

It's Not About Federalism #12: Financial Privacy

To paraphrase Ronald Reagan, “There they go again.” In INAF #11, we detailed efforts by federal regulators and financial institutions to preempt state and local predatory lending laws. A similar cast of characters is now trying to do the same thing to state laws that prevent identity theft and protect the privacy of financial information.

The Fair Credit Reporting Act (“FCRA”) has been around since 1970, but when new provisions were added in 1996, Congress acceded to industry requests and temporarily preempted stronger state laws to allow financial institutions to adjust to the new federal regime. That temporary preemption expires on January 1, 2004, and industry groups are lobbying Congress furiously (and, it appears, successfully) to make the preemption permanent.

The Partnership to Protect Consumer Credit (“PPCC”), an industry group, says that “[l]ocal privacy laws only work when local privacy issues are being addressed (e.g., peeping toms, school records, etc.)” The Bush Administration agrees. Secretary of the Treasury John Snow testified: “We want the sunset removed. We think it would be really devastating if the business community couldn’t plan on the preemption staying in place.”

On the other side are consumer advocates like Consumer Union, U.S. PIRG, and the Consumer Federation of America, as well as privacy advocates like the Electronic Privacy Information Center. The National Association of [State] Attorneys General also opposes renewing preemption, urging Congress to set “a national floor” and permit states “to fashion consumer protection laws uniquely suited to their circumstances.” Privacy advocate Evan Hendricks told a Federalist Society panel last October that preemption would be acceptable if more meaningful privacy standards were put into FCRA itself: “If there is a good national law, the need for state law withers away. The states are not sitting around looking to get into the privacy field.”

The House overwhelmingly passed a bill that would make FCRA’s preemption permanent. Senate Banking Committee Chairman Richard Shelby (R-AL) has introduced a similar bill, although Senators Barbara Boxer and Dianne Feinstein (both D-CA) have written to Shelby urging him either to remove the preemption provision, to “grandfather” California’s recently enacted law, or to raise the federal privacy standards to be nearly as stringent as California’s (six other states have also adopted laws that are tougher than FCRA in anticipation of the expiration of the preemption provision). PPCC claims that California’s law, which prohibits financial institutions from sharing credit information with affiliates without consumers’ express consent, would “limit access to credit for millions of Californians, particularly among traditionally underserved populations.”

The bill is expected to emerge from committee with the preemption intact, though Boxer, Feinstein, and others may attempt to amend it on the Senate floor. The Center for Responsive Politics, a campaign finance reform group, notes that members of the PPCC and the Financial Services Coordinating Council, another industry organization, have given Shelby more than \$171,000 in the 2004 election cycle (Shelby is up for re-election

next year). Other members of the committee, Democrat and Republican, have received more than \$300,000 from the same sources.

We don't have the expertise to know whether consumers will be better off with federal preemption, as the PPCC claims, or without it, as all of the consumer advocacy groups contend (though we have our suspicions). But once again, ostensibly pro-states' rights conservatives are standing up for federal power, even when the states' attorneys general have asked them not to.

But we shouldn't judge them too harshly. Industry can be very persuasive. Among the 10 or more lobbyists hired by financial services companies and business groups to lobby specifically on FCRA is G. Stewart Hall, Shelby's former legislative director. After leaving Shelby's staff, Hall set up a lobbying firm, which he decided to call the Federalist Group—and if the Federalist Group says it's OK to override the sovereign states, who are we to argue?

It's not about federalism; it's about putting lenders ahead of borrowers

On the Internet:

PPPC's website: <http://www.protectconsumercredit.org>

The resolution of the National Association of Attorneys General:
<http://www.pirg.org/consumer/credit/resolution1.pdf>

The Electronic Privacy Information Center's FCRA analysis:
<http://www.epic.org/privacy/fcra>

The Consumer Federation of America's FCRA page, with links:
<http://www.consumerfed.org/backpage/creporting.html>

The Center for Responsive Politics' page on industry contributions to Banking Committee members: <http://www.capitaleye.org/inside.asp?ID=104>

Transcript of panel discussion on FCRA at the Federalist Society's 4th annual Financial Services Conference on Oct. 11, 2002: <http://www.fed-soc.org/Publications/Transcripts/finserv2.pdf>