furnish information to consumer reporting agencies.' Any other interpretation would fly in the face of the plain meaning of the statute." See e.g., Jaramillo v. Experian Info. Solutions Inc., 155 F.Supp. 2d 356, 361–362 (E.D. Pa. 2001). In other words, 1681(t) implicitly repealed § 1681h(e).

The second approach — "statutory only" — attempts to harmonize the two statutes saying that state statutory claims are preempted while common-law claims are not. The advocates of this approach argue it is the only one that does not violate fundamental notions of statutory construction, does not lead to absurd results and does the most to harmonize the two preemption provisions.

Finally, some courts adopted a "temporal" approach, making the provision's application dependent on the timing of the conduct at issue. These courts reason that § 1681(t)(b)(1)(F) only covers the subject matter regulated under 1681s-2. Section 1681s-2 only applies to the reporting of information after a dispute is received.

Therefore any state law — whether based on a statute or common law — predicated on conduct occurring after notice that the information being furnished is false or contested is preempted. However, any reporting made before such notice is received is not covered by 1681s-2. Therefore 1681(t) cannot apply and the preemption provisions of 1681h(e) control. See e.g., Beuster v. Equifax Info. Serv., 435 F.Supp. 2d 471 (D. Md. 2006) (addressing each approach).

This temporal approach of course leads to the strange result that one who incorrectly reports is at less risk when it knows of a possible error than when it does not. Under this analysis, a person could bring a tort claim against one who had no notice that it was reporting incorrectly, but would be prevented from suing one who had notice of the incorrect information and acted with willful intent to injure the consumer.

While the Second and Seventh Circuit opinions only apply in their circuits, it seems likely that their analysis will greatly influence future courts to adopt the total preemption approach.

--By Michael C. Lueder, Foley & Lardner LLP

Michael Lueder is a partner with Foley & Lardner in the firm's Milwaukee, Wis., office and chairman of its consumer financial services litigation practice.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2012, Portfolio Media, Inc.