DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

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ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

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SUBJECT: Credit Reporting Limitations by State Law

REQUESTED BY: Senator Dan C. Lynch
District 13

WRITTEN BY: Robert M. Spire, Attorney General
Lisa D. Martin-Price, Assistant Attorney General

QUESTION: 1. Whether a state is precluded from enacting legislation limiting the information that a credit reporting agency may release regarding an individual who has filed for bankruptcy by virtue of federal legislation in this area?

CONCLUSION: 1. No. Our analysis of 15 U.S.C.A. §1681t indicates that a state may enact its own legislation regarding credit reporting.

QUESTION: 2. If so, whether federal statutes preclude a state from legislatively setting a shorter time frame within which an individual's bankruptcy history may be reported?

CONCLUSION: 2. Yes. The federal statutes prohibit a state from setting a shorter time frame. Although there is little case law on this issue, the legislative history of this Act indicates that Congress intended there to be a set time period of 10 years, after which a credit reporting agency may not report an individual's bankruptcy history. Therefore, our analysis of the legislative history and case law indicates that a lesser time period would violate the federal Act.

Congress has enacted federal statutes which regulate credit reporting agencies. Specifically, 15 U.S.C.A. §1681t provides in part that a credit reporting agency is prohibited from disclosing information regarding an individual's bankruptcy beyond ten years. However, as to whether or not a state may legislate in this area, 15 U.S.C.A. §1681t expressly provides:

> 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, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(Emphasis added.) Clearly, states are not preempted from enacting legislation in this area by the federal Act (supremacy clause of Article VI of the United States Constitution).

Section 1681t is a manifestation of the Congressional intent to leave some regulatory power to the states in this area. As to how much power the states have, the key question relates to whether a provision in a state act prohibiting disclosure of information concerning a bankruptcy to under 10 years is inconsistent with the provision of the federal Act limiting disclosure to 10 years. Because there is little case law dealing with this provision, its language is difficult to interpret.

Looking at the "inconsistency" language in Section 1681t as a whole, "to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency" (emphasis added), it suggests that Congress intended that any state legislation in this area should closely resemble the federal Act. In other words, if a provision in a state act is inconsistent with the federal Act, that portion which is inconsistent will be stricken. Thus, the state act may not vary greatly or significantly from the federal Act or it will not be upheld. Keeping this in mind, we will discuss the pertinent legislative history of the Act.

The Congressional legislative history discloses that the overall purpose of the federal Act is:

> The new title attempts to balance the need by those who extend credit, insurance, or employment to know the facts necessary to make a sound decision, and the consumer's right to know of adverse information being disseminated about him, and the right to correct any erroneous information so disseminated. The requirements of the legislation permit the free flow of information about a consumer, while providing the consumer at the same time the ability to rectify any errors causing his unwarranted difficulties.

116 Cong.Rec. 36572 (1970) (emphasis added). From this language, it is clear that Congress intended to protect both consumers and creditors, etc., and not just consumers. Therefore, any state laws which require additional duties in favor of consumers are not necessarily "consistent" with the federal Act.

The issue of whether a state law is inconsistent with the federal Act has appeared in few cases. However, standards for preemption and for defining when an inconsistency exists between state and federal law were promulgated by Mr. Justice Marshall in Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). One standard, as Justice Marshall outlined it, is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress." The other standard is whether or not it would be possible to comply with the state act without triggering a federal enforcement action on the ground that the state act is inconsistent with federal law. 430 U.S. at 540-41, 97 S.Ct. at 1317.

To determine whether or not an enforcement action would ensue, we must examine whether the proposed state legislation is consistent with the purposes and objectives of Congress in enacting a 10-year time period. As discussed previously, the congressional intent was clearly to balance consumers' and creditors' interests and protections. Each group must be treated fairly. The language of Section 1681c very clearly states:

> (a) Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:
>
> (1) Cases under Title II or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years (emphasis added).

Thus, it appears that Congress intended to provide a set guideline of 10 years. This interpretation is supported by the following language from the congressional record when the Federal Fair Credit Reporting Act was amended.

> Section 312 of the House Amendment contains a technical amendment in light of amendments made to the Consumer Credit Protection Act and represents a compromise between the House bill and Senate amendment in permitting a bankruptcy to antedate a

> credit report by not more than 10 years in lieu of the 14 years contained in present law, and 7 years contained in the House bill (emphasis added).

Clearly, although a lesser time period was proposed by the House bill, a compromise of 10 years was reached in the Senate amendment. The rationale behind this compromise is, more than likely, a reflection of the congressional intent to balance the protections afforded to consumers and creditors.

It is now necessary to turn to the second standard outlined by Justice Marshall, whether or not it would be possible to comply with the state act without triggering a federal enforcement action. It appears that, considering the statutory language and congressional intent, because a state provision lessening the time frame after which a person's bankruptcy history may be reported is contrary to the purposes and objectives of Congress in enacting a 10 year period, a federal enforcement action would ensue. It would be illogical to assume that it would not violate the federal Act, since there is clear language showing that a lesser time frame was considered and rejected when the Fair Credit Reporting Act was amended in 1978.

Sincerely,

ROBERT M. SPIRE
Attorney General

Lisa D. Martin-Price
Lisa D. Martin-Price
Assistant Attorney General

LMP:cw

Approved:

Robert M. Spire
Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature