

No. 24A144

IN THE

Supreme Court of the United States

FRANK McKENNA

Petitioner

v.

DILLON TRANSPORTATION, LLC

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the application of 15 U.S.C. § 1681t(b)(1)(F) conflicts with the application of 15 U.S.C. § 1681h(e)?

Whether the circumstances and the furnisher to whom the consumer is mandated under 15 U.S.C. § 1681s-2(a)(7)(D) to give notice of any dispute of the accuracy of information are identified in 15 U.S.C. § 1681s-2(a)(7)(A)?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Frank McKenna is the sole plaintiff in the district court and the sole appellant in the court of appeals. Respondent Dillon Transportation LLC is the sole defendant in the district court and the sole appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Not filed by or on behalf of a nongovernmental corporation.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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The court of appeals opinion (Appendix 1a) in this case is reported at 97 F.4th 471.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 2, 2024. A petition for rehearing was denied on May 9, 2024. The due date under the 90-day period for filing the petition for a writ of certiorari was August 7, 2024. An application for an extension to September 6, 2024 was granted on August 5, 2024. The petition for a writ of certiorari was timely submitted to the Clerk on September 6, 2024. The Clerk thereafter made contact for a compliance filing. A request to the Clerk for the submission of a supplemental filing was made. No authority or case law for the subject matter of statutory interpretation in this case was presented in the trial court or appellate court. The search of context authority commences in 1968. The Clerk was advised when the authority for the supplement was reached. The Clerk's Rule 14.5 compliance letter, dated July 31, 2026, was submitted with a 60 day window for compliance. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

15 U.S.C. § 1681h (See Appendix – 8a)

15 U.S.C. § 1681t (See Appendix – 10a)

15 U.S.C. § 1681s-2 (See Appendix –14a)

STATEMENT OF THE CASE

This case presents issues under the Fair Credit Reporting Act of preemption by federal law of a state action for defamation and of statutory interpretations and applications of federal law under the Act.

Frank McKenna is a CDL(commercial drivers license)-licensed over-the- road driver and was employed by the carrier, Dillon Transportation, LLC, the owner of commercial semitrailer motor vehicles used on the public streets, roads, and highways of the United States. Dillon's principal office for managing the affairs of the company is located in the Middle District of Tennessee. Dillon maintained a service center for its vehicles at Kingman, Arizona for its operations in the western United States and also maintained an Ontario drop yard in the LA area for its loaded and sealed freight box semi-trailers ready for over-the-road deliveries in the U.S. The unloaded trailers were delivered to the shippers in the LA area by local CDL drivers and were sealed after the local drivers' supervision of the loading and the signing of the bill of lading by the shipper and the driver. The sealed loaded trailer was parked at the drop yard for pick-up by the assigned CDL over-the-road driver. The assigned driver was not permitted to unseal the loaded trailer. McKenna was assigned to pick-up a loaded sealed trailer under a bill of lading shipment to Nashville. The cargo consisted of containers grouped together in 14 pallets weighing a total of 41,677 pounds. During its transport to the drop yard, the cargo shifted and failed to pass a state weigh station. The senior CDL employee at the drop yard returned the loaded trailer to the shipper for reloading. The employee saw that there was no blocking, bracing or shoring to keep the cargo from shifting. The employee contacted Dillon at its principal office in Tennessee by cell phone for instructions and presented digital i-phone pictures in real time during Dillon's instructions for the securement. During the progression of the instructions, shown in real time, the cargo was tied to straps attached to the side walls of the box trailer. The employee was aware

that CMV operators are required by the Federal Motor Carrier Safety Administration to be knowledgeable of the principles and procedures for the proper handling of cargo, including the consequences of improperly secured cargo, the drivers' responsibilities, the principles and procedures for the proper handling of cargo, including the principles of weight distribution, and the principles of the methods of cargo securement. Dillon did not follow any of the cargo securement principles. The employee could not give assurance to Dillon that the cargo would not shift again. The employee sealed the semi-trailer and returned it to the drop yard for the scheduled pick-up by McKenna.

McKenna had no knowledge of Dillon's securement handling and was not advised of the securement problems. McKenna was a million mile operator with no preventable accidents. He commenced the operation of the sealed semi-truck trailer for the Nashville run. Approximately 50 miles from the drop yard, as he entered the access ramp to I-15, the cargo shifted and the trailer overturned. He was injured and after his recovery, McKenna was discharged. The accident and discharge were reported by Dillon to HireRight, a consumer reporting agency under the Fair Credit Reporting Act. McKenna obtained a copy of the HireRight report. The report contained in part inclusions of the following: *Eligible for Rehire: No; Reason for Leaving: Discharged; Work Record: Unsatisfactory Safety Record; DOT Recordable accident: 1; Date: 01/05/2017; DOT Recordable: Yes; City, State: Ontario, CA; Injuries: 1; Description: Overturn; No additional accident/incident information available.* McKenna was not responsible for the shifting cargo that caused the accident. Under the Federal Motor Carrier Safety Regulations, Dillon's actions in not securing the cargo pursuant to such Regulations resulted in a preventable accident by the carrier. (49 C.F.R. § 385) Consequently, Dillon was responsible for the accident. Under the Tennessee defamatory common law, the inclusions under Dillon's DAC report to HireWright of McKenna's

accident and discharge were libelous. Under the Tennessee common law, there is defamation by implication. Defamation by implication arises not from what is stated but from what is implied when a defendant juxtaposes a series of facts so as to imply a defamatory connection between them. Pate v. Serv. Merck. Co., 959 S.W.2d 569 (Tenn.Ct.App.1996) Dillon knew that the overturn was caused by shifting cargo that was not secured by DOT safety requirements but by Dillon's instructions. With malice and willful intent to injure McKenna's reputation in the cover-up of Dillon's breach of the DOT safety cargo securement requirements, Dillon intentionally prepared a report to HireRight falsely implying a preventable overturn by McKenna to the injury of his reputation and employment.

A state defamation action under the defamation laws of Tennessee was commenced by McKenna, an Arizona resident, under the diversity jurisdiction of 28 USC 1332 in the U.S. District Court for the Middle District of Tennessee, the District in which Dillon maintained its principal office. The deposition of the senior CDL driver at Dillon's Ontario drop yard is in the record and supports the hereinabove narrative. Dillon presented no opposing proof and maintained an affirmative defense of the mandatory requirement under 15 U.S.C.A. § 1681s-2(a)(8)(D) of the Fair Credit Reporting Act that any dispute by the consumer must first be given to the furnisher before the consumer can commence any legal action. All case law and authority filed by Dillon was with respect to consumer agencies in connection with credit transactions, not with respect to consumer agencies (*i.e.* HireRight) in connection with personnel in the trucking industry. In the instant case, no authority was presented with respect to consumer agencies or HireRight for employment purposes within the jurisdiction of the Secretary of Transportation for DAC reports in the trucking industry. 15 USCA § 1681b(a)(3)(B) The case was heard on Dillon's motion for summary judgment in open court upon Dillon's affirmative defense . The

District Court granted the motion based upon no authority in opposition to the Sixth Circuit's case of Scott v. First S. Nat'l Bank, 936 F.3d 509 (6th Cir. 2019) The authority in Scott was with respect to a credit consumer agency and held that 15 USCA § 1681t(b)(1)(F) and not 15 USCA § 1681h(e) preempted the state common law claims presented in §1681h(e). Scott acknowledged that the Circuits were not in agreement as to the relationship of §1681h(e) and § 1681t(b)(1)(F). Likewise, no authority was presented in this case before the Sixth Circuit with respect to employment consumer agencies and with respect to Dillon's affirmative defense of McKenna's failure to comply with the mandatory Section 1681s-2(a)(D) of the Fair Credit Reporting Act that any dispute by the consumer must first be given to the furnisher before the consumer can commence any legal action. This interpretation is contested. There is therefore a present need for this Court to determine the statutory interpretations and constructions, and related applications, of 15 USCA § 1681h(e), 15 USCA § 1681t(b)(1)(F) and 15 USCA § 1681s-2. (See **Appendix - Scott v. First S. Nat'l Bank, 936 F.3d 509 (6th Cir. 2019) – 27a**)

All of the foregoing is supported by Dillon's employee deposition and Dillon's response to discovery filed in the appellate record. In reliance on its affirmative defense under **15 U.S.C.A. § 1681s-2(a)(8)(D)**, Dillon presented no proof in opposition to the employee deposition.

FEDERAL JURISDICTION IN SIXTH CIRCUIT

This case was commenced in the U.S. District Court for the Middle District of Tennessee at Nashville under **28 U.S.C.A. § 1332. Diversity of citizenship.** Dillon's principal place of business is in the Middle District at Ashland City in Cheatham County, Tennessee. The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. McKenna is a citizen of Arizona.

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The following Circuits have recognized conflicts in the application of 15 U.S.C.A. § 1861t(b)(1)(F) and/or in the interpretation of subject matters and relative terms in the Fair Credit Reporting Act.

First Circuit – **Consumer Data Industry Association v. Frey**, 26 F.4th (2022)

Second Circuit – **Macpherson v. JPMorgan Chase Bank, N.A.**, 665 F.3d 45 (2011)

Fourth Circuit – **Ross v. F.D.I.C.**, 625 F.3d 808 (2010)

Seventh Circuit – **Purcell v. Bank of America**, 659 F.3d 622 (2011)

Ninth Circuit – **Gorman v. Wolpoff & Abramson, LLP**, 584 F.3d 1147 (2009)

In the Sixth Circuit referenced in this case, the conflicts have also been addressed in **Scott**. (See **Appendix - Scott v. First S. Nat'l Bank**, 936 F.3d 509 (6th Cir. 2019) – 27a)

These Circuits have entered in, or have acknowledged in other cases, decisions in conflict on the same important matters under the Fair Credit Reporting Act. Pursuant to Rule 10 of this Court, this is a compelling reason for this Court to grant Certiorari in this case in order to bring certainty in the enforcement of the Fair Credit Reporting Act.

ARGUMENT

The application of 15 U.S.C. § 1681t(b)(1)(F) does not conflict with the application of 15 U.S.C. § 1681h(e)

In the hearings before the trial and appellate judges, the first language addressed is 15 U.S.C.A. § 1681s-2(a)(1)(A)(D). This language is in response to the instruction of 15 U.S.C.A. § 1681t(b)(1)(F). The language for 15 U.S.C.A. § 1681s-2(a)(1)(A) is as follows:

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.*

In both hearings, the courts invoked the Menasche effect and looked no further than the above initial language noted, finding that the subject matter regulated thereby was not subject to state laws. As in this Court's 1955 case, United States v. Menasche, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 (1955), the Court of Appeals looked no further and ignored Congress' remaining language. When the excluded language is considered, the actual subject matter being regulated, not subject to state laws, is unintentional bona fide errors (Note: "completeness and errors" are not addressed but only "errors"). There is therefore no exclusion of state law which would conflict with 15 U.S.C. § 1681h(e).

The circumstances and the furnisher to whom the consumer is mandated under 15 U.S.C. § 1681s-2(a)(7)(D) to give notice of any dispute of the accuracy of information are identified in 15 U.S.C. § 1681s-2(a)(7)(A)

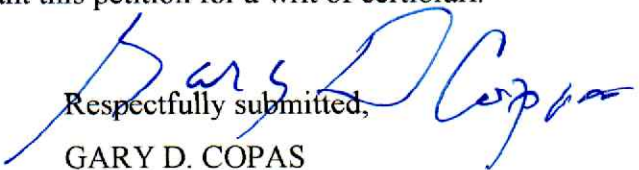
The theme of 15 U.S.C. § 1681s-2 is to expedite the correction of errors provided by furnishers. Under 15 U.S.C.A. § 1681s-2(a)(1)(A), as hereinabove provided, there is no prohibition under any state law for unintentional acts. As provided in 15 U.S.C. § 1681s-2(a)(7)(C), the circumstances under which, and to whom, a consumer is mandated to submit a

dispute is stated in 15 U.S.C. § 1681s-2(a)(7)(A). The correction is expedited in that the consumer is not required to submit the dispute to a consumer agency. Furthermore, 15 U.S.C. § 1681s-2(a)(7)(A) provides that the designated recipients will expedite the process. All of the foregoing are inconsistent with the affirmative defense of Dillon and, held by the trial and appellate courts, that the submission of a dispute to a consumer agency is mandatory. The submission is mandatory to the parties and under the circumstances stated in 15 U.S.C. § 1681s-2(a)(7)(A).

The foregoing responses to the QUESTIONS PRESENTED FOR REVIEW show that the trial and appellate courts were in error on issues which have not been uniformly ruled upon in the Circuits and that a writ of certiorari should issue and be heard.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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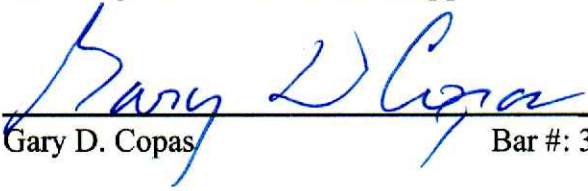
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CERTIFICATE OF SERVICE

I hereby certify that this Petition has been served upon the Respondent/Appellee by mailing a copy of the Petition *via* U.S. mail on the 1st day of October, 2026 addressed to:

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Attorneys for the Defendant/Appellee



Gary D. Copas Bar #: 322442

cc: Frank McKenna

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0073p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK MCKENNA,

Plaintiff-Appellant,

v.

DILLON TRANSPORTATION, LLC,

Defendant-Appellee.

No. 23-5568

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:22-cv-00129—Waverly D. Crenshaw, Jr., District Judge.

Argued: March 21, 2024

Decided and Filed: April 2, 2024

Before: GRIFFIN, THAPAR, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Gary D. Copas, Nashville, Tennessee, for Appellant. Jeffrey E. Cox, LAW OFFICE OF SEATON & HUSK, LP, Vienna, Virginia, for Appellee. **ON BRIEF:** Gary D. Copas, Nashville, Tennessee, for Appellant. Jeffrey E. Cox, Henry E. Seaton III, LAW OFFICE OF SEATON & HUSK, LP, Vienna, Virginia, for Appellee.

OPINION

NALBANDIAN, Circuit Judge. HireRight, LLC is a consumer reporting agency that collects information about truck drivers and then provides that information to employers who are thinking about hiring those drivers. Defendant Dillon Transportation, LLC gave HireRight a report about one of its former drivers, Plaintiff Frank McKenna. McKenna later sued Dillon for

defamation based on the report. On summary judgment, the district court found that the Fair Credit Reporting Act preempted McKenna's claim. The court also refused to defer its ruling to let McKenna obtain additional discovery. McKenna appeals, but finding no error, we AFFIRM.

I.

Dillon Transportation, LLC is a motor carrier. Dillon employed Frank McKenna as a truck driver. After McKenna's tractor trailer overturned around January 5, 2017, Dillon fired him in February 2017. Dillon later submitted a "DAC Report" about McKenna to a company called HireRight, LLC. R.22-4, Koharik Affidavit, p. 1, PageID 181.¹ Employers like Dillon subscribe to HireRight's services so they can use DAC Reports to perform background checks on driver applicants.

Dillon stated that McKenna had an unsatisfactory safety record and noted that he had been involved in an accident—information available to anyone who viewed HireRight's report. But according to HireRight's records, no motor carriers have requested McKenna's DAC report. McKenna himself admitted he could not show that any carrier had requested the report.

In February 2022, McKenna sued Dillon under state law for defamation and tortious interference with a business relationship. McKenna contends that, to the extent that the report implies that he was responsible for the January 2017 accident and had an unsafe driving record overall, it was defamatory and resulted in his inability to secure later employment. After some discovery, Dillon moved for summary judgment. Dillon argued that the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, preempted McKenna's claims.

McKenna responded that a Department of Transportation regulation, 49 C.F.R. § 391.23, applied instead and permitted his defamation claim. McKenna also moved to defer consideration of the motion under Federal Rule of Civil Procedure 56(d) so he could obtain documents about McKenna's accident that Dillon sent to its insurance carrier. In support, McKenna's attorney asserted that any communication to the insurer blaming McKenna for the accident "would be false and injurious to [McKenna's] reputation." R.32-1, Copas Decl., p. 5, PageID 544.

¹"DAC Report" apparently means "Drive-A-Check Report." Appellant Br. at 7.

The district court granted summary judgment, concluding that McKenna's claims were preempted by the Fair Credit Reporting Act. The district court also decided that more discovery was unnecessary because McKenna was not diligent, and the discovery sought "has no bearing and doesn't change the outcome on summary judgment." R.42, Tr., pp. 35–36, PageID 629–30.

II.

This case involves two issues: First, does the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, as amended, preempt McKenna's defamation claim?² Second, did the district court abuse its discretion in refusing McKenna additional discovery before summary judgment?

A.

We start with the Fair Credit Reporting Act (FCRA) and review the district court's grant of summary judgment *de novo*. *Cash-Darling v. Recycling Equip., Inc.*, 62 F.4th 969, 974–75 (6th Cir. 2023). The FCRA provides that 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." 15 U.S.C. § 1681s-2(a)(1)(A). In addition, it prohibits states from imposing a requirement or prohibition "with respect to any subject matter regulated under" § 1681s-2. 15 U.S.C. § 1681t(b)(1)(F).³ We have concluded that § 1681t(b)(1)(F) "preempts state common law claims involving a furnisher's reporting of information to consumer reporting agencies." *Scott v. First S. Nat'l Bank*, 936 F.3d 509, 519 (6th Cir. 2019).

This preemption clause applies here. The district court found that, under the FCRA, McKenna was a consumer, HireRight was a consumer reporting agency, and Dillon was "a furnisher or provider of information." R.42, Tr., p. 32, PageID 626. McKenna does not contest those findings on appeal. We agree that "consumer reporting agency" generally includes companies like HireRight that sell employment-history reports. *See* 15 U.S.C. § 1681a(d), (f); *Maiteki v. Marten Transp. Ltd.*, 828 F.3d 1272, 1273 (10th Cir. 2016) (calling HireRight a

²McKenna abandoned his tortious interference claim before the district court. And on appeal, he asks us to reverse summary judgment on only the defamation claim.

³15 U.S.C. § 1681t(b)(1)(F) provides two exceptions, but neither is relevant.

consumer reporting agency). So, on its face, § 1681t bars McKenna's defamation suit, since it preempts state causes of action based on providing information to HireRight.

McKenna points to a different source of law that he says authorizes his lawsuit. A federal regulation requires motor carriers to investigate a driver's "safety performance history with Department of Transportation regulated employers" when they hire that driver. 49 C.F.R. § 391.23(a)(2). Presumably to facilitate the flow of truthful information, the regulation generally preempts certain state-law claims against the motor carriers and the providers of the information that could arise out of the furnishing of those safety performance records. § 391.23(l). That preemption clause closely resembles the governing statute, 49 U.S.C. § 508, which provides:

Limitation on liability. No action or proceeding for defamation, invasion of privacy, or interference with a contract that is based on the furnishing or use of safety performance records in accordance with regulations issued by the Secretary may be brought against—

- (1) a motor carrier requesting the safety performance records of an individual under consideration for employment as a commercial motor vehicle driver as required by and in accordance with regulations issued by the Secretary;
- (2) a person who has complied with such a request; or
- (3) the agents or insurers of a person described in paragraph (1) or (2).

§ 508(a).⁴ But importantly, unlike the FCRA, § 508 does not exempt from suit those "who knowingly furnish false information." § 508(b)(3). Because his case involves a motor carrier, McKenna argues that his suit can be brought under this statute.

McKenna's argument runs into several problems. First, § 508(a) protects a person supplying safety performance records "of an individual under consideration for employment." No motor carriers requested McKenna's DAC report, so for purposes of the statute he may never

⁴49 C.F.R. § 391.23(l) was promulgated in response to the enactment of 49 U.S.C. § 508. See Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 4014, 112 Stat. 107, 410 (1998) (codified at 49 U.S.C. § 508); Safety Performance History of New Drivers, 68 FR 42339, 42350, 42359-60 (July 17, 2003) (supplemental notice of proposed rulemaking); Safety Performance History of New Drivers, 69 FR 16684, 16721 (March 30, 2004) (final rule, codified at 49 C.F.R. pts. 390-391). While McKenna looks primarily to the regulation, we focus on the statute, which has the same operative terms.

have been “under consideration.” Second, we are not confident that McKenna created a genuine issue of fact about whether Dillon acted “knowingly,” as opposed to negligently.⁵

But even if § 508 covers McKenna, that still leaves the FCRA preemption provision. McKenna responds that we should harmonize the two preemption statutes by giving priority to the more specific statute, essentially reading § 508 to create an exception to 15 U.S.C. § 1681t. Appellant Br. at 25–27. Granted, we’ve said, “Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” *United States v. Hunter*, 12 F.4th 555, 567 (6th Cir. 2021) (emphasis omitted) (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)). This general-specific canon applies to statutes with conflicting provisions and statutes with “a specific provision that is swallowed by [a] general one.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). So conflict between the relevant provisions is key.

And in this vein, the Supreme Court has cautioned that “repeals by implication are not favored.” *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (quoting *Morton*, 417 U.S. at 549). “Presented with two statutes, the Court will regard each as effective—unless Congress’ intention to repeal is clear and manifest, or the two laws are irreconcilable.” *Id.* (cleaned up). An implied repeal has occurred when “the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute.’” *Carciere v. Salazar*, 555 U.S. 379, 395 (2009) (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion)). But when statutes complement each other, because “each has its own scope and purpose,” courts should let them operate side-by-side. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014).

The two preemption statutes here complement each other, so they can coexist. 15 U.S.C. § 1681t stops states from regulating false reports to consumer reporting agencies, including agencies that provide background checks. 49 U.S.C. § 508 blocks specific causes of action against those who answer a motor carrier’s request for employment information. One regulates the consumer reporting industry. Another regulates the hiring of commercial drivers.

⁵We are not even certain that 49 U.S.C. § 508(a)(2) covers an employer who uses a third-party intermediary like HireRight. In that situation, who “comple[s] with” requests for records as they arise? The original source of the records (Dillon), the immediate source of the records (HireRight), or both?

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The statutes have different textual purposes and scopes, and neither swallows the other. Communications between motor carriers about driver applicants would only fall under § 508. And only 15 U.S.C. § 1681t would cover cases without a request for records or an individual under consideration for employment. That the FCRA is a more general law that covers more conduct than 49 U.S.C. § 508 doesn't change this. Greater specificity only matters if two complementary acts cannot be implemented at the same time. *POM Wonderful*, 573 U.S. at 118. And the statutes do not conflict—one simply provides more protection for companies in Dillon's position. So we give both statutes full effect rather than resorting to the specific-general canon. Dillon can invoke one preemption clause even if it cannot invoke the other.

McKenna makes several arguments to the contrary, but none are persuasive. He invokes the *in pari materia* canon. But even if we applied the canon and read the two statutes “as if they were one law,” *United States v. Soto*, 794 F.3d 635, 654 (6th Cir. 2015) (quoting *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006)), we would still give each provision its full effect. McKenna also appeals to the Secretary of Transportation's authority to enforce the FCRA. See 15 U.S.C. § 1681s(b)(1)(C). But the Secretary's authority, however great, cannot alter the plain meaning of 15 U.S.C. § 1681t. And McKenna's argument that the district court misunderstood 49 C.F.R. § 391.23 is ultimately irrelevant to our ruling. Because § 1681t preempts McKenna's claim, we need not decide whether the regulation also applies to him.

B.

McKenna argues that the district court should not have ruled on Dillon's summary judgment motion until Dillon produced documents that it sent to its insurance carrier about McKenna's accident. Appellant Br. at 27–28. We review a district court's ruling on a motion under Federal Rule of Civil Procedure 56(d) for abuse of discretion. *Doe v. City of Memphis*, 928 F.3d 481, 486 (6th Cir. 2019).

A party cannot oppose summary judgment by asking to develop a new claim that does not appear in the pleadings. Parties are not entitled to use discovery “to develop new claims or defenses that are not already identified in the pleadings.” Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2000 amendment; see also Wright & Miller, *Federal Practice & Procedure*

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§ 2008 (West 2023) (discussing the committee note). Nor can a plaintiff oppose summary judgment by asserting new claims. *Bridgeport Music, Inc. v. WM Music Corp.*, 508 F.3d 394, 400 (6th Cir. 2007). It follows that parties cannot postpone summary judgment by requesting supplemental discovery on a new claim. This fits our precedent that district courts can deny a Rule 56(d) motion that asks for irrelevant discovery. *See Doe*, 928 F.3d at 490.

The district court did not err in denying McKenna's motion. McKenna wanted documents that Dillon sent to its insurer. The problem is that McKenna's complaint alleged that Dillon defamed him to prospective employers. *See* R.1, Compl., pp. 6–7, PageID 6–7. It never mentioned Dillon's insurer. So the complaint provided no notice that McKenna's claims related to communications with the insurer. *See Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (stating that factual allegations in the complaint must give sufficient notice to the defendant). McKenna sought discovery on a new claim, and the district court rightly rejected that request.

III.

For all these reasons, we AFFIRM the grant of summary judgment.

15 U.S.C. § 1681h - Conditions and form of disclosure to consumers

(a) In general

(1) Proper identification

A consumer reporting agency shall require, as a condition of making the disclosures required under section 1681g of this title, that the consumer furnish proper identification.

(2) Disclosure in writing

Except as provided in subsection (b), the disclosures required to be made under section 1681g of this title shall be provided under that section in writing.

(b) Other forms of disclosure

(1) In general

If authorized by a consumer, a consumer reporting agency may make the disclosures required under 1681g of this title-

(A) other than in writing; and

(B) in such form as may be-

(i) specified by the consumer in accordance with paragraph (2); and

(ii) available from the agency.

(2) Form

A consumer may specify pursuant to paragraph (1) that disclosures under section 1681g of this title shall be made-

(A) in person, upon the appearance of the consumer at the place of business of the consumer reporting agency where disclosures are regularly provided, during normal business hours, and on reasonable notice;

(B) by telephone, if the consumer has made a written request for disclosure by telephone;

(C) by electronic means, if available from the agency; or

(D) by any other reasonable means that is available from the agency.

(c) Trained personnel

Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

(d) Persons accompanying consumer

The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

(e) Limitation of liability

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report² except as to false information furnished with malice or willful intent to injure such consumer.

(Pub. L. 90-321, title VI, §610, as added Pub. L. 91-508, title VI, §601, Oct. 26, 1970, 84 Stat. 1131; amended Pub. L. 104-208, div. A, title II, §2408(e)(1), (4), (5)(B), Sept. 30, 1996, 110 Stat. 3009-438, 3009-439.)

15 U.S.C. § 1681t - Relation to State laws

(a) In general

Except as provided in subsections (b) and (c), 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.

(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-

(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;

(B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(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;

(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);

(G) section 1681g(e) of this title, relating to information available to victims under section 1681g(e) of this title;

(H) section 1681s-3 of this title, relating to the exchange and use of information to make a solicitation for marketing purposes;

(I) section 1681m(h) of this title, relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;

(J) subsections (i) and (j) of section 1681c-1 of this title relating to security freezes; or

(K) subsection (k) of section 1681c-1 of this title, relating to credit monitoring for active duty military consumers, as defined in that subsection;

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996);

(3) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 1681g of this title, or subsection (f) of section 1681g of this title relating to the disclosure of credit scores for credit granting purposes, except that this paragraph-

(A) shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on December 4, 2003) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);

(B) shall not apply with respect to sections 5-3-106(2) and 212-14.3-104.3 of the Colorado Revised Statutes (as in effect on December 4, 2003); and

(C) shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance;

(4) with respect to the frequency of any disclosure under section 1681j(a) of this title, except that this paragraph shall not apply-

(A) with respect to section 12-14.3-105(1)(d) of the Colorado Revised Statutes (as in effect on December 4, 2003);

(B) with respect to section 10-1-393(29)(C) of the Georgia Code (as in effect on December 4, 2003);

(C) with respect to section 1316.2 of title 10 of the Maine Revised Statutes (as in effect on December 4, 2003);

(D) with respect to sections 14-1209(a)(1) and 14-1209(b)(1)(i) of the Commercial Law Article of the Code of Maryland (as in effect on December 4, 2003);

(E) with respect to section 59(d) and section 59(e) of chapter 93 of the General Laws of Massachusetts (as in effect on December 4, 2003);

(F) with respect to section 56:11-37.10(a)(1) of the New Jersey Revised Statutes (as in effect on December 4, 2003); or

(G) with respect to section 2480c(a)(1) of title 9 of the Vermont Statutes Annotated (as in effect on December 4, 2003); or

(5) with respect to the conduct required by the specific provisions of-

(A) section 1681c(g) of this title;

(B) section 1681c-1 of this title;

(C) section 1681c-2 of this title;

(D) section 1681g(a)(1)(A) of this title;

(E) section 1681j(a) of this title;

(F) subsections (e), (f), and (g) of section 1681m of this title;

(G) section 1681s(f) of this title;

(H) section 1681s-2(a)(6) of this title; or

(I) section 1681w of this title.

(c) "Firm offer of credit or insurance" defined

Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 1681a(l) of this title shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations

Subsections (b) and (c) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996.

(Pub. L. 90–321, title VI, § 625, formerly § 622, as added Pub. L. 91–508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1136; renumbered § 623, Pub. L. 102–537, § 2(a), Oct. 27, 1992, 106 Stat. 3531; renumbered § 624 and amended Pub. L. 104–208, div. A, title II, §§ 2413(a)(1), 2419, Sept. 30, 1996, 110 Stat. 3009–447, 3009–452; renumbered § 625 and amended Pub. L. 108–159, title I, § 151(a)(2), title II, §§ 212(e), 214(a)(1), (c)(2), title III, § 311(b), title VII, § 711, Dec. 4, 2003, 117 Stat. 1964, 1977, 1980, 1983, 1989, 2011; Pub. L. 115–174, title III, §§ 301(b), 302(d)(2), May 24, 2018, 132 Stat. 1332, 1335.)

§1681s-2. Responsibilities of furnishers of information to consumer reporting agencies

(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 has reasonable cause to believe 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.

(D) Definition

For purposes of subparagraph (A), the term "reasonable cause to believe that the information is inaccurate" means having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.

(E) Rehabilitation of private education loans

(i) In general

Notwithstanding any other provision of this section, a consumer may request a financial institution to remove from a consumer report a reported default regarding a private education loan, and such information shall not be considered inaccurate, if-

(I) the financial institution chooses to offer a loan rehabilitation program which includes, without limitation, a requirement of the consumer to make consecutive on-time monthly payments in a number that demonstrates, in the assessment of the financial institution offering the loan rehabilitation program, a renewed ability and willingness to repay the loan; and

(II) the requirements of the loan rehabilitation program described in subclause (I) are successfully met.

(ii) Banking agencies

(I) In general

If a financial institution is supervised by a Federal banking agency, the financial institution shall seek written approval concerning the terms and conditions of the loan rehabilitation program described in clause (i) from the appropriate Federal banking agency.

(II) Feedback

An appropriate Federal banking agency shall provide feedback to a financial institution within 120 days of a request for approval under subclause (I).

(iii) Limitation

(I) In general

A consumer may obtain the benefits available under this subsection with respect to rehabilitating a loan only 1 time per loan.

(II) Rule of construction

Nothing in this subparagraph may be construed to require a financial institution to offer a loan rehabilitation program or to remove any reported default from a consumer report as a consideration of a loan rehabilitation program, except as described in clause (i).

(iv) Definitions

For purposes of this subparagraph-

(I) the term "appropriate Federal banking agency" has the meaning given the term in section 1813 of title 12; and

(II) the term "private education loan" has the meaning given the term in section 1650(a) of this title.

(F) Reporting information during COVID-19 pandemic

(i) Definitions

In this subsection:

(I) Accommodation

The term "accommodation" includes an agreement to defer 1 or more payments, make a partial payment, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID-19) pandemic during the covered period.

(II) Covered period

The term "covered period" means the period beginning on January 31, 2020 and ending on the later of-

(aa) 120 days after March 27, 2020; or

(bb) 120 days after the date on which the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates.

(ii) Reporting

Except as provided in clause (iii), if a furnisher makes an accommodation with respect to 1 or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall-

(I) report the credit obligation or account as current; or

(II) if the credit obligation or account was delinquent before the accommodation-

(aa) maintain the delinquent status during the period in which the accommodation is in effect; and

(bb) if the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current.

(iii) Exception

Clause (ii) shall not apply with respect to a credit obligation or account of a consumer that has been charged-off.

(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) Duty to provide notice of delinquency of accounts

(A) In general

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 date of delinquency on the account, which shall be the month and year of the commencement of the delinquency on the account that immediately preceded the action.

(B) Rule of construction

For purposes of this paragraph only, and provided that the consumer does not dispute the information, a person that furnishes information on a delinquent account that is placed for collection, charged for profit or loss, or subjected to any similar action, complies with this paragraph, if-

(i) the person reports the same date of delinquency as that provided by the creditor to which the account was owed at the time at which the commencement of the delinquency occurred, if the creditor previously reported that date of delinquency to a consumer reporting agency;

(ii) the creditor did not previously report the date of delinquency to a consumer reporting agency, and the person establishes and follows reasonable procedures to obtain the date of delinquency from the creditor or another reliable source and reports that date to a consumer reporting agency as the date of delinquency; or

(iii) the creditor did not previously report the date of delinquency to a consumer reporting agency and the date of delinquency cannot be reasonably obtained as provided in clause (ii), the person establishes and follows reasonable procedures to ensure the date reported as the date of delinquency precedes the date on which the account is placed for collection, charged to profit or loss, or subjected to any similar action, and reports such date to the credit reporting agency.

(6) Duties of furnishers upon notice of identity theft-related information

(A) Reasonable procedures

A person that furnishes information to any consumer reporting agency shall have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency under section 1681c-2 of this title relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information.

(B) Information alleged to result from identity theft

If a consumer submits an identity theft report to a person who furnishes information to a consumer reporting agency at the address specified by that person for receiving such reports stating that information maintained by such person that purports to relate to the consumer resulted from identity theft, the person may not furnish such information that purports to relate to the consumer to any consumer reporting agency, unless the person subsequently knows or is informed by the consumer that the information is correct.

(7) Negative information

(A) Notice to consumer required

(i) In general

If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 1681a(p) of this title furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.

(ii) Notice effective for subsequent submissions

After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 1681a(p) of this title with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.

(B) Time of notice

(i) In general

The notice required under subparagraph (A) shall be provided to the customer prior to, or no later than 30 days after, furnishing the negative information to a consumer reporting agency described in section 1681a(p) of this title.

(ii) Coordination with new account disclosures

If the notice is provided to the customer prior to furnishing the negative information to a consumer reporting agency, the notice may not be included in the initial disclosures provided under section 1637(a) of this title.

(C) Coordination with other disclosures

The notice required under subparagraph (A)-

(i) may be included on or with any notice of default, any billing statement, or any other materials provided to the customer; and

(ii) must be clear and conspicuous.

(D) Model disclosure

(i) Duty of Bureau

The Bureau shall prescribe a brief model disclosure that a financial institution may use to comply with subparagraph (A), which shall not exceed 30 words.

(ii) Use of model not required

No provision of this paragraph may be construed to require a financial institution to use any such model form prescribed by the Bureau.

(iii) Compliance using model

A financial institution shall be deemed to be in compliance with subparagraph (A) if the financial institution uses any model form prescribed by the Bureau under this subparagraph, or the financial institution uses any such model form and rearranges its format.

(E) Use of notice without submitting negative information

No provision of this paragraph shall be construed as requiring a financial institution that has provided a customer with a notice described in subparagraph

(A) to furnish negative information about the customer to a consumer reporting agency.

(F) Safe harbor

A financial institution shall not be liable for failure to perform the duties required by this paragraph if, at the time of the failure, the financial institution maintained reasonable policies and procedures to comply with this paragraph or the financial institution reasonably believed that the institution is prohibited, by law, from contacting the consumer.

(G) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Negative information

The term "negative information" means information concerning a customer's delinquencies, late payments, insolvency, or any form of default.

(ii) Customer; financial institution

The terms "customer" and "financial institution" have the same meanings as in section 6809 of this title.

(8) Ability of consumer to dispute information directly with furnisher

(A) In general

The Bureau, in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration, shall prescribe regulations that shall identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer.

(B) Considerations

In prescribing regulations under subparagraph (A), the agencies shall weigh-

(i) the benefits to consumers with the costs on furnishers and the credit reporting system;

(ii) the impact on the overall accuracy and integrity of consumer reports of any such requirements;

(iii) whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of any such dispute; and

(iv) the potential impact on the credit reporting process if credit repair organizations, as defined in section 1679a(3) of this title, including entities that would be a credit repair organization, but for section 1679a(3)(B)(i) of this title, are able to circumvent the prohibition in subparagraph (G).

(C) Applicability

Subparagraphs (D) through (G) shall apply in any circumstance identified under the regulations promulgated under subparagraph (A).

(D) Submitting a notice of dispute

A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to such person at the address specified by the person for such notices that-

(i) identifies the specific information that is being disputed;

(ii) explains the basis for the dispute; and

(iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.

(E) Duty of person after receiving notice of dispute

After receiving a notice of dispute from a consumer pursuant to subparagraph (D), the person that provided the information in dispute to a consumer reporting agency shall-

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

(ii) review all relevant information provided by the consumer with the notice;

(iii) complete such person's investigation of the dispute and report the results of the investigation to the consumer before the expiration of the period under section 1681i(a)(1) of this title within which a consumer reporting agency would be

required to complete its action if the consumer had elected to dispute the information under that section; and

(iv) if the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the person furnished the inaccurate information of that determination and provide to the agency any correction to that information that is necessary to make the information provided by the person accurate.

(F) Frivolous or irrelevant dispute

(i) In general

This paragraph shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including-

(I) by reason of the failure of a consumer to provide sufficient information to investigate the disputed information; or

(II) the submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the person or through a consumer reporting agency under subsection (b), with respect to which the person has already performed the person's duties under this paragraph or subsection (b), as applicable.

(ii) Notice of determination

Upon making any determination under clause (i) that a dispute is frivolous or irrelevant, the person shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the person.

(iii) Contents of notice

A notice under clause (ii) shall include-

(I) the reasons for the determination under clause (i); and

(II) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(G) Exclusion of credit repair organizations

This paragraph shall not apply if the notice of the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in section 1679a(3) of this title, or an entity that would be a credit repair organization, but for section 1679a(3)(B)(i) of this title.

(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.

(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

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for

purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly-

- (i) modify that item of information;
- (ii) delete that item of information; or
- (iii) permanently block the reporting of that item of information.

(2) Deadline

A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 1681i(a)(1) of this title within which the consumer reporting agency is required to complete actions required by that section regarding that information.

(c) Limitation on liability

Except as provided in section 1681s(c)(1)(B) of this title, sections 1681n and 1681o of this title do not apply to any violation of-

- (1) subsection (a) of this section, including any regulations issued thereunder;
- (2) subsection (e) of this section, except that nothing in this paragraph shall limit, expand, or otherwise affect liability under section 1681n or 1681o of this title, as applicable, for violations of subsection (b) of this section; or
- (3) subsection (e) of section 1681m of this title.

(d) Limitation on enforcement

The provisions of law described in paragraphs (1) through (3) of subsection (c) (other than with respect to the exception described in paragraph (2) of subsection (c)) shall be enforced exclusively as provided under section 1681s of this title by the Federal agencies and officials and the State officials identified in section 1681s of this title.

(e) Accuracy guidelines and regulations required

(1) Guidelines

The Bureau shall, with respect to persons or entities that are subject to the enforcement authority of the Bureau under section 1681s of this title-

(A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and

(B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).

(2) Criteria

In developing the guidelines required by paragraph (1)(A), the Bureau shall-

(A) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

(B) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

(C) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to ensure the accuracy and integrity of information furnished to consumer reporting agencies; and

(D) examine the policies and processes that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.

(Pub. L. 90-321, title VI, §623, as added Pub. L. 104-208, div. A, title II, §2413(a)(2), Sept. 30, 1996, 110 Stat. 3009-447; amended Pub. L. 108-159, title I, §154(a), title II, §217(a), title III, §§312(a)-(e)(1), 314(b), title IV, §412(a), Dec. 4, 2003, 117 Stat. 1966, 1986, 1989-1993, 1995, 2002; Pub. L. 111-203, title X, §1088(a)(2)(D), (11), July 21, 2010, 124 Stat. 2087, 2090; Pub. L. 115-174, title VI, §602(a), May 24, 2018, 132 Stat. 1366; Pub. L. 116-136, div. A, title IV, §4021, Mar. 27, 2020, 134 Stat. 489 .)

Scott v. First S. Nat'l Bank

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No. 18-6130

08-29-2019

Michael L. SCOTT ; Linda A. Larkin, Plaintiffs-Appellants, v. FIRST SOUTHERN NATIONAL BANK,
Defendant-Appellee.

ARGUED: Richard A. Getty, THE GETTY LAW GROUP, PLLC, Lexington, Kentucky, for Appellants.
Robert C. "Coley" Stilz III, KINKEAD & STILZ, PLLC, Lexington, Kentucky, for Appellee. ON BRIEF:
Richard A. Getty, Danielle Harlan, THE GETTY LAW GROUP, PLLC, Lexington, Kentucky, for Appellants.
Robert C. "Coley" Stilz III, KINKEAD & STILZ, PLLC, Lexington, Kentucky, Stanton L. Cave, LAW
OFFICE OF STAN CAVE, Lexington, Kentucky, for Appellee.

CLAY, Circuit Judge.

ARGUED: Richard A. Getty, THE GETTY LAW GROUP, PLLC, Lexington, Kentucky, for Appellants.
Robert C. "Coley" Stilz III, KINKEAD & STILZ, PLLC, Lexington, Kentucky, for Appellee. ON BRIEF:
Richard A. Getty, Danielle Harlan, THE GETTY LAW GROUP, PLLC, Lexington, Kentucky, for Appellants.
Robert C. "Coley" Stilz III, KINKEAD & STILZ, PLLC, Lexington, Kentucky, Stanton L. Cave, LAW
OFFICE OF STAN CAVE, Lexington, Kentucky, for Appellee.

Before: CLAY, LARSEN, and READLER, Circuit Judges.

512 CLAY, Circuit Judge.*512 Plaintiffs Michael L. Scott and Linda A. Larkin filed a five count Complaint in state court against Defendant First Southern National Bank ("First Southern") after First Southern failed to extend additional loans to finance Plaintiffs' commercial renovation project. First Southern removed the action to federal district court, properly invoking federal question jurisdiction, *see* 28 U.S.C. §§ 1331 and 1441, for Plaintiffs' claims under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.*, and supplemental jurisdiction over Plaintiffs' related state common law claims, *see* 28 U.S.C. § 1367. After discovery, First Southern moved for summary judgment on all claims. In response, Plaintiffs filed a motion for partial summary judgment on their claim that First Southern breached its duty of good faith and fair dealing. The district court granted First Southern's motion for summary judgment, denied Plaintiffs' motion for partial summary judgment, and entered judgment in favor of First Southern. Plaintiffs filed this timely appeal.

For the reasons provided below, we **AFFIRM** the district court.

I. BACKGROUND

A. Factual History

Plaintiffs own two dental practices, several LLC's that own properties that Plaintiffs use to generate rental income, a sports bar, and an indoor basketball gymnasium that they also rent out as an event center. Around 2009, Scott began "buying property" that he "could rehab" because "it was a great time to buy ... especially in Cincinnati." (Scott Dep., ECF No. 66-2 at PageID #322.) To further his property-investment efforts, Scott obtained a \$300,000 commercial line of credit ("Credit Line") from First Southern.

Scott had previously taken out several loans from First Southern, including a home equity loan, a line of credit, and a construction loan. From his prior dealings with First Southern, Scott knew that First Southern went through a "process" before it "len[t] money or renew[ed] notes to approve people for loans." (*Id.* at 316.) Scott knew that this process entailed "collect[ing] ... financial information about the borrower" through "[p]ersonal financial statements" and "credit reports" and gathering "information about the collateral that's going to be pledged." (*Id.* at 317.) And Scott understood that First Southern evaluated this financial information before deciding whether to approve a borrower for a loan.

In June 2013, Scott sought a loan from First Southern to convert a vacant former hotel into 26 apartment units and two commercial spaces. To support his loan request, Scott provided First Southern with a total cost estimate of \$941,793.32 for the renovation. Scott submitted the cost estimate to Rocky Mason, the Community
513 President of First Southern's Lexington *513 branch who managed Plaintiffs' accounts at First Southern. Scott and Mason also communicated about the loan request via text message, discussing, among other things, the terms of the potential loan, the bank's appraisal of Scott's collateral, and the bank's valuation of the renovation project.

After First Southern received the cost estimates for the renovation project from Scott, First Southern followed its usual process for reviewing a request for a sizable loan. An analyst from First Southern evaluated Plaintiffs' financial statements, three years of Plaintiffs' tax returns, and Plaintiffs' credit report. The analyst compiled Plaintiffs' financial information into a "loan presentation" that was submitted to First Southern's Executive Loan Committee. After reviewing the loan presentation, the Executive Loan Committee approved Plaintiffs' loan request.

On July 23, 2013, Plaintiffs and First Southern executed a Commercial Loan Agreement through which First Southern extended Plaintiffs a commercial loan for the renovation project ("Construction Loan"). The Commercial Loan Agreement provided that the "maximum total principal balance" for the Construction Loan "will not exceed \$1,013,519.00." (Loan Agreement, ECF No. 66-11 at PageID #582.) The Commercial Loan Agreement, by its terms, represented "the complete and final expression of the understanding between" Plaintiffs and First Southern, provided that it could "not be amended or modified by oral agreement," and stated that "[n]o amendment or modification ... is effective unless made in writing and executed" by Plaintiffs and First Southern. (*Id.* at PageID #587.)

While the Commercial Loan Agreement did not contain any promise that First Southern would extend additional loans to Plaintiffs, Scott believed that First Southern would loan him any extra funds needed to complete the renovation. According to Scott, he and Mason had discussed the possibility of cost overruns before Plaintiffs and First Southern entered into the Commercial Loan Agreement; Mason understood that overruns were likely and told Scott that because of Scott's longstanding relationship with First Southern, Mason "d[id]n't see [Scott] having any problems" obtaining additional financing. (Scott Dep., ECF No. 66-2 at PageID #336.) Scott asserts that Mason "represented [that] the project was going to be finished." (*Id.* at PageID #345.) Scott states that he relied on Mason's assurances that Scott could obtain additional funding in deciding to finance the project through First Southern rather than through a different lending institution.

In early November 2013, Scott informed Mason via text message that Plaintiffs would likely need an additional \$400,000 to complete the renovation. Scott asked Mason to "let me know as soon as possible" if First Southern "cannot do" the additional loan because Scott could "get it from PNC" instead. (Text Messages, ECF No. 66-7 at PageID #533.) In response, Mason asked Scott to provide a "breakdown" for the additional \$400,000 Scott might request. (*Id.*) Scott stated that he would have the architect for the renovation project explain to Mason the reasons for requesting the additional funds.

On November 9, 2013 and November 27, 2013, the architect provided Mason with revised bids for certain individual components of the renovation. But the architect did not provide an updated estimate of the total cost to complete the project. On January 10, 2014, Mason emailed Scott, "[i]f you will need more funds, we will need to gather an estimate of what it will cost to complete soon." (ECF No. 77-14 at PageID #1195.) On 514 February 21, 2014, the architect provided First Southern with an updated cost estimate for the entire renovation project. The revised total estimated cost was \$1,654,648.65, i.e., approximately \$712,000 above the total cost for the project that Plaintiffs had represented in their loan application and approximately \$640,000 more than First Southern had loaned Plaintiffs.

The following week, Mason and Scott met in Cincinnati. Mason states that Scott requested that First Southern loan Plaintiffs an additional \$650,000; that Mason requested that Scott present additional collateral to support his new loan request; and that Scott refused to offer additional collateral. Scott states that Mason never asked that Scott provide additional collateral. Scott also asserts that additional collateral was not needed because he was already "overcollateralized" on his loans with First Southern. (Scott Dep, ECF No. 66-2 at PageID #358.) A few days after their meeting, Scott texted Mason to "try [his] best to get the whole amount" of the additional funds that Scott had requested. (ECF No. 66-7 at PageID #539.)

Mason initiated the process of reviewing Scott's new loan request. This process involved obtaining itemized cost breakdowns from the architect, assembling Plaintiffs' updated financial information, running new credit checks on Plaintiffs, and ultimately seeking approval of a new loan from First Southern's Executive Loan Committee. When compiling this updated information, an analyst from First Southern discovered that Plaintiffs had incurred additional debt in the period since First Southern had approved the Construction Loan and that Plaintiffs had failed to disclose this new debt to First Southern. After conducting an investigation, First Southern learned that Plaintiffs had obtained approximately \$600,000 in loans from United Bank to purchase and renovate a gymnasium.

After Mason learned about Plaintiffs' additional debt burden, Mason spoke with members of the Executive Loan Committee. According to John Ball, one of the members of the Executive Loan Committee, the Committee determined that the loans Scott had received from United Bank "increase[d] leverage and [Scott's] debt position." (Ball Dep., ECF No. 66-8 at PageID #562.) The Executive Loan Committee also believed that the renovation project had a "tremendous amount of [cost] overrun." (*Id.* at PageID #562.) For these reasons, the Executive Loan Committee "didn't feel like it was a safe and sound loan" and denied Scott's request for additional financing. (*Id.*) On March 31, 2014, Mason called Scott and informed him that First Southern had denied Scott's additional loan request.¹

¹ Later that day, Scott texted Mason, "[n]o hard feelings on the loan. Business is business. I like u as a person and we both know that is all that matters in life. Your daughter is more than welcome to come to the office anytime. Good people know good people. U and Shelia r good people. Thanks bro." (ECF No. 66-7 at PageID #540.)

Plaintiffs' Credit Line with First Southern was scheduled to mature on June 24, 2014. On June 17, 2014, First Southern notified Plaintiffs that because Plaintiffs' request to renew the Credit Line was still pending, First Southern would not require Plaintiffs to repay the balance of the Credit Line when it became due; instead, until First Southern rendered an ultimate determination about whether to renew the Credit Line, First Southern would only require that Plaintiffs continue to make interest payments.

515 Unlike in previous years, First Southern failed to extend the Credit Line's maturity date during this review period. Because First Southern's computer system still listed the maturity date for the Credit Line as *515 June 24, 2014, the computer system generated automated delinquency reports that it transmitted to the credit bureaus in July and August 2014, damaging Plaintiffs' credit score. First Southern admits that its computer system sent delinquency notices to the credit bureaus but asserts that these notices were proper because Plaintiffs were in fact delinquent; Plaintiffs had failed to pay off the loan balance by the maturity date or make the required interest payments in July and August 2014.

After First Southern denied his loan request, Scott applied for financing from United Bank. United Bank loaned Scott \$2,040,000. Using the financing he had received from United Bank, Scott completely payed off the Construction Loan and Credit Line with First Southern in early September 2014. Scott also used the loan from United Bank to complete the renovation project.

Even after Scott paid off his debts with First Southern, First Southern's automated computer system continued to report Scott's entire prior payment history, including the fact that he had previously been delinquent on his loans. In early October 2014, Scott discovered that First Southern had reported damaging information to the credit bureaus after Clarion Financial, which regularly provided Plaintiffs credit to purchase dental supplies, denied Plaintiffs' latest credit request because Plaintiffs' credit report showed that Plaintiffs had previously been delinquent on their loans with First Southern. After Scott contacted Mason, Mason checked the status of Scott's loans and reported to Scott that First Southern's system indicated that Scott was "current." (ECF No. 66-7 at PageID #548.) Mason texted Scott that "we will work to straighten [the situation] out immediately." (*Id.*) Scott asserts that he did not contact the credit bureaus to complain about the reporting error because Mason had assured him that First Southern would take care of the issue.

In October 2014, First Southern submitted amendments to the national credit reporting bureaus informing them that Plaintiffs had paid off their loans with First Southern and were no longer delinquent. Mason's assistant, Shelia Myers, emailed Scott and informed him that "Equifax acknowledged receipt of our requested change" to Plaintiffs' payment history. (Myers Email, ECF No. 77-32 at PageID #1242.) Myers also stated that she had recently spoken with First Southern's loan administrator and that he believed that Equifax's having confirmed receipt of the amendment "should suffice in knowing the error had been corrected" and that Scott should "NOT ... pull a credit report just to confirm the correction" because "each time a report is pulled, the credit score lowers a bit." (*Id.*)

In March 2015, Plaintiffs' lawyer sent First Southern a letter complaining about First Southern's "erroneous reporting" to the credit bureaus and the financial and reputational damage it caused Plaintiffs. The letter also alleged that First Southern deliberately provided the credit bureaus with false and damaging information about Plaintiffs' payment history in retaliation for Plaintiffs financing the basketball gymnasium project through United Bank. In June 2015, Plaintiffs' lawyer sent First Southern another letter that alleged continued harms to Plaintiffs because of First Southern's erroneous reporting. Both letters stated that Plaintiffs were suffering harms because of First Southern's past erroneous reporting. Neither letter alleged that First Southern continued to provide inaccurate information to the credit bureaus.

Despite First Southern's representation in October 2014 that the reporting issue had been remedied, the credit
 516 bureaus *516 continued to report the delinquency on Plaintiffs' credit report. In fact, First Southern had reported to TransUnion that Plaintiffs were delinquent in September, October, and November of 2014, even though Plaintiffs had paid off the entire balance of their loans in early September. On August 20, 2015, Plaintiffs' attorney sent First Southern a letter stating that Plaintiffs had received a credit report earlier that week that continued to show delinquencies from September, October, and November of 2014 based on Plaintiffs' previous accounts with First Southern. On September 11, 2015, First Southern submitted a second amendment to the national credit bureaus to correct the erroneous information that First Southern had previously provided stating that Plaintiffs were delinquent. First Southern's second amendment notice remedied the erroneous delinquency reports; during his deposition, Scott stated that any credit issue he had previously experienced because of First Southern's inaccurate reporting had been "resolved." (Scott Dep., ECF No. 66-2 at PageID #388.)

B. Procedural History

Plaintiffs filed a five-count Complaint, asserting that First Southern: violated the FCRA by willfully and/or negligently failing to fully and timely investigate Plaintiffs' complaints that First Southern had inaccurately reported Plaintiffs' payment history to the credit bureaus (Counts I and II); breached its duty of good faith and fair dealing and tortiously interfered with Plaintiffs' business relationships by deliberately reporting false information to the credit bureaus in retaliation for Plaintiffs' financing the gymnasium project through United Bank (Counts III and V); and made fraudulent misrepresentations that First Southern would loan Plaintiffs additional funds as necessary to complete the renovation (Count IV). First Southern moved for summary judgment on all of Plaintiffs' claims. Plaintiffs filed a cross-motion for partial summary judgment on their claim that First Southern breached its duty of good faith and fair dealing. The district court granted First Southern's motion for summary judgment, denied Plaintiffs' cross-motion for partial summary judgment, and entered judgment for First Southern. This timely appeal followed.

II. STANDARD OF REVIEW

"[T]his Court reviews a district court's grant of summary judgment *de novo*." *Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Dorn Sprinkler Co.*, 669 F.3d 790, 793 (6th Cir. 2012) (citing *Trs. of Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 247–48 (6th Cir. 2005)).

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Smith v. Perkins Bd. of Educ.*, 708 F.3d 821, 825 (6th Cir. 2013) (quoting *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 551 (6th Cir. 2002)). When evaluating a motion for summary judgment, the court must "view[] [the evidence] in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks omitted). Further, "all reasonable inferences must be made in favor of the non-moving party." *Moran v. Al Basit LLC*, 788 F.3d 201, 204 (6th Cir. 2015) (citing *Little Caesar Enters., Inc. v. OPPCO, LLC*, 219 F.3d 547, 551 (6th Cir. 2000)).
 517 The moving party bears the burden *517 of showing that no genuine issues of material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324–25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

III. DISCUSSION

A. FCRA Claims

Plaintiffs argue that the district court improperly granted First Southern summary judgment on Plaintiffs' FCRA claims. Plaintiffs concede that they "did not notify the credit bureaus of the false reports submitted to them by [First Southern]." (Pls.' Br. at 32.) But Plaintiffs maintain that they would have notified the credit bureaus but-for Mason's representation that First Southern would "take care" of the inaccurate reporting of Plaintiffs' payment history and Myers' recommendation that Plaintiffs not pull a credit report to confirm that the reporting error had been remedied. (*Id.* at 32–33.) Plaintiffs assert that the district court violated principles of justice and contravened the consumer-protection purposes of the FCRA by granting summary judgment to First Southern on Plaintiffs' FCRA claims. In response, First Southern argues that Plaintiffs failed to trigger First Southern's obligations under the FCRA because Plaintiffs never filed a dispute with a consumer reporting agency.

As explained below, the district court properly granted First Southern's motion for summary judgment on Plaintiffs' FCRA claims. Plaintiffs never notified a consumer reporting agency about their dispute, a prerequisite for prevailing on their FCRA claims.

1. Relevant Legal Principles

"Under the FCRA, those who furnish information to consumer reporting agencies have two obligations: (1) to provide accurate information; and (2) to undertake an investigation upon receipt of a notice of dispute regarding credit information that is furnished." *Downs v. Clayton Homes, Inc.*, 88 F. App'x 851, 853 (6th Cir. 2004); see 15 U.S.C. § 1681s–2. The FCRA "creates a private right of action" for consumers to enforce the requirement under § 1681s–2(b) that furnishers of information investigate upon receiving notice of a dispute, but not the requirement under § 1681s–2(a) that furnishers of information initially provide accurate information to consumer reporting agencies. *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 615 (6th Cir. 2012).

This Court has repeatedly held that consumers must file a dispute with a consumer reporting agency to trigger the furnisher's duty to investigate under § 1681s–2(b). See, e.g., *Merritt v. Experian*, 560 F. App'x 525, 528–29 (6th Cir. 2014) ("Furnishers of information to consumer reporting agencies do have certain responsibilities to investigate [under the FCRA]—but *only after* receiving a request from a consumer reporting agency to respond to a dispute.") (emphasis added); *Boggio*, 696 F.3d at 615–16 (holding that "consumers may step in to enforce their rights *only after* a furnisher has received proper notice of a dispute from a [credit reporting agency]") (emphasis added); *Brown v. Wal-Mart Stores, Inc.*, 507 F. App'x 543, 547 (6th Cir. 2012) ("A private cause of action against a furnisher of information does not arise until a consumer reporting agency provides proper notice of a dispute."); see also *Downs*, 88 F. App'x at 853–54 (explaining that to implicate § 1681s–2(b)'s duty that a furnisher of information conduct an investigation "the plaintiff must show that the furnisher received notice from a consumer reporting agency.").

518 A consumer's complaining directly to a furnisher of information about a purported *518 error in the information the furnisher supplied to a consumer reporting agency does not trigger the furnisher's duty to investigate under the FCRA. See, e.g., *Brown*, 507 F. App'x at 547 ("Directly contacting the furnisher of credit information does not actuate the furnisher's obligation to investigate a complaint.") (citing *Nelson v. Chase Manhattan Mortg. Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002)); *Downs*, 88 F. App'x at 853–54 (explaining that "the plaintiff must show that the furnisher received notice from a consumer reporting agency, not the plaintiff, that the credit information is disputed").

2. Application to the Matter at Hand

The district court correctly granted summary judgment to First Southern on Plaintiffs' FCRA claims. Because Plaintiffs never filed a dispute with a consumer reporting agency, First Southern's duty to investigate under § 1681s-2(b) was never activated. *See, e.g., Merritt*, 560 F. App'x at 528-29; *Boggio*, 696 F.3d at 615-16; *Brown*, 507 F. App'x at 547; *Downs*, 88 F. App'x at 853-54. Plaintiffs' notifying First Southern directly about the errors in the information that First Southern had furnished to the consumer reporting agencies failed to trigger First Southern's duty to investigate. *See, e.g., Brown*, 507 F. App'x at 547 (citing *Nelson*, 282 F.3d at 1060); *Downs*, 88 F. App'x at 853-54. Therefore, the district court properly granted summary judgment in favor of First Southern on Plaintiffs' FCRA claims.

Plaintiffs do not assert any legal arguments for why the district court erred by dismissing their FCRA claims. Rather, Plaintiffs rely exclusively on a policy argument. Plaintiffs contend that by dismissing their FCRA claims despite Mason's representation that First Southern would remedy the problem with Plaintiffs' payment history and Myers' admonition that Plaintiffs' not generate a credit report to confirm that the problem had been remedied, the district court allowed First Southern to "have its cake and eat it too," in contravention of the pro-consumer purposes of the FCRA. (Pls.' Br. at 33.) Plaintiffs fail to appreciate that the FCRA protects both consumers and furnishers. For instance, this Court has explained that while the FCRA "provides consumers with a private remedy against negligent or willful misconduct by a furnisher ... it simultaneously protects furnishers from answering frivolous consumer disputes." *Boggio*, 696 F.3d at 616; *see also Nelson*, 282 F.3d at 1060 (describing the FCRA's reporting requirement as "a filtering mechanism" that protects furnishers of information from frivolous consumer complaints). One way that the FCRA protects furnishers is by requiring that a consumer file a dispute with a consumer reporting agency, and that the consumer reporting agency screen the complaint and provide notice of the dispute to a furnisher if warranted, before the consumer may assert a private right of action against the furnisher. *See Boggio*, 696 F.3d at 614-16. Accordingly, Plaintiffs' argument

is unpersuasive.² *519 **3. Summary**

² Plaintiffs' most promising avenue to attempt to avoid application of the FCRA's notice requirement may have been through the doctrine of equitable estoppel. This Circuit has held that equitable estoppel can bar a defendant from raising an affirmative defense, *see E.E.O.C. v. Kentucky State Police Dep't*, 80 F.3d 1086, 1095 (6th Cir. 1996), and, in some instances, from contesting an element of a plaintiff's claim, *see Thomas v. Miller*, 489 F.3d 293, 302 (6th Cir. 2007). This Circuit has never decided whether equitable estoppel could prevent a defendant from asserting that a plaintiff failed to satisfy the FCRA's notice requirement.

Because Plaintiffs never raised an equitable estoppel argument, we do not decide at present whether, in appropriate circumstances and if properly raised, a furnisher of consumer credit information could be equitably estopped from arguing that the plaintiff failed to file a dispute with a consumer reporting agency.

We find that the district court properly granted summary judgment in favor of First Southern on Plaintiffs' FCRA claims.

B. Claims for Breach of the Duty of Good Faith and Fair Dealing and Tortious Interference with Contractual Relationships

Plaintiffs assert that the district court erroneously held that the FCRA preempts state common law claims. Plaintiffs further assert that the district court improperly dismissed Plaintiffs' claims for breach of the duty of good faith and fair dealing and tortious interference with contractual relationships because First Southern deliberately harmed Plaintiffs' credit score by not extending the maturity date on the LOC and by allowing its computer system to send false delinquency notices to the credit bureaus. In response, First Southern argues that the district court correctly held that the FCRA preempts state common law claims that concern a furnisher's

transmission of information to consumer reporting agencies. First Southern asserts that because Plaintiffs' claims arise from First Southern's reporting obligations, the district court properly dismissed Plaintiffs' claims as preempted by the FCRA.

As explained below, the district court correctly concluded that the FCRA preempts state common law claims involving a furnisher's reporting of information to consumer reporting agencies. Further, the district court correctly found that the FCRA preempts Plaintiffs' claims of breach of the duty of good faith and fair dealing and tortious interference with contractual relationships because these claims relate to First Southern's reporting obligations.

1. Relevant Legal Principles

The FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State ... with respect to any subject matter regulated under ... section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies[.]" 15 U.S.C. § 1681t(b)(1)(F). This Court has held that the FCRA preempts state common law claims. *Ellen Sparks v. Countrywide Homes Loans, Inc., et al.*, No. 15-6330, slip op. at 3 (6th Cir. Sep. 2, 2016) (per curiam) (holding that the FCRA preempted the plaintiff's common law negligence claim arising from the defendants' furnishing of information to credit reporting agencies); *see also Lloyd v. Midland Funding, LLC*, 639 F. App'x 301, 307 (6th Cir. 2016) (explaining that the FCRA would preempt plaintiffs' common law claims if said claims "rel[ie]d on the proposition that [the defendant] was a furnisher of information" under the FCRA). The other Courts of Appeals that have addressed whether the FCRA preempts state common law claims have also answered the question in the affirmative. *See, e.g., Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 47–48 (2d Cir. 2011); *Purcell v. Bank of Am.*, 659 F.3d 622, 625–26 (7th Cir. 2011).

2. Application to the Matter at Hand

The district court correctly held that the FCRA preempts Plaintiffs' common law claims of breach of the duty of good faith and fair dealing and tortious interference with contractual relationships. Plaintiffs' common law
520 claims arise from First Southern's reporting incorrect information to the credit bureaus. Because these common law claims concern the same "subject matter regulated under ... section 1681s-2 of [the FCRA]," *see* § 1681t(b)(1)(F), they are preempted by the FCRA. *See Sparks*, No. 15-6330, slip op. at 3; *Macpherson*, 665 F.3d at 47–48; *Purcell*, 659 F.3d at 625–26; *see also Lloyd*, 639 F. App'x at 307. The fact that Plaintiffs' claims arise under state common law, rather than state statutory law, does not save them from preemption.

Plaintiffs rely on a district court case from the Western District of Kentucky to argue that the FCRA preempts only state statutory claims. *See Miller v. Wells Fargo & Co.*, No. 3:05-CV-42-S, 2008 WL 793676, at *8 (W.D. Ky. Mar. 24, 2008). The district court in *Miller* perceived a "tension" between § 1681t(b)(1)(F) and § 1681h(e), the FCRA's two preemption provisions, because § 1681h(e) "preempts state law claims for defamation, invasion of privacy, and negligence, to the extent that the plaintiff cannot prove the defendant acted with malice or willful intent to injure" while § 1681t(b)(1)(F), enacted twenty-six years later, "prohibits *all* state claims against furnishers." *Id.* at *7 (emphasis added). The *Miller* court believed that reconciling this tension required adopting what some district courts have referred to as the "statutory approach," that is, holding that the FCRA preempts state statutory claims but not state common law claims. *Id.* at *10.

While a handful of district courts have followed the "statutory approach," the two Courts of Appeals that have addressed the issue both explicitly rejected the "statutory approach" and held that the FCRA preempts state common law claims. In *Purcell*, 659 F.3d 622, the Seventh Circuit explained why § 1681t(b)(1)(F) and § 1681h(e) are not in conflict,

Unlike these judges, we do not perceive any inconsistency between the two statutes. Section 1681h(e) preempts some state claims that could arise out of reports to credit agencies; § 1681t(b)(1)(F) preempts more of these claims. Section 1681h(e) does not create a right to recover for wilfully false reports; it just says that a particular paragraph does not preempt claims of that stripe. Section 1681h(e) was enacted in 1970. Twenty-six years later, in 1996, Congress added § 1681t(b)(1)(F) to the United States Code. The same legislation also added § 1681s-2. The extra federal remedy in § 1681s-2 was accompanied by extra preemption in § 1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges. Reading the earlier statute, § 1681h(e), to defeat the later-enacted system in § 1681s-2 and § 1681t(b)(1)(F), would contradict fundamental norms of statutory interpretation.

Our point is not that § 1681t(b)(1)(F) repeals § 1681h(e) by implication. It is that the statutes are compatible: the first-enacted statute preempts some state regulation of reports to credit agencies, and the second-enacted statute preempts more. There is no more conflict between these laws than there would be between a 1970 statute setting a speed limit of 60 for all roads in national parks and a 1996 statute setting a speed limit of 55. It is easy to comply with both: don't drive more than 55 miles per hour. Just as the later statute lowers the speed limit without repealing the first (which means that, if the second statute should be repealed, the speed limit would rise to 60 rather than vanishing), so § 1681t(b)(1)(F) reduces the scope of state regulation without repealing any other law. This understanding does not vitiate the final words of § 1681h(e), because there are exceptions

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to § 1681t(b)(1)(F). When it drops out, § 1681h(e) remains. But, even if our understanding creates some surplusage, courts must do what is essential if the more recent enactment is to operate as designed.

Purcell, 659 F.3d at 625. In a decision issued shortly after *Purcell*, the Second Circuit followed the Seventh Circuit's conclusion that "§ 1681h(e) is compatible with § 1681t(b)(1)(F)" and held that state common law claims "are preempted by the plain language of § 1681t(b)(1)(F)." *Macpherson*, 665 F.3d at 48 (explaining that "the operative language in § 1681h(e) provides only that the provision does not preempt a certain narrow class of state law claims; it does not prevent the later-enacted § 1681t(b)(1)(F) from accomplishing a more broadly-sweeping preemption.")

We follow the prior decisions from this Circuit and the other Courts of Appeals that have decided the issue and hold that the FCRA preempts both state statutory and state common law claims. As the Second Circuit held in *Macpherson*, the plain language of § 1681t(b)(1)(F) preempts all state "laws" without distinguishing between state statutory law and state common law. See *Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 285 (6th Cir. 2010) ("When we can discern an unambiguous and plain meaning from the language of a statute, our task is at an end.") (quoting *Bartlik v. U.S. Dep't of Labor*, 62 F.3d 163, 166 (6th Cir. 1995) (internal quotation marks omitted)). Based on its plain language, § 1681t(b)(1)(F) preempts state common law claims.³

³ Plaintiffs do not develop a textual argument that the word "laws" in § 1681t(b)(1)(F) refers only to state statutory laws as opposed to state common law. But the Seventh Circuit persuasively rejected this argument in *Purcell*, holding that the word "laws" in § 1681t(b)(1)(F) applies to "all sources of legal rules" including "judicial decisions." 659 F.3d at 624 (citing *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106–07 (2d Cir. 2009)).

Like the Seventh Circuit in *Purcell* and the Second Circuit in *Macpherson*, we conclude that the FCRA's preemption provisions are not in conflict. Congress implemented § 1681h(e) as part of the first iteration of the FCRA. When Congress amended the FCRA in 1996, Congress decided to impose additional duties on furnishers (as codified in § 1681s-2) and, as part of the modified statutory scheme, also decided to preempt additional state law claims (through § 1681t(b)(1)(F)). There is nothing remarkable about Congress changing the scope of federal preemption of state law when it refines a previously-enacted statutory scheme. *See, e.g., Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 520, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (describing the preemption provision in the Public Health Cigarette Smoking Act of 1969 ("PHCSA") as "much broader" than the preemption provision in the 1965 version of the PHCSA). Further, as the Seventh Circuit explained in *Purcell*, "courts do not read old statutes to defeat the operation of newer ones." *Purcell*, 659 F.3d at 626. But accepting Plaintiffs' argument that the FCRA's original preemption provision, § 1681h(e), preserved state law claims governed by the plain language of the later-enacted preemption provision, § 1681t(b)(1)(F), "would defeat the 1996 decision [by Congress] that administrative action rather than litigation is the right way to deal with false reports to credit agencies." *Id.*

The Supreme Court's decision in *Cipollone* further diminishes Plaintiffs' argument that this Court should adopt the "statutory approach" to the scope of preemption under the FCRA. In *Cipollone*, *522 the Supreme Court held that by precluding "requirement[s] or prohibition[s] ... imposed under State law," the PHCSA preempted state common law actions. 505 U.S. at 522-24, 112 S.Ct. 2608. The relevant language in § 1681t(b)(1)(F) is nearly analogous to the language from the PHCSA at issue in *Cipollone*. And, like the PHCSA's preemption provision, § 1681t(b)(1)(F) preempts state common law claims.

3. Summary

The FCRA preempts state common law causes of action concerning a furnisher's reporting of consumer credit information to consumer reporting agencies. Plaintiffs' claims for breach of the duty of good faith and fair dealing and tortious interference with contractual relationships concern First Southern's reporting of Plaintiffs' credit information to consumer reporting agencies. Therefore, the district court correctly concluded that the FCRA preempts Plaintiffs' claims for breach of the duty of good faith and fair dealing and tortious interference with contractual relationships.

C. Fraudulent Misrepresentation Claim

As an initial matter, we note that the FCRA does not preempt Plaintiffs' fraudulent misrepresentation claim. Plaintiffs assert that First Southern fraudulently represented to Plaintiffs that First Southern would loan additional funds to Plaintiffs as necessary to complete the renovation. Because Plaintiffs' fraudulent misrepresentation claim does not arise from First Southern's reporting obligations as a furnisher of consumer credit information, the FCRA does not preempt this claim. *See* § 1681t(b)(1)(F).

As explained below, Plaintiffs forfeited this issue on appeal because they failed to discuss the district court's reasoning for granting First Southern's motion for summary judgment on their fraudulent misrepresentation claim.

1. Relevant Legal Principles

In this Circuit, an appellant forfeits an argument that he fails to raise in his opening brief. *See, e.g., In re Isaacs*, 895 F.3d 904, 917 (6th Cir. 2018) (citing *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 462 (6th Cir. 2003)). Further, "where a plaintiff fails to address the district court's reasoning in disposing of a claim on summary judgment or motion to dismiss, we have deemed the claim forfeited." *Rees v. W.M. Barr & Co., Inc.*,

736 F. App'x 119, 124–25 (6th Cir. 2018) (collecting cases); *see also* *Grosswiler v. Freudenberg-Nok Sealing Techs.*, 642 F. App'x 596, 599 (6th Cir. 2016) (holding that plaintiffs abandoned their claim on appeal because they did not "challenge or even mention" one of the district court's bases for granting summary judgment).

2. Application to the Matter at Hand

Plaintiffs have forfeited their appeal of the district court's dismissal of their fraudulent misrepresentation claim. The district court held that Plaintiffs' fraudulent misrepresentation claim was barred by Kentucky's statute of frauds, K.R.S. § 371.010. Because the district court dismissed the claim under Kentucky's statute of frauds, it did not reach the merits of Plaintiffs' fraudulent misrepresentation claim. However, in their briefing before this Court, Plaintiffs do not address the district court's reasoning. Instead of arguing that the district court erred by finding that Kentucky's statute of frauds barred their fraudulent misrepresentation claim, Plaintiffs argue exclusively that the district court improperly dismissed this claim on the merits. Because Plaintiffs have failed
523 to provide any argumentation concerning *523 the district court's reasoning for dismissing their fraudulent misrepresentation claim, Plaintiffs have forfeited any challenge to the district court's disposition of this claim. *See, e.g.*, *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005); *Rees*, 736 F. App'x at 124.

IV. CONCLUSION

For the above-stated reasons, we **AFFIRM** the district court.

