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Email: TBennigson@publicgoodlaw.org

March 4, 2009

Hon. Ronald M. George
Chief Justice of California
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102

RE: Support of Petition for Review
Liceaga v. Debt Recovery Solutions, LLC, S170308
Court of Appeal Case No. A120277, Reported at 169 Cal.App.4th 901

To the Chief Justice and Associate Justices:

Public Good writes to support Rebecca Liceaga's petition for review of a published opinion of the court of appeal, *Liceaga v. Debt Recovery Solutions*, *LLC* (Dec. 29, 2008) 169 Cal. App. 4th 901, Case No. A120277.

The First District held that the federal Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 et seq.) preempts California's private right of action against persons who knowingly or negligently furnish inaccurate credit information in violation of section 1785.25(a) of the California Civil Code. Less than a month later the Second District reached the opposite conclusion on precisely the same issue, holding that the private right of action is not preempted. (*Sanai v. Saltz* (Jan. 26, 2009) 170 Cal.App.4th 746, modified and rehearing denied (Feb. 18, 2009) 2009 Cal.App. LEXIS 177.)

This untenable split in the courts of appeal urgently requires this Court's resolution. The question whether the private right of action survives preemption potentially affects tens of thousands of suppliers of credit information, and millions of California consumers.

INTEREST OF AMICUS CURIAE

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through amicus participation in cases of particular significance for consumer protection and civil rights, Public Good seeks to ensure that the protections of the law remain available to all.

The right of access to the courts that lies at the heart of this case exemplifies the rights that Public Good seeks to defend. Incorrect credit reporting can make it difficult or impossible for the victim to purchase a home, insurance, and basic services, and can even threaten her livelihood. Loss of the right to hold furnishers of credit information who violate the law accountable would severely impair the ability of California consumers to seek redress for these harms. In addition, the State as a whole would lose an important tool for deterring the wrongdoing that leads to these harms – at a time when credit is scarce even for those without major inaccuracies on their credit reports. As the present case shows, without the threat of legal action, furnishers of credit information have little incentive to responsibly investigate claims of identity theft and other sources of serious reporting error.

DISCUSSION

"The first and basic ground" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 915, p. 976) for granting review in this Court is "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rule of Court 8.500(b)(1).)

The necessity "to secure harmony and uniformity in the decisions" of the courts of appeal is perhaps the foremost factor for this Court to consider in deciding whether to grant review. (*People v. Davis*, 147 Cal. 346, 348 (1905).) This "primary ground for review" arises from the Court's core "institutional" function (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2008) ¶ 13:8), and consistently informs its selection of cases. (See, e.g., *Peralta Community College Dist. v. Fair Employment & Housing Commn.* (1990) 52 Cal.3d 40, 44 ["[b]ecause there is a conflict among the Courts of Appeal …, we granted review to secure uniformity of decision"]; *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 407 [because "the Court of Appeal refused to follow [an earlier Court of Appeal decision], we granted review to secure uniformity of decision"].)

Whether review "will help settle important questions of law" is likewise a factor that the Court "ordinarily consider[s] in deciding whether to grant review of a decision of a California Court of Appeal." (*Ventura Group Ventures v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1094; see also *California ex rel. State Lands Commn. v. Superior Court* (1995) 11 Cal.4th 50, 62 [accepting review in order to decide "important legal issue of statewide importance"; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114-115 ["[r]ecognizing … this court's role in the judicial system … to settle important questions of law"].)

The present case represents a paradigmatic example of both lack of uniformity of decision and importance of the legal question at stake.

I. THIS COURT SHOULD INTERVENE TO RESOLVE AN UNAMBIGUOUS SPLIT OF AUTHORITY.

The parties agree that there now exists a clear split of authority among the courts of appeal on a significant point of law. (See Petition for Review, at pp. 4-5; Response to Petition for Review, at pp. 13-14.) That agreement alone underscores the propriety of review in this Court.

The disputed issue concerns the availability of private remedies for violations of a provision of California's Consumer Credit Reporting Agencies Act (CCRAA) (§ 1785.1 et seq.) regulating those who furnish information to consumer credit reporting agencies. That provision imposes a duty not to supply information that is known or should be known to be inaccurate. (Civ. Code § 1785.25(a).) A later section of the same chapter establishes a private right of action for consumers to seek damages and injunctive relief for violations of the CCRAA. (Civ. Code, § 1785.31.) The question calling for this Court's resolution concerns whether those private remedies are preempted by the federal Fair Credit Reporting Act.

The relevant provisions of the FCRA are as follows. The Act states a general presumption against preemption, except to the extent that state laws are inconsistent with the FCRA. (21 U.S.C., § 1681t(a).) It then lists exceptions to this presumption, specifying various areas covered under the statute concerning which "[n]o requirement or prohibition may be imposed under the laws of any State." (§ 1681t(b).) One of those areas is "the responsibilities of persons who furnish information to consumer reporting agencies." (§ 1681t(b)(1)(F).) However, the FCRA goes on to exempt two specific state law sections from this preemption of state law requirements or prohibitions affecting furnishers of consumer information. One of those is section 1725(a) of the California Civil Code. (21 U.S.C §1681t(b)(1)(F)(ii).)

The question presented to the Court is whether the foregoing implies that the enforcement provisions of section 1785.31 are preempted as applied to section 1785.25(a).

A. Split Between California Courts of Appeal.

The court of appeal in this case held, on two principal grounds, that the private enforcement provisions are preempted. The first ground was that language in the FCRA explicitly exempting section 1785.25(a) from preemption implied that all other sections of the CCRAA are preempted. (169 Cal.App.4th at pp. 908-909.) The second ground was that allowing private enforcement of the CCRAA under section 1785.31 would lead to inconsistencies between the California and federal statutes, and the federal statute states that inconsistent state provisions are preempted. (*Id.* at pp. 909-910.)

Less than a month later, the Second District Court of Appeal concluded that section 1785.31 is *not* preempted. The court in *Sanai v. Saltz* ((2009) 170 Cal.App.4th 746) reasoned that section 1681t(b) preempts only "requirement[s] or prohibition[s]" imposed by state law. Because section 1785.31 imposes no requirements or prohibitions, but only a remedy for a violation of requirements imposed by other sections, it was not touched by the general preemption language of section 1681t(b), and so there was no need for the statute to state an exemption for section 1785.31. (*Id*. at 777.) Moreover, the *Sanai* court noted, it is implausible that Congress would have specifically exempted section 1785.25(a) from preemption for little or no purpose, as would be the case if the only plausible threat of enforcement in most cases—the private right of action—were made unavailable. (*Id.* at 778.)

B. Split Between State and Federal Courts in California.

Not only are the two recent Court of Appeal decisions squarely at odds concerning this crucial question of law, but there is now a conflict between the decision below and federal law governing California as well. The Ninth Circuit recently concluded that the enforcement provisions of section 1785.31 are *not* preempted as applied to the substantive provisions of section 1785.25(a). (*Gorman v. Wolpoff & Abramson, LLP* (9th Cir., Jan. 12, 2009) --- F.3d ---, 2009 U.S. App. LEXIS 585, at pp. *67-*68).) The Ninth Circuit's opinion overruled not only the district court decision in *Gorman* ((N.D. Cal. 2005) 370 F.Supp.2d 1005) but also those in *Lin v. Universal Card Servs. Corp.* (N.D. Cal. 2002) 238 F.Supp.2d 1147 and *Roybal v. Equifax* (E.D. Cal. 2005) 405 F.Supp.2d 1177. Those district court opinions were the precedents that the court of appeal here relied on to find that private enforcement of section 1785.25(a) was preempted. (169 Cal.App.4th at p. 909.)

The Ninth Circuit reasoned that "the likely purpose of the express exclusion [of section 1785.25(a) from preemption] was precisely to permit private enforcement of these provisions." (*Gorman*, *supra*, 2009 U.S. App. LEXIS 585 at p. *68.) Indeed, if private enforcement were preempted, so would be any California law authorizing enforcement of section 1785.25(a) by state officials, since the FCRA contains no explicit exemption for those provisions either. The court found it "an unlikely result at best" that Congress would have gone out of its way to preserve section 1785.25(a) while stripping away all possible enforcement of that provision. (*Id.* at p. *61.) The court also emphasized that section 1785.31 imposes no "requirement or prohibition," and therefore did not need to be explicitly exempted from preemption. (*Id.* at pp. *62-*63.)

C. Split Between Federal Circuits.

Federal courts likewise lack of uniformity of decision about how to apply the preemption clauses of the FCRA. Along with section 1785.25(a), the FCRA explicitly exempts one substantive section of Massachusetts law from the general preemption of state-imposed requirements or prohibitions pertaining to furnishers of consumer information. (15 U.S.C. § 1681t(b)(1)(F)(i).) As with California law, the FCRA does not mention the section of the Massachusetts law that provides for private enforcement.

Contrary to the Ninth Circuit's conclusion in *Gorman*, district courts in the First Circuit have held that private enforcement mechanisms of the exempted section *are* preempted. In one such case the decision was affirmed by the First Circuit, albeit without opinion. (*Gibbs v. SLM Corp.* (D.Mass. 2004) 336 F.Supp.2d 1, affd. mem. (1st Cir. 2005) 2005 U.S. App. LEXIS 29462.) The district court in *Gibbs* concluded, "Where, as here, the FCRA does not exempt the state law provision expressly authorizing a private cause of action, such private causes of action remain preempted." (336 F.2d at p. 13; see also *Leet v. Cellco Partnership* (D. Mass. 2007) 480 F.Supp.2d 422, 433 ["While the FCRA expressly exempts [Mass. Gen. Laws ch. 93,] § 54A(a) from its preemptive reach, it includes no such exemption for § 54A(g)—the provision that creates a private cause of action for violations of § 54A(a). In the Court's view, the absence of express language exempting § 54A(g) from the FCRA's preemption provision is fatal"]; *Islam v. Option One Mortgage Corp.* (D. Mass. 2006) 432 F. Supp. 2d 181, 187 [noting "the apparent

disparity between Congress expressly excepting from preemption that portion of the Massachusetts statute creating a duty and nevertheless not excepting the portion creating liability," but going on to find the liability portion preempted, based in part on the First Circuit's affirmance of *Gibbs*].)

In sum, with respect to the question whether the FCRA preempts private enforcement under state law of duties exempted from preemption by the FCRA, there is currently a split of authority between two California courts of appeal, a split of authority between the decision below and federal law applying to California, and a split of authority between federal courts in the Ninth and First Circuits. Uniformity of decision could not be more lacking.

II. THE COURT SHOULD ACT TO RESOLVE AN IMPORTANT QUESTION OF LAW.

The importance of clarifying enforcement mechanisms for proper credit reporting was underscored by the California legislature in the CCRAA itself: "Consumer credit reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." (Civ. Code § 1785.1(b).) Consequently, "[t]here is a need to insure that consumer credit reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." (§ 1785.1(c).) Eliminating enforcement of the standards set by the CCRAA would frustrate the legislature's intent "to regulate consumer credit reporting agencies … in a manner which will best protect the interests of the people of the State of California." (§ 1785.1(e).)

Resolution of the disputed issue is important to all constituencies involved. The state has an interest in the existence of deterrents to the furnishing of inaccurate credit information. Consumers need legal recourse if they are harmed by inaccurate adverse credit reports resulting from carelessness by information furnishers, from contract disputes, or from outright fraud. Furnishers of credit information need to know what liability they may be exposed to. And credit reporting agencies need to know how much credence to give the credit information they receive. Finally, legislators require an accurate picture of the standards and enforcement mechanisms that are currently in place, so that they may determine whether to expand, supplement or pare back those mechanisms.

Published credit information has an enormous impact on consumers' lives. Not only do credit reports and credit ratings affect families' ability to make large purchases, but credit reports are also regularly relied on by employers, landlords, utilities, and insurers. (National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports* (Jan. 2009) at p. 3 <http://www.consumerlaw.org> (as of Mar. 2, 2009).) "It is no exaggeration to say that a credit history can make or break a consumer's finances." (*Ibid.*; see also Consumer Fedn. of America, *Credit Score Accuracy and Implications for Consumers* (Dec. 17, 2002) at pp. 2-3 <http://www.consumerfed.org/pdfs/121702CFA_NCRA_Credit_Score_Report_Final.pdf> (as of Mar. 2, 2009).

As the present case illustrates, consumers can suffer from adverse credit reporting inaccuracies through no fault of their own. The plaintiff here was a victim of straightforward identity theft, resulting in debts incurred in her name. Those debts were eventually turned over to a collection agency. Although Ms. Liceaga repeatedly informed the collection agency that the debts were not hers, the agency continually harassed her, and reported the debts to credit reporting agencies without noting that they were disputed. As a result, her credit score was significantly damaged. (*Liceaga v. Debt Recovery Solutions, LLC*, 2007 LEXIS CA App. Ct. Briefs 20277, at pp. *5-*6.)

Ms. Liceaga's situation is far from unique. The Federal Trade Commission recently reported that identity theft remains the subject of more consumer complaints than any other topic. (Federal Trade Commission, *Consumer Sentinel Network Data Book for January-December 2008* (Feb. 2009) <http://www.ftc.gov/opa/2009/02/2008cmpts.shtm> (as of Mar. 2, 2009) at p. 3.) In California, more than 100,000 cases of identity theft were reported in 2008 alone. (*Id.* at p. 14.)

Moreover, harmful errors in reporting credit information are by no means limited to cases of identity theft. Errors in credit reports also frequently arise when furnishers of credit information misreport payment history or current payment status, because payments were misapplied, data was incorrectly entered, or the creditor failed to comply with industry reporting standards. (National Consumer Law Center, *Automated Injustice*, *supra*, at p. 10.) Still other errors arise when disputed debts are reported without recording the dispute, or when one person is held accountable for debts incurred by another. (*Id.*) Debt collectors also frequently deliberately misrepresent dates of delinquency, in order to report obsolete debts. (*Id.* at pp. 11-12.)

The cumulative rate of error is disturbingly large. A 2004 survey of consumers in 30 states found that 79% of credit reports surveyed contained errors, with 25% containing mistakes serious enough to result in the denial of credit. (Nat. Assn. of State PIRGs, *Mistakes Do Happen: A Look At Errors in Consumer Credit Reports* (June 2004) <http://www.uspirg.org/home/reports/report-archives/financial-privacy-security> (as of Mar. 2, 2009) at pp. 11, 13.) A 2000 survey found that more than 50% of credit reports contained inaccuracies significant enough to result in denial or higher cost of credit. (Consumer Reports, *Credit Reports: How Do Potential Lenders See You?* (July 2000) <http://www.accessmylibrary.com/coms2/summary_0286-28070197_ITM> (as of Mar. 2, 2009) at pp. 52-53.)

Credit reporting errors can prove difficult—if not impossible—to correct when furnishers of credit information ignore the requirements of the CCRAA and FCRA, as they often do. (See National Consumer Law Center, *Automated Injustice*, *supra* [profiling numerous consumers frustrated in their efforts to correct serious errors in their credit reports].) One Virginia man was driven to suicide by his inability to purchase a house, a situation which arose only because he could not clear his credit report of delinquent debts incurred by another man with the same name. (*Id.* at p. 3.) According to an attorney specializing in credit reporting litigation who contributed to the National Consumer Law Center study, "The examples in this report are just the tip of the iceberg…. I see hundreds of consumers with similar problems every year." (Leonard Bennett,

quoted in National Consumer Law Center, *New Report Reveals Industry-Wide Failures in Handling Errors in Credit Reports* (press release) (Jan. 24, 2009) <http://www.consumerlaw.org> (as of Mar. 2, 2009).)

Credit bureaus have no background economic incentive to investigate complaints. The complaining consumers are not the bureaus' customers; in fact, vigorous investigation is likely to drive away the creditors who *are* the bureaus' paying customers. (National Consumer Law Center, *Automated Injustice*, *supra*, at pp. 2, 30-32.) Consequently, both credit bureaus and furnishers of information have been found to conduct at best cursory investigations in response to complaints, reducing consumers' letters of complaint to 2- or 3-digit codes automatically entered into computerized systems, with fact-checking reduced either to confirming alleged debts with the creditor who furnished the incorrect information in the first place, or to comparing the bureaus' data with the very document whose correctness is being disputed. Investigators do not otherwise review documents or contact consumers; indeed, "investigations" are often outsourced to overseas workers unfamiliar with United States (and California) credit law. (*Id.* at pp. 2, 20-29, 31-33.)

The only apparent incentive for furnishers of credit information and the credit bureaus themselves to seriously investigate disputed credit information is the threat of liability through a private action brought under state law. For violations of the federal Fair Credit Reporting Act, the prospect of occasional federal lawsuits appears insufficient to outweigh the economic incentives to minimize investigation. (National Consumer Law Center, *Automated Injustice*, *supra*, at p. 30.) As a matter of history and scarce resources, California's public prosecutors—the lone remaining attorneys authorized to sue under the CCRAA, according to the court below (169 Cal.App.4th at p. 910)—are no more likely than their federal counterparts to bring suit against credit information furnishers or credit bureaus for failing to comply with their legal obligations. Indeed, the unlikelihood of public enforcement in California can be gauged from the state Attorney General's website, which after advising anyone with an individual consumer complaint to "pursue remedies in your private dispute on your own" (http://ag.ca.gov/consumers/general.php> (as of Mar. 2, 2009)) ultimately directs consumers with complaints about credit ratings to the Federal Trade Commission. (<http://www.dca.ca.gov/publications/guide/comptable/cmpltbc.shtml> (as of Mar. 2, 2009.) Even victims of outright credit fraud are unlikely to obtain assistance from law enforcement, which often appears to regard financial institutions as the only real victims. (Maria Ramirez-Palafox, *Identity Theft on the Rise: Will the Real John Doe Please Step Forward?* (1998) 29 McGeorge L. Rev. 483, at pp. 483-84.)

The lack of any other credible deterrent to unlawful behavior by furnishers of credit information explains why the California legislature found it necessary to provide California consumers with the recourse of private legal action. The decision below would eliminate even this deterrent.

In order to promote genuine investigation into disputed credit information, the threat of private legal action is particularly important against furnishers of credit information, because "the furnisher of credit information stands in a far better position to make a thorough investigation of a disputed debt than the [credit reporting agency] does." (*Gorman*, *supra*, 552

F.3d at p. 1016.) Thus whether a right of private action survives against furnishers of credit information who supply inaccurate information is a question of great significance for consumers.

In summary, serious error in reporting consumers' credit information is widespread; errors occur through no fault of the consumer; it is often difficult—if not impossible—for a consumer to correct credit reporting errors; the effects on the victimized consumer are often devastating; private lawsuits under §1785.31 are often the victimized consumer's sole recourse; and the threat of such lawsuits constitutes the principal incentive to prevent or correct errors. Consequently, the issue whether private enforcement of §1785.25(a) under §1785.31 is preempted is very much "an important question of law." (Cal. Rule of Court 8.500(b)(1).)

CONCLUSION

Because the law is so unsettled, and the legal question so important, we urge the Court to grant review of this case.

Respectfully,

Thomas Bennigson
State Bar No. 237804
Seth E. Mermin
State Bar No. 189194

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